

**STREAMLINING: DEPARTMENT OF TRANSPORTATION REGULATIONS ON PLANNING AND THE ENVIRONMENT**

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**HEARING**

BEFORE THE

**COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE**

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

PROPOSED REGULATIONS BY THE DEPARTMENT OF TRANSPORTATION  
RELATIVE TO STREAMLINING, PLANNING, AND ENVIRONMENTAL  
IMPACT OF CONSTRUCTION PROJECTS UNDER THE PROVISIONS OF  
THE TRANSPORTATION EQUITY ACT FOR THE TWENTY-FIRST  
CENTURY

—————  
SEPTEMBER 12, 2000  
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**STREAMLINING: DEPARTMENT OF TRANSPORTATION REGULATIONS ON PLANNING AND THE ENVIRONMENT**

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**TUESDAY, SEPTEMBER 12, 2000**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:37 a.m., in room 406, Senate Dirksen Building, Hon. Robert C. Smith (chairman of the committee) presiding.

Present: Senators Smith, Chafee, Inhofe, Crapo, Voinovich, Thomas, Baucus, and Graham.

**OPENING STATEMENT OF HON. BOB SMITH,  
U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE**

Senator SMITH. The committee will come to order.

I'd like to welcome the panelists here this morning to our hearing on the planning and environmental regulations proposed by the Department of Transportation (DOT). These regulations cover many cross-cutting issues in transportation, and we're going to hear from two panels this morning, both the Administration and the States, on their views.

I certainly want to start off by recalling for a moment the great work of my predecessor, Senator John Chafee, who, along with Senator Warner and Senator Baucus and other members of this committee, passed the so-called "TEA-21" (Transportation Equity Act for the 21st Century) legislation in 1998. This was landmarked in two ways. First, it marked a 40-percent increase in transportation funds with guaranteed revenues, but second, and perhaps more importantly, it gave much-needed flexibility to the States in meeting the transportation needs, an area that I certainly agree with.

My involvement in the development of the environmental streamlining process—it was something that we had worked on for a long, long time, recognizing that we need to streamline the process.

I certainly want to also recognize the work of Senator Voinovich, who has had several hearings on the streamlining process.

In many areas, the results of the dialog on both the local and regional level are quite commendable. TEA-21 provides the statutory basis for making improvements to the process and relationships, most notably in the northwest in the mid-Atlantic regions, and even in my own State of New Hampshire.

The Federal Highway Administration has taken an appropriate role in information sharing and encouraging best practices, but the ideal vision for transportation planning is one that meets the needs of all stakeholders and takes environmental concerns into consideration early, early in the process, with no hidden agendas in the process and no duplication of effort.

In reaching this vision, we can't expect Federal mandates to impose a solution for what is ultimately up to the stakeholders in a particular region to work out.

If there are environmental concerns, let's address them before we lay out the highway.

In its role as regulators, the Administration has crafted an umbrella of consultation, data gathering, and planning that I believe goes well beyond the process refinements contemplated in the intent of the legislation. I'm sure the Administration has had advice from competing interests on these issues. It is certainly difficult to find the middle ground. But what we have before us today, in my view, is not the best solution, and we'd like to get into that somewhat this morning.

The environmental streamlining provision called for concurrent reviews, cooperatively determined time periods for review, and a formal dispute resolution process between Federal agencies. I know that the laws and the regulations involved are complex, but Congress charged the Administration with establishing a coordinated environmental review process for the purpose of reducing unnecessary delays.

As proposed, in my view, these regulations do miss the mark. In TEA-21 Congress directed Federal agencies to jointly develop and establish time periods for review. The environmental streamlining section in these regulations directs the lead Federal agency to identify and distribute a process schedule. When the results should be to reduce delays, the regulation asks that agencies confess the delays. Hopefully we can address that issue here this morning.

We all want early and continuous involvement, but flexibility must remain, in my view, for each State to build their own working relationships to make that happen.

Today we have an opportunity to hear how the final regulations can achieve greater flexibility and less-rigid mandates.

I know the witnesses have a lot of testimony on these areas, and I hope the Administration is prepared to take a serious look at these comments.

[The prepared statement of Senator Smith follows:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF  
NEW HAMPSHIRE

I would like to welcome the panelists this morning to our hearing on the planning and environment regulations proposed by the Department of Transportation. These regulations cover many cross-cutting issues in transportation planning and environmental protection that are important to the Committee. This morning we will hear testimony in two panels: the administration and the States.

I want to recall for a moment the great work of my predecessor Senator John Chafee who along with Senator Warner and other members of this committee passed TEA-21 in 1998. TEA-21 is landmark legislation in two important ways. First, it marked a 40 percent increase in transportation funds with guaranteed revenues. Second, it gave much needed flexibility to States in meeting their transportation needs. Yet we are facing increasing congestion on the Nations highways and a growing need for more transportation choices, especially in our fastest growing

areas. This is good reason to eliminate unnecessary delays that waste time and millions of taxpayer dollars.

I was directly involved in the development of the environmental streamlining provisions of TEA-21, in partnership with my colleagues Senators Wyden and Graham. The implementation of these provisions remains a top priority for me as chairman of the committee.

Last year, Senator Voinovich's Transportation and Infrastructure Subcommittee had several hearings on TEA-21 implementation, including the environmental streamlining issue. At that time, we heard from the administration on the execution of a Memorandum of Understanding between Federal agencies to expedite the review process for highway and transit projects while reaffirming a commitment to the environment. While it took over a year from that time for the administration to publish the proposed regulations before us today, the transportation community has engaged in active dialog on environmental streamlining.

In many areas, the results of such dialog on a local and regional level are quite commendable. TEA-21 provides the statutory basis for making improvements to process and relationships and progress has been made, most notably in the north-west and the mid-atlantic regions, and in my own State of New Hampshire. The Federal Highway Administration has taken an appropriate role in information sharing and encouraging best practices. The ideal vision for transportation planning is one that meets the needs of all stakeholders, and takes environmental concerns into consideration early, with no hidden agendas in the process and no duplication of effort. In reaching this vision, we cannot expect Federal mandates to impose a solution for what is ultimately up to the stakeholders in a particular region to work out.

In its role as regulators the administration has crafted an umbrella of consultation, data gathering and planning that goes well beyond the process refinements contemplated in TEA-21. I am sure the administration has had advice from competing interests on these issues. Well, it is certainly difficult to find a middle ground, but what we have before us today is not the best solution.

The environmental streamlining provision called for concurrent reviews, cooperatively determined time periods for review, and a formal dispute resolution process between Federal agencies. I know that the laws and regulations involved are complex, but Congress charged the administration with establishing a coordinated environmental review process for the purpose of reducing unnecessary delays. As proposed the regulations miss the mark. In TEA-21, Congress directed Federal agencies to jointly develop and establish time periods for review. The environmental streamlining section in these regulations directs the lead Federal agency to identify and distribute a process schedule. When the result should be to reduce delays, the regulations just asks that agencies confess the delays.

The final regulations must not frustrate the intent of TEA-21 for efficient project development that is still protective of the environment. We all want early and continuous involvement, but flexibility must remain for each State to build their own working relationships to make that happen. Today we have an opportunity to hear how the final regulations can achieve greater flexibility and less rigid mandates. I know the witnesses will have detailed testimony on particular areas for improvements. I hope the administration is prepared to take a serious look at the comments and take the time necessary to revise these regulations.

Senator SMITH. With that, before I turn to Senator Baucus, I know that two of the witnesses have a 10:30 time problem, and so what we're going to do is try to move as quickly as we can, at least with those two witnesses.

We're going to have a vote at 10 o'clock, I'm told, so that means at about 10:10 or so, we're going to have to recess anyway, so at that point, if you have to leave, we understand that and that's no problem.

Senator Baucus.

**OPENING STATEMENT OF HON. MAX BAUCUS,  
U.S. SENATOR FROM THE STATE OF MONTANA**

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Chairman, as you said, we have had two hearings on this subject and we have been waiting for the Department's regulations

and this is our third hearing. I must say, however, I'm less than pleased about what I see in these proposed regulations.

I remember—and you've alluded to it—working with Senators Warner, Graham, Wyden, and Chafee on TEA-21 in 1990, I guess it was, and it was difficult. There was a lot there, long involved. We heard repeatedly from our State DOT's, from contractors, and from others just how difficult and complex this system was from planning all the way through to completion of a project.

In the bill, in TEA-21, we asked the Department to come up with some streamlining regulations. We did lay out some considerations. We certainly don't want to give short shrift to environment. Far from it. But we also clearly directed the Department to come up with some streamlining regulations, not regulations that make the process even more burdensome.

I must say that when I look at these proposed regulations they seem to go backward—not only not forwards, not only not merely the status quo, but backward, because there are so many more groups that are to be coordinated with—not consulted, but coordinated with. I hope the Department can disabuse me of that assessment by telling me that still the Department makes the final decisions in all these cases and its various other agencies, various other groups which properly should be consulted, which properly should be talked to and listened to, get their ideas from, but which also should not be co-equal in making the decisions.

It looks like, from these proposed regulations, that most of these entities are co-equal in making decisions, so not only do we have a lot more groups, but the decisionmaking process looks like it is even more confused than it was in the past.

Now, I don't know where we go from here, frankly. I guess it depends, in part, on the results of this hearing—that is, what information we elicit from the hearing and whether some of my assumptions and assumptions of others are incorrect that could be corrected by testimony this morning, or, to the degree to which our assumptions/conclusions seem to be correct, we may have to go back to the drawing board. I don't know.

It is even more difficult to determine what to do because we are going to be adjourning here in about a month this year, and presumably the Department could come up with some revisions later. We have no way of knowing whether the proposed regulations will, in fact, streamline or whether, as these appear, they will go backward again.

Based upon the track record of these, one has to reluctantly reach the conclusion that the revised, back to the drawing board, won't be any better, at least not significantly better than these, and certainly not along the lines that we had contemplated when we wrote TEA-21.

So, Mr. Chairman, it is with great reluctance that I am forced to reach the conclusion that I am very disappointed in these proposed regulations, and I very much hope that the witnesses can clarify what I see so that we can go forward and help our people.

We're here to serve people. I don't mean to preach here, but, my gosh, the contractors, the States, people who construct highways, I mean, they're our employers. We're the employees. I'm an employee. You're an employee. We're here to help streamline this,

again, with more than adequate consideration to the environment and Fish and Wildlife Service and NEPA process, etc. But NEPA doesn't require these agencies to decide, you know. It doesn't require that at all.

So, Mr. Chairman, I do look forward to this hearing because I hope to have some of my assessments clarified, and clarified in a way which is much more promising.

Senator SMITH. Thank you, Senator Baucus.

[The prepared statement of Senator Baucus follows:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you Mr. Chairman.

This committee has held two hearings on the subject of environmental streamlining since the passage of TEA-21 in 1998. I am pleased that we are meeting this time to finally discuss actual proposed regulations. However, I am less than pleased about what I see in these proposed regs.

I remember working with Senators Warner, Graham, Wyden and Chafee and with the House members to come to a compromise on environmental streamlining provisions included in TEA-21. Those provisions are now Sections 1308 and 1309.

I had heard from my Department of Transportation and from others about how cumbersome a process it is to come to completion on a highway project. Everyone who worked on TEA-21 both the House and Senate, wanted to include a direction to the USDOT to streamline the planning and project development processes for the States.

We were very clear—the environment and the environmental reviews should NOT get short shrift! But, we need to find a way to make it easier to get a project done, eliminate unnecessary delays, move faster and with as little paperwork as possible.

I cannot over-emphasize that the planning and environmental provisions of TEA-21 need to be implemented in a way that will streamline and expedite, not complicate, the process of delivering transportation projects.

That is why Congress directed the USDOT to include certain elements in their regulations on Environmental streamlining.

We included concepts to be incorporated in future regulations like concurrent environmental reviews by agencies and reasonable deadlines for the agencies to follow when completing their reviews.

Certainly we did not legislate an easy task to the USDOT. Trying to coordinate so many separate agencies is like trying to herd cats. The whole concept of environmental streamlining—that is, to make the permit and approval process work more smoothly and effectively, while still ensuring protection of the environment—is one of the more difficult challenges of TEA-21.

So I waited for the rules to come out. And waited. And 2 years after the passage of TEA-21 I receive these.

I have to tell you Mr. Chairman. I'm very disappointed. I believe these regulations hit very far from the mark.

I have identified several problems with these regulations and I will let Jim Currie of MDT go into more detail, but I would like to mention just a few things that I see as real problems.

First, the raising of the planning process participants to the roles of decision-makers. These regs were supposed to help the State DOTs get their jobs done better and more efficiently. Its one thing to add more participants to the process. More involvement is a good thing.

But its another thing to give them the authority to make decisions about how the planning process will work. This decisionmaker role is currently held by State DOTs and MPOs for a reason.

Second, like the old commercial asked "Where's the Beef?" I want to know "Where's the streamlining?" The basic elements of streamlining the herding of the cats, so to speak is the only thing NOT in the regs. What statute was the DOT looking at when these rules were drafted? Certainly not Sections 1308 and 1309 of TEA-21.

These regulations are supposed to answer questions but what is contained in these documents raises even more questions than before because they are vague where they need to be precise.

These regs make it even harder, if not impossible to come to a decision. These regs include initiatives NOT outlined in sections 1308 and 1309 and in many areas serve only to strip States of their authority.

I would also like to mention that the Montana Department of Transportation filed comments or wrote letters at every possible opportunity for the public record. As I read these proposed regs, I see that MDT's comments were either never read by the USDOT or simply ignored. I would like to hear from DOT today how it considered the comments they received on the Options Paper.

Let me close by saying that I believe the proposed rules would add significant requirements and uncertainty to planning and environmental review for transportation projects. In practical terms, they would increase overhead and delay—and delay usually means increased project costs. These proposed rules could make it difficult for States to deliver their programs. Contracts won't get let and jobs will be lost.

I know this is a tough task. TEA-21 DOT to streamline a process while ensuring that we maintain a thorough planning and environmental review process. Adding requirements to the process is contrary to the course charted by Congress.

Mr. Chairman, I would have like to have seen representation from more groups affected by these regulations—like the environmental community, the MPOs, the highway Community and local governments. Hopefully we will have an opportunity to hear from them soon.

Regardless, I am very much looking forward to hearing from the panelists about their views on these proposed regulations.

Senator SMITH. Senator Chafee, any comments?

**OPENING STATEMENT OF HON. LINCOLN CHAFEE,  
U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator CHAFEE. I know we have a time constraint, so I'll pass and submit my comments for the record.

[The prepared statement of Senator Chafee follows:]

STATEMENT BY HON. LINCOLN D. CHAFEE, U.S. SENATOR FROM THE STATE OF  
RHODE ISLAND

Thank you Mr. Chairman. I have a brief statement I would like to make on this very important issue.

First, Mr. Chairman, I want to thank you for holding this hearing today. This certainly is an issue in which an open dialogue between Members of Congress and the Administration will ensure that any final rule will be well written and balanced.

I also would like to take a minute to acknowledge the Ranking Member, Senator Baucus. It was not long ago that you, our current Chairman and my father were late-night partners putting the final touches on the landmark TEA-21 legislation. It was a job well done.

As my colleagues are well aware, the Transportation Equity Act for the 21st Century was approved overwhelmingly in 1998. TEA-21, to which it is commonly referred, reauthorized surface transportation programs and funding through the year 2003. Included in TEA-21 was section 1309 entitled "environmental streamlining." As I understand it, the intent of this section was to make the permit and approval process for highway construction projects work in a more smooth and coordinated manner, while still ensuring protection of the environment.

As many know, there is a need to address the concerns raised by many project applicants, such as our state transportation officials, about delays in project approvals and the costs that are incurred by these delays—which are not always inexpensive. However, I believe that any effort to achieve this goal should not be a means to weaken existing environmental standards that already have been established. We are here to discuss "streamlining" the process—not "steamrolling" it.

This, my colleagues, is where the careful balance to which I referred at the beginning of my statement comes into play. How can our transportation projects move forward without circumventing environmental reviews or limiting a meaningful analysis of alternatives?

The proposed rule issued by the U.S. Department of Transportation has generated a great deal of discussion about what the intent was for section 1309. Further, there is discussion about what exactly "environmental streamlining" means to the different parties involved. In my homestate, this very issue has surfaced. In fact, I have been contacted by my state transportation director, Dr. William Ankner, about the need to keep an open dialogue on this issue. According to Dr. Ankner, the Rhode Island Department of Transportation and the Rhode Island Department of Environmental Management are hosting a regional conference next week between the Northeast Association of Transportation Officials and their counterparts at the En-

vironmental Council of the States to discuss environmental streamlining and to develop comments for the proposed regulations. Allowing comments to be submitted and reviewed will inevitably lead to a improved regulation.

I believe in the shared goal of working collectively to ensure that (1) environmental concerns are given appropriate and early consideration in the decision-making process, and (2) project delays are minimized. With that goal in mind, the process for environmental streamlining will work and our environment will be preserved for future generations.

In closing, I would like to thank today's witnesses for taking time out of their busy schedules to be here, and for keeping the dialogue open for working toward a well balanced approach.

Senator SMITH. Senator Inhofe.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Mr. Chairman. I'm sorry we're a little bit late here. I won't be able to stay for the entire hearing. This is the one day a year that the Oklahoma Chamber of Commerce comes to town, and we call it the longest day of the year—

[Laughter.]

Senator INHOFE [continuing]. And so we have a lot of delegations to meet with.

I appreciate, Mr. Chairman, your holding this hearing today on the Department of Transportation's proposed regulations to streamlining the planning and environmental review process for the highway program.

In 1998, I worked with Chairman Smith and other members of the committee to make changes in the TEA-21 to streamline the environmental review process for approving highway projects, particularly the NEPA process, which is within my subcommittee. With full bipartisan support, the full Senate and the Congress has, as a whole, worked together to make changes to streamline this sometimes burdensome process of environmental impact statements under NEPA.

We came together, crafted a process which would be easier for the States to implement as they construct new highway projects, while protecting environment. Unfortunately, the Administration has completely ignored the law and proposed a regulation which will make the environmental review program even more burdensome. These proposed regulations were over a year late, and with the comment period closing on September 23, I agree with Senator Baucus that, you know, we're running out of time in terms of finalizing the regulations.

It seems to me that a political decision was made to punt this issue to the next administration, perhaps in order to appease certain constituency groups. Even if this rule was finalized, as proposed, it would have to be reopened next year because it does not follow the law. This seems to be part of a pattern of environmental regulations. The Administration ignores the law or the science or the facts or sometimes all three in writing regulations. They get sued. They lose. Sometimes it is a decree that's entered into. Then they have to start all over again.

They don't seem to be bothered by the fact that environmental laws and regulations are in legal limbo for months or years, nor are they bothered by the cost to taxpayers in defending these suits.

They seem to care only about what has been scoring a few points with a few groups.

The proposed regulations ignore the clear intent of Congress and in some cases the clear language of law. I believe the witnesses on the second panel will do a very good job of outlining many of these problems insofar as how the States are impacted.

I believe if the proposed regulations are finalized, the Government will be sued, they will lose, and the next administration will have to clean up the mess.

So I think that, even though it is late in the year, I appreciate the fact that you are having this hearing. They are bringing these concerns from the States, the ones who are going to have to be impacted the most by this, so that we can get them on record this year, if nothing more than that.

Senator SMITH. Thank you, Senator Inhofe.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JIM INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

I appreciate the Chairman holding this important hearing today on the Department of Transportation's proposed regulations to streamline the planning and environmental review process for the Highway Program. In 1998 I worked with Chairman Smith and other members of this Committee to make changes in Tea-21 to streamline the environmental review process for approving highway projects; particularly the NEPA process which is within my Subcommittee.

With full bipartisan support, the full Senate and the Congress as a whole worked together to make changes to streamline this sometimes burdensome process of Environmental Impact Statements under NEPA. We came together, crafted a process which would be easier for the States to implement as they constructed new Highway projects, while still protecting the environment.

Unfortunately, the Administration has completely ignored the law and proposed a regulation which will make the environmental review program even more burdensome.

These proposed regulations were over a year late and, with the comment period closing on September 23d, I doubt seriously if they will be able to finalize the regulations before the end of this Administration; which might be for the best considering how far off the proposal is from what is required in the law.

It seems to me that a political decision was made to punt this issue to the next Administration, perhaps in order to appease a particular constituent group such as the environmentalists. Even if this rule was finalized as proposed it would have to be reopened next year because it does not follow the law.

This seems to be part of a pattern for environmental regulations. The Administration ignores the law, or the science, or the facts; or sometimes all three in writing regulations. They get sued. They lose. Then they have to start over again. They don't seem to be bothered by the fact that environmental laws and regulations are in legal limbo for months or years nor are they bothered by the costs to tax payers in defending these suits. All they seem to care about is scoring a few points with a few special interest groups with these regulations which are based more on political science than real science.

The proposed regulations ignore the clear intent of Congress, and in some cases, the clear language of the law. I believe the witnesses on the second panel do a very good job in outlining many of these problems. I believe if the proposed regulations are finalized, the government will be sued, they will lose, and the next Administration will have to clean up the mess.

Senator SMITH. Let me introduce the three witnesses: Mr. George Frampton, the chairman of the Council on Environmental Quality; Mr. Kenneth Wykle, the Administrator of the Federal Highway Administration; and Ms. Lois Schiffer, Assistant Attorney General, Environmental and Natural Resources Division of the Department of Justice.

Welcome to all. As you know, your statements are made part of the record formally, and I know two of you at least have time con-

straints, so feel free to summarize and make the points you'd like to make, and we'd like to have a few questions before you have to go.

We'll start with you, Mr. Frampton.

**STATEMENT OF GEORGE T. FRAMPTON, JR., CHAIRMAN,  
COUNCIL ON ENVIRONMENTAL QUALITY**

Mr. FRAMPTON. Thank you, Mr. Chairman and Senator Baucus. I appreciate the opportunity to testify today, and I greatly appreciate your courtesy in recognizing that I have another hearing today.

This spring the Department of Transportation published notices of proposed rulemaking for new transportation planning regulations and also for new NEPA procedures to implement those regulations separate and apart from the rulemaking on the new planning regulations. With Assistant Attorney General Schiffer, we're going to devote our attention to the NEPA part of this.

The NEPA regulations obviously spring, in part, from the streamlining provisions in TEA-21, section 1309, streamlining, but they're broader than that. The proposed NEPA regulations actually rewrite all of the NEPA regulations for this area for DOT, which hadn't been done since the mid-1980's, so they go somewhat broader than simply the streamlining provisions in TEA-21.

There are also some aspects of the streamlining provisions here that DOT has been working on that are not incorporated in the regulation. For example, the streamlining provisions, the 1309 provisions from TEA-21, talk about setting up a dispute resolution process, and DOT has done that as contracted with the U.S. Institute for Environmental Dispute Resolution, the Udall Institute, to set up that process. That is not embodied in the regulations.

As you know, Mr. Chairman, the staff of CEQ worked with the committee on these streamlining provisions and the Administration supported them. We have worked to try to implement those and realize the promise of those provisions in the proposed NEPA regulations, worked with DOT.

The goal of the new proposed NEPA regulations is streamlining. It is effective early collaboration. It is to try to achieve the kinds of outcomes that are reflected in this recent AASHTO case study, a book called, "Best Practices and Environmental Partnering: Raising the Bar." This is what we're trying to get at here.

Prior to the hearing, the principal concern that I think we had heard about the NEPA regulations, proposed regulations, was that in some way they embody some sort of new substantive mandate under the procedural parts of NEPA; that instead of process, this is setting some new substantive requirements that will need to be met.

I hope that this hearing can set the record straight on that. There is no intent to do that. I don't think the language in the proposed regulations does that. I do deal with that in my written testimony. Certainly, if there are from the later panels today—since the comment period is still open on the regulations, you know, if you would be willing to leave the record of the hearings open, we'd like a chance to hear from these folks and respond.

But I think the concerns that have been raised about the language in the NEPA regulations—for example, defining “practicable” as “common sense”—or setting a series of seven goals that simply reflect the statute and existing guidance, these are not things that set new substantive mandates. In fact, we have 20 years of court opinion saying that the NEPA process provisions, environmental review provisions, do not create a substantive mandate. We have no intention to do that. I don’t think the new regulations do that.

Now, Senator Baucus raised the issue of whether the environmental provisions in some way require consultation with or greater clout for more decisionmakers in the process. Again, I think if there are specific concerns about that that will be expressed later today, we’d like to have a chance to respond to those.

But my reading of the NEPA regulations doesn’t indicate that the NEPA procedures, themselves, do that. In other words, the purpose of the NEPA procedures is to try to make NEPA work better by making sure that everybody who has to be in, who is going to be in, is in early and is working in one environmental review process that is collaborative from the very beginning.

If you don’t have that, what you have is years of delay. If you don’t get everybody in at the beginning, that’s what causes the delay, in many cases, so that’s what we’re trying to do. That’s the intent of the regulations. The way I read them, that’s what the NEPA procedures do.

Whether there are provisions in the planning rules that in some way cause a more-complicated process, I think Administrator Wykle could better respond to that than I could. But there’s nothing in the NEPA regulations—to me, my reading is that the NEPA regulations actually do streamline the process, do simplify the process, and do make sure that anybody who is going to be in the process is there at the beginning, with some guaranteed time deadlines.

If the regulations don’t accomplish that, then obviously we want to hear those concerns, specific provisions of the NEPA regulations that don’t accomplish those goals, and see if we can’t work on those problems.

I appreciate very much the opportunity to be here and hope that we can have the chance after the subsequent panels to respond to concerns that are expressed.

Thank you, Mr. Chairman.

Senator SMITH. I’m going to go a little bit out of order here and go to you, Ms. Schiffer, because I know the two of you have to leave.

Mr. Wykle, you don’t have to leave; is that correct?

Mr. WYKLE. No, I do not.

Senator SMITH. Unfortunately for you.

Ms. SCHIFFER. I’ll actually volunteer and say I don’t have to leave, either.

Senator SMITH. Let me just say, in response to you, Mr. Frampton, we will certainly keep the record open for any response to any panel two concerns so that you have a chance to respond to that.

Mr. FRAMPTON. Thank you.

Senator SMITH. Ms. Schiffer.

**STATEMENT OF LOIS SCHIFFER, ASSISTANT ATTORNEY  
GENERAL, ENVIRONMENT AND NATURAL RESOURCES  
DIVISION OF THE DEPARTMENT OF JUSTICE**

Ms. SCHIFFER. Good morning, Mr. Chairman and members of the committee.

I am appearing before you today to testify about the Department of Transportation's proposed rule implementing the National Environmental Policy Act, or NEPA. This is an ongoing rulemaking, and ordinarily I do not speak publicly during the course of a pending rulemaking because the Justice Department may have to defend the final regulation in court if it is challenged. I appreciate the committee's sensitivity to this concern as we proceed here today.

I must say, as a small point of pride, in response to Senator Inhofe, we actually win more cases than we lose when we are defending regulations.

Today I will focus on three points: That NEPA is effective as a statute that, through providing for effective public participation and development of relevant environmental information and alternatives, has caused better, more environmentally-protective decisionmaking throughout the Federal Government; second, that NEPA has an important role in decisionmaking about highway projects, and the Federal Highway Administration and the Federal Transit Administration are taking an important step in implementing NEPA and the streamlining provisions of TEA-21 in their proposed regulations; and, third, the best approach to reducing the possibility that a transportation project may be slowed by court challenge is undertaking an effective environmental review.

NEPA was enacted in 1969, and became effective on January 1, 1970, to address increasing public concern about the worsening state of the environment. While NEPA has a number of sections, including important statements about national purposes and goals, many people have focused on section 102(2)(C), which is the section that requires agencies to prepare for environmental impact statements for major Federal actions significantly affecting the quality of the human environment.

In the early days of NEPA, agencies did not take this section seriously and courts were free with advice and injunctions. Eventually, through hard work and effective guidance from the Council on Environmental Quality, agencies got the message and developed effective approaches to this environmental review requirement.

In 1978, CEQ published regulations and virtually every agency adopted implementing regulations following those of CEQ.

Courts, including the U.S. Supreme Court, have recognized CEQ's expertise in this area and have given it deference in interpreting NEPA.

Over time, the number of NEPA cases nationwide has dropped, as have the number of injunctions. A quick check of my docket—and this is approximate—shows that I have approximately 13 pending NEPA cases nationwide involving highways. That's quite a small number, and certainly way down from the 1970's.

In the late 1970's, I actually worked with the Federal Highway Administration on NEPA cases when I was at the Justice Depart-

ment before, and the number of cases was greater and the EIS's far less effective. The agency has come a long way.

Courts have repeatedly held that the environmental review provisions of NEPA are procedural only, that they require the agency to develop and evaluate environmental information, including social and economic impact information, to develop and evaluate reasonable alternatives for a project, and to provide for effective public participation.

National Environmental Policy Act does not dictate a substantive outcome to an agency, but the expectation is that, with effective information available, the agency will make better decisions that are likely to be more environmentally protective.

Because transportation projects can have widespread impacts on the physical environment and on communities, NEPA is important for these projects.

The public participation component of NEPA is also crucial. It gives those people with interest in and concern about a project the opportunity to participate in developing information that will be available to the agency when it decides how to proceed.

The streamlining provisions of TEA-21 underscore the importance of early and effective coordination among Federal agencies and with the States. These are useful provisions that, when implemented, should avoid delay and assure better decisionmaking.

I must say I've had many meetings around my conference table with different agencies who have a role in making decisions about a permit necessary for a project, and the idea that they coordinate early is a very effective one that could well be a model.

A review of the Department of Transportation proposed NEPA rule, including the preamble to the proposed rule, reflects great interest in and concern for both NEPA and the streamlining provisions. Department of Transportation uses a NEPA umbrella to carry out these goals. That should be a very good approach. It stresses that streamlining must be about better compliance, not about weakening environmental protections and public participation.

A word about environmental justice—and I just have a moment more. I understand the committee has concerns about the environmental justice provisions of the draft regulations. Without getting into detail, I note that in February 1994, President Clinton issued an executive order and accompanying memorandum stressing that paying attention to the effect of Federal actions related to the environment on minority and low-income communities is imperative. DOT'S draft NEPA rules emphasize the importance of considering environmental justice issues during the environmental review process.

Council on Environmental Quality has issued environmental justice guidance to which courts will give deference, and generally the proposed DOT regulations follow that guidance.

Certainly highways and mass transit projects can have a significant effect on minority- and low-income communities, and regulations that assure public participation and development of information are useful. The committee may choose at some future time to hear from the environmental justice community or the environmental community about their views of these proposed regulations.

Since the enactment of TEA-21, we have been meeting regularly with the Federal Highway Administration—and I must say this happened right after the statute was passed—to talk about effective ways to implement NEPA, streamlining, and other environmental laws so that if DOT is sued we will have a good defense.

The most effective defense to a concern about NEPA challenges is an effective NEPA process with effective development of information, a number of reasonable alternatives, good public participation, and sound coordination among Federal and State agencies that have a role. These proposed regulations, in general, will help serve that purpose.

Thank you. I would, of course, be pleased to answer any questions the committee may have.

Senator SMITH. Thank you very much, Ms. Schiffer.

I'm told that the vote at 10 o'clock, that we were going to have has been vitiated, so that gives us a little more time.

What I think I'll do is change the procedure just a bit and have Members ask a question or two. Instead of going with any minute rule, let's just ask one or two questions of each of the two witnesses who have to leave at 10:30, and then we can go back to regular order and we'll hear from Mr. Wykle.

Let me just start, Mr. Frampton, with you.

I certainly share the frustration that Senator Baucus and Senator Inhofe and others have outlined here. You know, we spent a lot of time on this, and the intention was to streamline, not to go around environmental concerns, but rather to get those concerns addressed early on in the process, and yet it seems, as you look at these proposed regulations, that it is—and we'll hear in a moment from the States, but it seems as if it is worse.

Let me just give you two examples that I'd like you to respond to.

In the proposed regulations there is a requirement for DOT to manage the NEPA process in order "to maximize attainment" and "environmental ethic." Where in language of TEA-21 do we come to any conclusion that there should be language like that in the law? In other words, where is there any authorization for that kind of requirement?

Second, under the proposed regulations, they also suggest that a transportation decision should be made through "a collaborative partnership involving Federal, State, local, and tribal agencies, communities, interest groups, private businesses, and interested individuals."

Now, the public has a right to comment. That's in the law. What's the legal authority for this expanded role?

I mean, those are the kinds of things that I think have caused us some problems, so if you'd just comment on those briefly, and then I'll yield to Senator Baucus.

Mr. FRAMPTON. Mr. Chairman, the first—you raised two issues. The first is the provision of section 1420.107 of the proposed regulations, which says that it is the intent that NEPA principles of stewardship and TEA objective of timely implementation should guide the decisionmaking, and that the process be managed to maximize attainment of seven different goals: Environmental ethic, environmental justice, integrated decisionmaking, streamlining,

collaborative process, practical transportation problem solving, and financial stewardship.

To me, that's a sort of preambular provision that simply reflects the kinds of goals that are in NEPA, itself, and in various other laws and requirements that have, you know, over time, since 1970, become a part of this process.

When you say "where is the authority," it seems to me—I would like an opportunity to sort of submit a more-detailed statement in response to your questions—but it seems to me that is basically a preamble that outlines the overall goals of the process, just as NEPA, itself, outlines overall goals.

Senator SMITH. They're pretty general phrases.

Mr. FRAMPTON. Pretty general.

The second quotation that you made, is that referring to—is that a rephrase of the preamble, where it talks about guiding Federal, State, local, and tribal decisionmaking?

Senator SMITH. I don't know if it is a rephrase of the preamble, but it's just a—the point I was making was that I think you've added—you've gone beyond, in this collaborative process, gone beyond the law.

Mr. FRAMPTON. If the NEPA regulations appear to create new decisionmakers, then they shouldn't do that. The NEPA regulations are a framework for the process of doing an environmental review. So I would be surprised if there is language in the proposed NEPA regulations that creates new decisionmakers, but if there is, I think that's obviously something that we would want to take a look at, because that's not the intent of the regulations, and I don't think the courts would ordinarily allow that kind of substantive mandate to be created in NEPA regulations.

Senator SMITH. I think that goes to the heart of what we think we intended and what maybe you think we intended, or that's the issue here.

I think I read it as it does expand the legal authority for these other groups, which I think goes beyond the statute, but that's an area I want you to look at.

Senator Baucus.

Senator BAUCUS. Yes.

Section 1308 of TEA-21, the last line reads, "The scope of the applicability of such regulations shall be no broader than the scope of such section."

Now, your proposed regulations delete the major investment studies, and the alternatives basically say that the alternative analysis applies to any investment, any size, not just major, but any.

Now, that clearly to me is broader than the scope of the section. Why did you do that? Why does the proposed regulation delete "major" from investment alternatives, instead, therefore, any alternative, regardless of size, must be investigated?

Mr. WYKLE. Would you like for me to respond to that?

Mr. FRAMPTON. I think that Administrator—I don't think your question is directed to the environmental review regulations.

Senator BAUCUS. They are directed to the Administration.

Mr. WYKLE. I will respond to that. Perhaps a little unfair to ask Mr. Frampton.

Senator BAUCUS. It is probably more properly addressed to you.  
Mr. WYKLE. As directed in TEA-21 and as shown in our regulations, we have completely eliminated the requirement for major investment studies.

TEA-21 guidance did ask us to integrate the planning and NEPA processes, bring them more closely together. And so we emphasize the importance of the planning process and the fact that the products from the planning process could be, should be used as part of the NEPA process, itself, in terms of doing the environmental reviews.

Experience has shown us that really the failure to do good work in the planning process—and if those documents or products are not used in the NEPA process, that’s where you have your redundancy, that’s where you have your duplication, and that’s where you slow down your project delivery.

Now, we certainly can’t guarantee that everything developed in the planning process would be accepted in the NEPA process, but we feel the majority, if not all, will, and that, in itself, then will speed up the overall process.

So the intent is to follow the TEA-21 guidance, integrate the planning and NEPA process, eliminate the major investment studies, and in doing that we would deliver projects more quickly.

Certainly, if organizations feel that there are some words or phrases that we should change to make that more clear, we are more than happy to do that because this is a proposed rule, so it is a proposal out for comment.

Senator BAUCUS. I appreciate that. I do not find that answer persuasive, but I appreciate your giving the answer.

Second, many times throughout these regulations the word “consultation” has been deleted, and the word either “collaborate” or “cooperate” has been inserted, leading one to at least wonder whether, instead of consulting—and consulting generally means you give somebody information on what you’re doing and you consult that person, whereas “cooperate” has the connotation that you have to have agreement.

Can you give me, Mr. Administrator, your reasons for the switch?

Mr. WYKLE. Again, it was our, I guess you’d say, interpretation to follow the intent of Congress in terms of TEA-21 because TEA-21 outlines three types of, I guess you’d say, activities, organizations, people—locally-elected officials, those that are affected officials, locally-affected officials, and local transportation officials. So, in following that guidance, we were trying to cover the groups that needed to be talked to, consulted with, get input from because a project affects a lot of people that’s going through a given area, so our attempt was to identify those groups that would be affected.

If there is another way to say that, in terms of an overall umbrella term or less listing of specific types, we’re certainly willing to take a look at that.

Senator BAUCUS. I appreciate that, but I have a very strong belief, in looking at these regulations, that has the effect, at best, of being confusing, not knowing how much power these groups have.

Mr. WYKLE. Sure.

Senator BAUCUS. Which will increase litigation, clearly; or, at worst, does give these groups a lot more power, which slows down this process.

I might also add, Mr. Administrator, there's a lot of—the proposed rules inject, I believe, new substantive considerations into NEPA. One section required the Department to “manage” the NEPA process in order to maximize attainment of, among other things, goals of environmental ethic, maximize environmental ethic. I don't see that in NEPA anywhere in the law, but that's what the regulations do. Also environmental ethic—maximize attainment of, among other things, environmental ethic.

Another stated goal or collaboration, not consultation, is that the transportation decisions are made through a collaborative partnership. Boy, that's vague. What in the heck does that mean? Lots of lawsuits there involving Federal, State, local, tribal agencies, communities, interest groups, private businesses, interested individuals. What in the world?

Mr. WYKLE. Well—

Senator BAUCUS. If I might, Mr. Administrator, it also has the effect of taking a lot of authority away from elected and appointed officials, the degree to which collaboration and/or cooperation means co-equal decisionmaking. That's the worst case.

The best case out of all this is it is even more confusing than the current regulations.

To be honest with you, I am baffled.

Mr. WYKLE. Well, that concern—

Senator BAUCUS. Given the charge of Congress, I'm just baffled at the proposed regulations.

Mr. WYKLE. That certainly was not our intent, in terms of making it more confusing, so I appreciate your comments.

Senator BAUCUS. Good.

Mr. WYKLE. And we certainly will look at the comments that come in from the others, because, as has been mentioned, the comment period has not been closed yet, and so we expect to get considerably more comments by the 23rd.

But, again, in terms of tribal organizations or tribal governments, if there is a project that impacts on their lands or their areas, then certainly we would expect for them to be involved in the planning process earlier.

Senator BAUCUS. Mr. Administrator, it says much more than “tribal governments,” your regulations. It says communities, interest groups—interest groups? That's right in the regulations—private businesses, interested individuals. You have to go out and collaborate with everybody who seems to be interested and give them co-equal power? I mean, it has that implication.

Again, at best, it is—

Mr. WYKLE. Sure. I appreciate that, sir, and that certainly was not the intent, but, as I mentioned, TEA-21 had the three categories, and the one was affected local individuals, officials, so—

Senator BAUCUS. If it's not the intent—

Mr. WYKLE [continuing]. Let's get it out of there. We're getting that guidance. That's not the intent, so we'll take a look at that.

Senator BAUCUS. Thank you. Thank you, Mr. Chairman.

Senator SMITH. I know that, just for the benefit of the Senators who came in a little late, Mr. Frampton and Ms. Schiffer have to leave at 10:30 for another testimony over on the House side, I believe, so if you have a couple of quick questions for each of those two witnesses, I'll try to get to each Member, and then we can come back to Mr. Wykle.

Senator Chafee.

Senator CHAFEE. It just sounds as though these new regulations are taking bipartisan torpedoes, and I haven't really heard the defense as to how we are streamlining, and I look forward to—we haven't heard your testimony yet, Mr. Wykle, but we look forward to it, and hopefully there will be further answers either through your testimony or through answers of other questions.

I don't have any questions.

Senator SMITH. Senator Graham.

**OPENING STATEMENT OF HON. BOB GRAHAM,  
U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator GRAHAM. Well, I'd like to convert Senator Chafee's comment into a question, because clearly one of the motivating forces behind this provision in TEA-21 was a series of experiences which had a common theme, and that was that people did not get together at the beginning of the process, substantial amounts of time and dollars were expended on a project which seemed to be feasible by people who were professional and experienced in the field, only to find, toward the end of the process, when permits were requested from a variety of Federal agencies, that the permits were denied, and they were denied on grounds that were knowable at the beginning of the process.

So the question is: How do we avoid that situation so that people who have responsibilities, particularly at the State and local level, can get a clear green light that what they are proposing to do is going to be permissible, a yellow light that what they are proposing to do is potentially permissible but will require modifications, or a clear red light that no matter what you do you cannot get this project permitted and you'd better spend your time doing something more constructive?

To what degree is it your interpretation—and I ask this to any member of the panel who would like to comment—that we've accomplished that objective of getting the decisionmakers, in terms of those people who will have eventual Federal regulatory authority, such as the Corps of Engineers or various components within the Department of Interior, at the table at the beginning of the process to give that green, yellow, or red light signal before all this investment is made in a project that may be doomed from the beginning?

I can tell you, as one of the co-authors of this section, we may not have been Shakespearian in our communicative ability, but that was what the Congressional intent was. How has that intent been captured and realized? And how would a specific situation such as I outlined in a hypothetical sense be treated differently under these regulations than they have been in the past?

Mr. FRAMPTON. Senator, let me take that from the environmental review side of this.

My understanding is that the planning regulations streamline and simplify the planning process, to some extent, certainly eliminate at least one major step that TEA-21 envisioned would be eliminated.

I think the NEPA procedures are designed to try to accomplish exactly what you describe by saying, "We want to pull in all of the State and Federal permitting, processing." All these agencies have got their own independent statutory authorities and have to give permits. We're going to try to pull that all into one process. At the beginning, make it a public process and satisfy the independent statutory authorities of a number of State and Federal agencies who have a stake in this.

So certainly the NEPA part of this is designed to be a much more streamlined process. Indeed, there is a provision in the regulations which is, I think, unusual, if not unprecedented, that imagines that there might be an alternative process proposed by States or other parties that would fit a particular project that would be different from these regulations. Plus, you have timelines and you have a dispute resolution process.

So the part of it that is the environmental review that fits the planning is supposed to integrate with the planning, is really designed to make this a one-stop, one-process kind of thing. That, as I understand it, is a major step forward here on the environmental review.

The concerns that I have heard this morning have to do with language in the preamble and in some of the other portions of the NEPA regulations that talk too much about collaboration, too much about cooperation, too much about meeting goals. I think we need to look at those concerns and review those provisions.

It is designed to take a multi-faceted process and turn it into a single process.

Senator GRAHAM. Are you saying that an agency like the Corps of Engineers would have to come in at the beginning of the process, outline what their requirements for permitting would be, and then be held to those commitments at the time the actual permit was requested, which might be at the middle or at the end of the process?

Ms. SCHIFFER. Certainly, as I read the proposed regulations, they talk about using NEPA as an umbrella, which means that all of the agencies that have to permit would come in, including, in your example, the Corps of Engineers. It is quite explicit about using the NEPA process as the umbrella for all of the permitting processes.

Then, in addition, there's a requirement that timeframes be established at the front end, which I think is also something that certainly, in my experience, I haven't seen and should be very helpful to assuring that the process moves forward in an effective way.

The one other thing I might add, there was discussion earlier about use of the terms "partnership" and "collaboration," and certainly, as Mr. Frampton has said, he will take a look at this again. But I might add that the opposite of that is the adversary process, and I think that one of the concerns that has generally been expressed as government agencies make decisions is that it gets to be too adversarial, and that lands us up in court, and so an approach which is looking at getting concerns out on the table early

and then seeing how they can be most effectively addressed, consistent with statutory authorities, would appear to help to avoid litigation down the road.

Senator SMITH. I'd like to just get to the last two Senators before they have to leave.

Senator Crapo.

**OPENING STATEMENT OF HON. MICHAEL D. CRAPO,  
U.S. SENATOR FROM THE STATE OF IDAHO**

Senator CRAPO. Thank you very much.

Just a quick comment on the collaboration issue.

I, for one, am a strong proponent of efforts to move toward collaboration. The concern that I think I see and that I think is being expressed by others here is that what appears to be done in these regulations is that, in the name of collaboration, the amount of potential adversaries in an adversarial process is being dramatically expanded, and so I think that when we talk about collaboration we have to use more than just the word and look at whether we truly get a real collaboration.

But let me just ask one quick question. I'll hold back on my other questions for you, Mr. Wykle.

I think, Ms. Schiffer, this is probably more of a legalistic question.

It seems to me, as I review these proposed rules and regulations, that we have a very interesting use or circumstance in which an Executive order is being used now to impose a massive new Federal mandate on the States.

What I'm talking about is that it appears that the rules transpose Executive Order 12898 on environmental justice into now a regulatory requirement that requires the States to collect and provide to the Federal Government—States and MPO's—to analyze and collect huge amounts of data on the distribution of transportation funds to meet this Executive order's objective.

I have a problem in the first place with whether this Executive order is authorized by law, but, second, to the extent that it is, the real question I'm asking is: Can an Executive order serve as the basis for the imposition of a Federal mandate on States and individuals?

Ms. SCHIFFER. Well, Senator, without addressing the issue of the authority that I think the President did have to issue that Executive order, and without really taking on the question of whether it imposes a mandate, what I think is responsive to your question is that to implement that Executive order the Council on Environmental Quality has issued guidance for how to implement NEPA to take a look at the information about the impact of environmental projects on minority- and low-income communities and, in general, what I think these proposed regulations do is put into these regulations what is in that guidance.

Courts will, in general, defer to the Council on Environmental Quality and its guidance for what NEPA means, and really what CEQ has done is just say that NEPA provides the opportunity to look at the kind of information about impacts on minority- and low-income communities, and, in general, these regulations seem to carry forth that CEQ guidance.

Senator CRAPO. Well, it would seem to me it will be interesting to find the core issue here, which is whether there is any Federal law which supports this Executive order, and, if so, then it would be that Federal law which would justify the imposition of this Federal mandate on the States. But it does seem to me to be an interesting circuit that we're following where an Executive order is issued, agencies then take the Executive order and create rules and regulations that implement that Executive order, which then, in turn, impose a Federal mandate on States and other individuals. I think that is stretching to the maximum the system of law that we have in this country, particularly in terms of our efforts here in Congress to try to reduce the impact of mandates on States.

Senator SMITH. I want to particularly compliment Senator Voinovich for the hearings that he's held on this issue at the subcommittee level and recognize Senator Voinovich at this time.

**OPENING STATEMENT OF HON. GEORGE V. VOINOVICH,  
U.S. SENATOR FROM THE STATE OF OHIO**

Senator VOINOVICH. I apologize that I wasn't here, but I had to preside this morning.

I'm just going to ask one thing. TEA-21 states that the replacement for the major investment study shall be no broader than it was before. That's what it says. Why do the proposed regulations require that the new MIS-type study be required for all urban projects, not just major projects, as the current rules require? Why are all of them included?

Mr. WYKLE. Well, I addressed that question earlier when Senator Baucus asked it, but I will—

Senator VOINOVICH. I'm sorry.

Senator BAUCUS. I'd like to hear it again, the answer.

Mr. WYKLE. I was going to say I'll be happy to give it another go. I don't know that it was overly successful the last time.

But, from our perspective, we eliminated all references, all requirements to major investment study. TEA-21 asked us to, in essence, eliminate that and integrate the planning and the NEPA process together.

So what we tried to do was emphasize the importance of the planning process and using planning documents in the environmental process. So the products, if you will, that came out of the planning process would be used in the NEPA process.

By doing that, we felt we would address this earlier, we would eliminate duplication and redundancy when we got to the NEPA process because we would use those documents throughout the entire process because our experience shows that really the failure to use the planning products as you get to the next stage of the NEPA process is one of the reasons projects are slowed down and they are delayed, because we start over or we don't give credibility to those documents that have been prepared in the planning process and/or they are not complete enough to use in the NEPA process.

So we can't guarantee that everything that is done in the planning process will be used in the NEPA process, but that's our intent. That's the philosophy that we're trying to get through in these proposed regulations.

So we were not looking to broaden in any way or add requirements over and above the congressional direction. We thought we were simplifying it. Eliminate the major investment study, integrate the planning and NEPA documents, do this work up front, use those products throughout, and in doing that you eliminate duplication, redundancy, and speed up the process.

Not convincing.

Senator VOINOVICH. The fact of the matter is that you're saying that the MIS is going to be involved in all of these projects because you want to get everything integrated in the beginning, and so you'd better include that in the beginning rather than doing it in one and not in another?

Mr. WYKLE. I would hope we're not saying that, sir. We have eliminated the MIS. There is no reference to it or requirement for that in any of the regulations. We're saying the work you do in the planning process should be detailed enough and complete enough that it can be used in the NEPA process, and when you get to the NEPA process it should be much easier and go faster because you addressed these concerns and issues in the planning process.

Senator VOINOVICH. But there is consideration of the MIS in—

Mr. WYKLE. I don't think you'll find any reference to the MIS.

Senator VOINOVICH. But it is implicit in the beginning in terms of the NEPA process, so by—is that what you're saying?

Mr. WYKLE. Well, we're certainly saying that some of the, I guess, technical work or actions that are taken under "the old MIS process" are still needed, and so you would do that in the planning process, and then the results of that, that product, should make it much easier and more efficient when you get to the NEPA process—the environmental impact statement, doing all of that environmental work—because you did a good job in the planning process.

I mean, our experience has shown one of the difficulties now, in terms of delaying projects, is when you have a disconnect between the planning process and the NEPA process. The documents and the work that you do in the planning process are not used in the NEPA process, so you start over again. You haven't involved groups early in the planning process so, as Senator Graham mentioned, the first time they hear about it is when they come to the NEPA process and they raise the flag in saying, "This is a surprise to us. You didn't consult with us. We weren't aware of this project, or we weren't aware of the impact of this project."

We're saying do all of that early in the planning process, get them all on board, in agreement, or at least know where the disagreements are as you move forward, and you carry that all the way through and that should significantly improve the process and speed up project delivery.

Senator VOINOVICH. I'd like to talk to you about it later.

Mr. WYKLE. Sure. I'll be happy to, sir.

Senator SMITH. Senator Thomas, you just came in. Two of the witnesses, Mr. Frampton and Ms. Schiffer, have asked to leave about 5 minutes ago.

[Laughter.]

Senator SMITH. What is your timeframe? When do you have to testify?

Mr. FRAMPTON. I've got a few more minutes.

Senator SMITH. A few more minutes. Mr. Wykle has not yet given his statement, so if you have questions of either of the other two witnesses you can proceed right now, or of Mr. Wykle, if you wish.

**OPENING STATEMENT OF HON. CRAIG THOMAS,  
U.S. SENATOR FROM THE STATE OF WYOMING**

Senator THOMAS. Thank you, sir. I appreciate that, and I'm sure I will be duplicative.

I guess the question is, there was an effort made here over the years, and particularly in TEA-21, to make this whole process more simple, more efficient, to blend in to getting the job done. We've had some very long projects right where I live, as a matter of fact.

I guess my question, Mr. Frampton—and I've been dealing with NEPA with your organization long before you were there, with very little success, frankly. There has been very little change ever made. Why would State departments, and so on, think that these proposed rules are probably going to be more burdensome rather than less?

Mr. FRAMPTON. I'm not sure, Senator, and I'm eager to review the testimony.

Senator THOMAS. You haven't heard any of these—

Mr. FRAMPTON. I have not reviewed the testimony from the later panels this afternoon and asked before that the hearing record be kept open. But I think, from our read of the environmental review, proposed regulations, they do try to centralize and integrate permitting processes from other agencies into one single process, and that should mean better, as well as more efficient environmental review.

The concerns that I think I have heard here have to do with whether language in the NEPA regulations creates new mandates or endows new parties with some substantive decisionmaking authority. That's not our intent. I don't think these regulations do that, but obviously they are proposed and we'll take a look at that.

For example, there is concern expressed that somehow there is a new mandate imposed on the States to collect information relating to environmental justice. I don't read the regulations that way. But, aside from the legal point that Senator Crapo raised, I guess I would say we're dealing with a practical set of problems, and that is how to have an integrated, streamlined environmental review that fits with the planning, satisfies the statutory requirements, and gets to an end result.

In identifying seven goals of the NEPA process, one of the goals is to take account of the fact that highway projects and mass transit projects have impacts on people. They have impacts on communities. They have impacts on minority- and low-income communities. We can't pretend that they don't.

An EIS that doesn't take account of those factors—agencies today, with or without these regulations, that do an EIS on a major highway or mass transit program that don't take account of potential impacts on minority- or low-income communities, you know where that EIS is going? Down.

The goal here is to try to make sure that the factors that have to be taken into account at the beginning will be taken into account at the beginning. That is the central problem, it seems to me, that you all sought to address with section 1309 and that we are trying to address.

Now, I realize there is concern from the State highway folks about language here, mandates, too much collaboration. We'll need to look at those issues. But I do think that the regulations and the environmental provisions that relate—review provisions that relate to them do create a much better process here, and if we need to tinker with this or we need to be careful about the language, we'll do that. But this is a major step forward.

A big part of that is making sure that the people who have to be in and the concerns that have to be in are there at the beginning, because if they're not then the process is longer and the process is more likely to fail, and that is what we've had in the past.

Trying to pretend that you can't—you want to eliminate some of these issues because they're a little bit uncomfortable—

Senator THOMAS. Mr. Frampton, I don't think that's the issue. The issue is that Congress—

Mr. FRAMPTON. That's what we're trying to avoid.

Senator THOMAS [continuing]. That Congress said to you, "Try and make these more streamlined. Try and make this more efficient," and my question is—and you don't need to answer it. We'll hear some more people. Did that happen or didn't it?

Mr. FRAMPTON. I think these regulations and the environmental review provisions that relate to them implement your intention and make a major step forward.

Senator THOMAS. OK. We'll see.

Mr. FRAMPTON. Now, if there are issues or concerns that somehow we have made it more complicated or we've created new substantive mandates or we've endowed new decisionmakers in the process, then we want to be careful about that because that's not the intent of any of these sets of proposed regulations.

Senator THOMAS. Thank you.

Senator SMITH. Somebody else may have one more question of the witnesses, but let me just pick up on what Senator Thomas was just asking you, Mr. Frampton.

You said, when I asked these questions earlier, you mentioned "preamble." This is not preamble language. These are in your goals.

Now, under the law, the law allows for comments on the proposals, but here is your language under your proposed rule: "The applicant must have a continuing program of public involvement which actively encourages and facilitates the participation of transportation and environmental interest groups, citizens groups—" as Senator Baucus pointed out before—"private businesses, the general public, including minority and low-income populations, through a wide range of techniques for communicating and exchanging information." Now, our goal was to streamline this process. That's not streamlining. That is absolutely not. And that's not a preamble. That's language, direct language that "USDOT agencies will manage the NEPA process to maximize attainment of the following goals: Environmental ethic, environmental justice—" not

defined, and on and on and on—"a collaborative partnership involving Federal, State, and local, tribal agencies, communities, interest groups—" again, as Senator Baucus said, could be anybody. It could be anybody.

And "this decision shall be made." There is no question about what you're doing here. This makes no sense. I mean, with all due respect, I think you've totally violated the spirit and the intent of Congress in streamlining.

We tried to make the process better, not to avoid any environmental impact studies or anything else, but just simply to streamline the process, get the environmental concerns dealt with in a manner so that we can proceed, or, if it can't be dealt with, then don't proceed, but not to have this kind of language here.

I mean, for you to—I don't see how you can defend this. "We're going to work on it. We're going to do this." Get it out. That's not the intent here, and everybody has said this on both sides of the aisle.

I don't mean to sit here and beat on you, but, I mean, it is really clear that this language is just not going to work. It is going to totally violate what we are trying to do. So I would ask you to consider that when you go back and work on this.

Senator BAUCUS. Mr. Chairman, if I might, this is not really probably very fair, but it is an anecdotal experience.

In Montana, one of the environmental review problems very clearly was a bridge, the Thorn Street Bridge in Missoula, MT. It turned out it was an Endangered Species Act problem. But the Fish and Wildlife Service did not get enough information to the Montana Department of Transportation early enough so that their bridge could be designed in a way to conform with the Endangered Species Act—that is, it would not destroy habitat.

So I am agreeing with you that a lot of this is more up-front consultation and exchange of information, but the problem was budget. There's only, I think, one or two Fish and Wildlife people in the State of Montana. There are, like, 116 in Seattle. It's just nuts. That had the effect of slowing down the building of a needed bridge in my State.

So, again, part of this is budget, part of this is agency allocation. If we want to streamline, really streamline, then that information would have been received by the Department of Transportation much more quickly and earlier, but it wasn't, partly because of budget constraints, at least in Montana.

I agree that it makes sense to get out and talk and consult, and so forth, but I have a problem when I see words here in the proposed regulation which at least make it appear that perhaps the people that you are consulting with, that the Department would be consulting with, are people that have an equal say or a near-equal say or a significant say in the final decision.

You've many times here said, "That's not our intent. That's not our intent." I'd like to know what is your intent. What is your intent with respect to the congressional mandate? Is the intent to have a greater environmental review than currently exists in current law? Is it your intent to really streamline?

I can give you some ideas how to streamline—that is, give all of the relevant agencies 30 or 60 days to comment, and if they don't

comment then the State construction can go ahead. If there is a failure by one of the agencies, then there's probably going to be a lawsuit, and if there is a lawsuit, pretty soon the departments will get the message and make sure the agencies do their job. Things will get done.

This world is run by deadlines, dates and deadlines and quantifying information. I can come up with some streamlining regulations pretty easily, I think, and give these agencies deadlines, for example. They don't have deadlines now.

They are also sequential, seriatim. Some agency, you know, looks at it first and then comments, and then another agency looks at it and comments, and that is a significant problem that states are facing in trying to get these projects out.

I don't see anything about that in your proposed regulations. Instead, your proposed regulations seem to be a new exercise of chaos theory, you know, just get everybody, consult, talk to everybody in a kind of feel-good kind of intent of just everybody is in on this, kind of one big, happy family. Boy, it just seems to me that is going to not streamline. That's going to delay.

I'd like to know what is your intent.

Mr. FRAMPTON. I think we've heard—

Senator BAUCUS. What is your intent here?

Mr. FRAMPTON. I think our intent is to find the balance that you and Mr. Chairman have described here between, on the one hand, a streamlining which—as you said, one way to streamline this is to give everybody 60 days and have done with it. You don't provide opportunities for collaboration, you don't encourage that—

Senator BAUCUS. Include the consultation.

Mr. FRAMPTON. The problem of going too far in that direction is, No. 1, you may end up with substance that is not defensible, and, No. 2, you create a lot of people who are unhappy because they were pushed out of the process. To some extent, that may have been what has happened in the past.

To deal with that problem, the regulations attempt to have an integrated, single process with time lines, but to make sure everybody comes in at the beginning.

Now, as the chairman has pointed out, if you go too far in that direction, you are expressing concern that too much collaboration then creates—

Senator BAUCUS. How much power do you intend these other groups to have?

Mr. FRAMPTON. We're trying to find a balance between—

Senator BAUCUS. How much power? How much decisionmaking power do you intend these other groups to have?

Mr. FRAMPTON. The proposed NEPA regulations don't create any new rights. They're not designed to, I think, create new rights or substantive—

Senator BAUCUS. So is it your intent not to?

Mr. FRAMPTON [continuing]. Mandates for additional players to make sure that the people who are going to be at the table anyway—

Senator BAUCUS. You didn't answer my question, Mr. Frampton.

Mr. FRAMPTON. I'm sorry.

Mr. WYKLE. I'll respond to that, sir. The intent is not to give additional decisionmaking authority to anyone. The intent was to draw them in, get their comments and concerns, but they are not in the decisionmaking chain.

Senator BAUCUS. That's helpful. Thank you.

Mr. WYKLE. So if we need to change the word "collaboration" to something else—

Senator BAUCUS. Well, the word "consultation" has been stricken and in its place "collaboration" and "cooperation." You know, somebody did that for a reason.

Senator SMITH. Senator Voinovich, did you have a question?

Senator VOINOVICH. Yes. This is on the same point. We're getting into the issue of are you making it easier or more difficult. You get in the area of environmental justice—you know, as a former mayor and a Governor of a State, the regulations mandate data collection, identifying low-income minority groups, yet fail to reveal the standards by which individuals are classified. How are the groups defined? Whether a group is minority may change with each community around the State. For example, in cities African Americans may be in the majority, while they may not be in the suburbs. You know, what's the threshold?

What constitutes a denial or reduction of benefits? For example, if a ramp is not available to a specific neighborhood, does that mean that that highway project is not going to go forward? How do you define these things?

I know for sure that you have all these little things in this thing, and if somebody makes up their mind, "We're not going to let this thing happen," they can drag this thing out forever and ever and ever. Where's the close-off date? Where's the time line?

I mean, when you look at this stuff—and I was part of TEA-21—this is not streamlining it. I think you are making it a lot more difficult to move projects ahead. At least it isn't what we anticipated streamlining to be.

I want to say that I am in favor of putting a moratorium on this. I am in favor of—frankly, I don't think you've met what we've asked you to do, and I think that maybe we are going to have to revisit this issue, ourselves, and pass some legislation that does accomplish what we intended to do in TEA-21 and 1309.

Senator SMITH. Does any other Member have a question of Mr. Frampton or Ms. Schiffer?

[No response.]

Senator SMITH. If not, if you folks need to leave, that would be fine.

Mr. FRAMPTON. Thank you, Mr. Chairman.

Ms. SCHIFFER. Thank you for accommodating us, Mr. Chairman.

Senator SMITH. Thank you for coming.

Mr. Wykle, you have been involved in the Q and A here pretty extensively, but if you have anything that you'd like to say that you didn't get to say because you didn't give your opening, please feel free to do that now. Of course, your statement is part of the record.

**STATEMENT OF KENNETH R. WYKLE, ADMINISTRATOR,  
FEDERAL HIGHWAY ADMINISTRATION**

Mr. WYKLE. If I could, sir, I would like to summarize some things that I had in my opening statement.

Senator SMITH. Sure.

Mr. WYKLE. Obviously, I am very pleased to be here today, seriously, in terms of responding to your questions.

As Mr. Frampton indicated, in May we put out three notices of proposed rulemaking, one on planning, one on NEPA, and one on ITS architecture, and through these rulemakings the intent is really to improve the project delivery process and get the projects delivered more quickly. We think we can do that by better integrating the planning and the NEPA requirements, getting the two integrated together.

So our proposals—and, as I indicated earlier, they are proposals, because they are out for comments. They are not final rules yet. Our proposals respond, we believe, to the new statutory requirements in TEA-21, while attempting to align our regulations with the laws and with the recent court decisions in these areas.

We developed these proposals through an open process, an inclusive process that began almost immediately after the passage of TEA-21. We had regional forums, we had focus groups, and we had workshops getting input from the various interest groups and the States and others and getting their comments.

Our outreach effort identified three main areas of concerns from these groups: No. 1, a need for early involvement of a variety of parties in the planning and project development process, so early involvement was No. 1; No. 2 was flexibility for the States to create their own custom-tailored procedures; and No. 3, improve the linkage between the planning and NEPA processes.

We listened carefully to our stakeholders and have attempted to provide options that will assist States, local governments, and transit operators in identifying ways to improve their transportation planning and decisionmaking.

We definitely have tried to avoid a one-size-fits-all mandate. We think there is considerable flexibility in these proposed regulations.

It is certainly clear that achieving some of the results will be difficult, and one we have talked about, the elimination of the major investment study. We deleted this required study from all major projects. We focused simply on improving the relationship between the planning and the environmental processes.

In our view, being able to use the planning products more effectively in the environmental process should, as I have mentioned, eliminate duplication, reduce cost, and shorten project delivery time.

Our recommended changes to the environmental rules recognize that the work done in the planning process will be used in the environmental process stage. We know that there are some concerns about perceived broadening in the range of projects affected for subjecting the planning process to NEPA analysis.

We will review these and other comments to ensure that, in our effort to reflect congressional intent, we have not created unintended consequences nor failed to give appropriate recognition to

the many interests affected by transportation decisionmaking. We want to work with our stakeholders on their issues.

In TEA-21, Congress directed the Department to streamline both the planning process and the environmental review process. Our proposed regulatory changes are only part of our streamlining efforts. Guiding projects through the planning and review process faster, without compromising environmental and civil rights safeguards, is a complex undertaking for which there is no easy solution.

DOT regulatory revisions, alone, will not provide a total solution for reducing delays, because the majority of environmental laws and regulations are under the authority of other Federal agencies, but we are working with our Federal partners, with the State DOT's, and with other stakeholders on multiple approaches to streamlining.

We are developing national and regional memoranda of understanding; programmatic agreements, as was mentioned; dispute resolution procedures; reimbursement procedures for Federal resource agency staffing to get at the issues that Senator Baucus mentioned in terms of shortage of Fish and Wildlife folks in Montana; and performance measures so that we can report back to you on streamlining progress over time.

We are encouraging the expanded use of the Federal agencies' ability to delegate authority to State agencies, to act on its behalf of carrying out Federal regulations.

This has occurred in Vermont, with the historic preservation responsibilities, and in Michigan and New Jersey for wetland permitting.

Our regulatory proposals are now in the public review and comment stage. In response to many requests, we have extended the comment period to September 23. We assure you that the Department will carefully evaluate all the concerns and the proposed changes that are submitted and make changes as appropriate before we finalize these rules.

We certainly look forward to continuing to work with you, with the interested parties that have commented on our NPRM's, and to improve the planning and environmental review process.

We hope that this cooperative effort will lead to the development of regulations that will successfully implement our shared goals of streamlining the environmental approval process.

The Department is certainly open to all sound alternatives, and the outcome of this rulemaking is in no way predetermined.

We think we have made a significant improvement in terms of flexibility, as Mr. Frampton mentioned, for the first time providing the States the option of submitting an alternative. If they think there is a better way on a project, they can come to us and submit that and we will certainly take a look and help them find a more objective and flexible way.

That concludes my remarks, and I will continue with questions.

Senator SMITH. Mr. Wykle, I don't have any further questions. If any other Member does, they can feel free to question you.

Let me just say this, though. You've heard across the board here a lot of frustrations—

Mr. WYKLE. Right.

Senator SMITH [continuing]. From the authors of the language. I think we know pretty well what we intended. I don't think that the intent has been captured in what you're doing, and I hope you will take that back and make appropriate adjustments. That's just my advice, for what it is worth.

Mr. WYKLE. We will do that, sir.

Senator SMITH. Does any other Member have a question of Mr. Wykle?

Senator BAUCUS. Mr. Chairman, I have no more questions. Mr. Chairman, just a couple of points.

One is that when the DOT put out its options paper for comment, various State departments of transportation did comment. I know my State of Montana did, and I know others did, too. It seems like their comments were not considered in this proposed regulation, which raises the question of what assurance does the public have that those kinds of comments will be considered in the future.

But, apart from all that, I know, Mr. Wykle, you've got a tough job, and it is just my suggestion that if you have the time that you listen to the next panel, because I think if you'll listen to the next panel personally and if you could stay for the hearings in the audience here that that would be very helpful and help the Department to know what steps to take next.

Mr. WYKLE. Thank you very much, sir. We will do that.

Senator BAUCUS. Thank you.

Mr. WYKLE. I will give you my assurance we will consider the comments and certainly make contact with the appropriate staff here to ensure that we are meeting your intent, because that's what we want to do.

Senator BAUCUS. Thank you.

Senator SMITH. Senator Graham, did you have another comment?

Senator GRAHAM. Yes. Thank you, Mr. Chairman.

I want to go back to my Corps of Engineers question. In reviewing your statement, where you talk about improving the linkage between planning and the NEPA process, you give three principal goals: Early involvement, flexibility, and integration of planning and environmental review process.

I may have missed it, but what I am looking for is the process by which the Federal permitting agencies, such as the corps, will be required at that early involvement stage to give a clear indication as to whether this is a permissible project that is about to be commenced; if not, is it subject to remediation that would make it permissible? Or, if not, is it a fatally flawed project and, therefore, should be abandoned.

Second, once having made that assessment—green, yellow, or red—and the State having come into compliance if it is a yellow situation, that the permitting agency—in my example, the corps—would be committed to permit the project at the appropriate time during the process of design and development of the details of the project.

Mr. WYKLE. Well, certainly it is our hope and our intent with these revisions that the corps and the other Federal resource agencies will be involved in this process early, and that's the intent of trying to get them up in the planning process, so we can all get

in a room, we can lay out the purpose and need of this project, and then we can find out right up front very early whether or not there are any concerns from any of those Federal resource agencies. If so, then we want to talk about that and see what action can be taken to mitigate that or to resolve their issue.

The one key point I believe you are getting at, sir: Can we require them to attend and participate? We cannot. We cannot require another Federal agency to come and attend. We can encourage them. We are working to get memorandums of agreement where they will agree and state that they will come and participate.

Once they come and participate we get their concerns, we work to resolve those. But, again, there is no iron-clad guarantee that later on in the NEPA process they may want to make some refinements or change something. We would hope that would not occur, because we ask to document consultations as we go along, so we know what is agreed to and what the comments are, but we cannot guarantee that they will not change or modify later on in the process, and I think that is perhaps what you are getting at.

Senator GRAHAM. You do not believe that the statute that was passed in TEA-21 provides the authority to require the participating agencies to make such a binding commitment?

Mr. WYKLE. We do not believe that the current statute gives us the authority to require other Federal resource agencies to come to the table and abide by a decision that's made early in the process.

Senator GRAHAM. If that is the case, either our objective is a futile one, in my opinion, or we need to then ask the question: What law changes would be required so that those permitting agencies would, in fact, be required to make a determination at the beginning of the process whether this was a permissible project and then be bound by that early determination?

Mr. WYKLE. Our experience has certainly been that when requested and asked they come and participate, but our experience also shows that there are occasions when different agencies change their position or modify it as you go through the process.

As of now, our interpretation is we have no authority to require them to stand by a given decision.

Senator GRAHAM. Who would you ask to draft the legislation that would be necessary in order to achieve that goal of requirement for early stage involvement, participation, and then commitment, and to be bound by that commitment?

Mr. WYKLE. I don't know, sir. I will provide that for the record after consulting with my legal staff. But I think it is going to be very difficult because there are 40 different statutes out there and these agencies respond to different oversight committees, so we will need to work to see if there is a way to do that. I just cannot answer that right now.

Senator GRAHAM. I'll look forward to your response.

Mr. WYKLE. For the record.

Senator SMITH. Senators Voinovich or Thomas or Chafee, do you have any other questions?

[No response.]

Senator SMITH. Let me just conclude, Mr. Wykle. In New Hampshire, Interstate 93, we've had a couple of meetings, and people are

working very well together to use this as a model of streamlining. As you know, there was another highway in our State, 101, that took—it is still not completed after 20 years. There have been a number of fatalities as a result of environmental—late environmental implications to that. We're trying to use this as a model. Frankly, the headquarters level of the Federal Highway Administration and the regional people have been very, very cooperative and seems to go against what you are putting in the language here, which I'm very grateful for.

So let me just put that on your radar screen to make sure that we can see to it that these projects go along at a reasonable manner without these unnecessary delays.

As I say, your regional people are working very well with us on that project, but, again, the language—we'll hear more about that in the next panel, but the language seems to indicate a different direction, and I don't want to see that change, not only in New Hampshire but anywhere else.

Thank you very much for your time.

Mr. WYKLE. Could I just say one thing, sir?

Senator SMITH. Yes.

Mr. WYKLE. We appreciate those comments, and we have pilot programs with several other States to look at various ways to improve the process. Certainly, the intent of our regulations is to do the types of things we are doing in New Hampshire and the other pilot programs, so I very much appreciate the feedback this morning, certainly the view of some of our terms and definitions of those terms, and I look forward to hearing the comments from the panel coming shortly.

One final thing, sir, just to kind of give you a quantifiable basis. Of all the projects, 97 percent are approved in 2 years or less. Now, 2 years is still too long for many. Many of those are environmental exclusions, but they move fast. We want to even shorten that time. Only 3 percent of the projects take over 2 years, and certainly those are the large, visible, complex projects. We want to shorten that time period, and that is the purpose, certainly, of your interest and the interest of this committee in terms of working to streamline the process, and we are committed to working to do that.

Thank you very much.

Senator SMITH. Thank you, Mr. Wykle.

I will now call the next panel.

Senator GRAHAM. Mr. Chairman, while the next panel is coming, if I could just comment on that last statement?

Senator SMITH. Yes, Senator Graham.

Senator GRAHAM. The problem is not, at least in my experience, getting initial approval of a project so that the State moves forward with more-detailed design and land acquisition, all the things that go on with a big project. The problem is 5 years later, when they apply for the permit and then are denied, and all of that effort that they've expended is for naught.

I'd like to know how many projects fell into that category of what I call the "post-approval gotcha" project.

Mr. WYKLE. We're working to get some of that data, sir, and we will provide that to you, in fact, because we have an effort underway to identify those projects that have been open more than 5

years since a record of decision and why, and so when we get that compiled I'll give you a copy of it.

Senator GRAHAM. And how many projects are either terminated or require extensive renovation because of requirements which were not known until the project was deep into development.

Mr. WYKLE. OK, sir. Thank you.

Senator VOINOVICH. Mr. Chairman.

Senator SMITH. Yes, Senator Voinovich.

Senator VOINOVICH. Mr. Chairman, I had an opening statement that I'm not going to have read because I want to hear from this panel.

[The prepared statement of Senator Voinovich follows:]

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE STATE  
OF OHIO

Thank you, Mr. Chairman, for conducting this important hearing this morning on the Department of Transportation's proposed regulations on planning and environmental streamlining. When I was Governor of Ohio, I witnessed first-hand the frustration of many of the various State agencies because they were required to complete a myriad of federally-required tasks on whatever project they initiated.

With my background as a local and State official, I bring a unique perspective to this issue. While environmental review is good public policy, I believe that there are more efficient ways to ensure adequate and timely delivery of construction projects, while still carefully assessing environmental concerns.

Congress recognized the frustration of the States and enacted planning and environmental provisions to initiate environmental streamlining and expedite project delivery. These programs are embodied in sections 1308 and 1309 of TEA-21. Section 1308 calls for the integration of the Major Investment Study, which had been a separate requirement for major metropolitan projects, with the National Environmental Policy Act (NEPA) process. Section 1309 of TEA-21 calls for the establishment of a coordinated review process for the Department of Transportation to work with other Federal agencies to ensure that transportation projects are advanced according to cooperatively determined time-frames. This is accomplished by using concurrent rather than sequential reviews, and allows States to include State-specific environmental reviews in the coordinated process.

Last year, I conducted two hearings as Chairman of the Subcommittee on Transportation and Infrastructure on streamlining and project delivery. During those hearings I stressed how important it is that the planning and environmental streamlining provisions of TEA-21 be implemented in a way that will streamline and expedite, not complicate, the process of delivering transportation projects. A year after these hearings and nearly 2 years after the passage of TEA-21, the Department of Transportation finally published its proposed planning and NEPA regulations on May 25, 2000. Frankly, I am very disappointed with how long it took to propose these rules, and I believe many of my colleagues feel the same way. More importantly, there is a lot of disappointment with the proposed rules in general.

I strongly believe these proposed regulations are inconsistent with TEA-21 and congressional intent and do little, if anything, to streamline and expedite the ability of States to commence transportation projects. The proposed rules create new mandates and requirements, add new decisionmakers to the process, and provide endless fodder for all kinds of lawsuits, especially with regard to environmental justice.

In Ohio, the process of highway construction has been dubbed: "So you Want a Highway? Here's the Eight Year Hitch." My hope has been that in the future we could say "So you Want a Highway? Here's the Five Year Hitch." I don't see that happening with the proposal we have before us. For that reason, I am willing to support a moratorium on the proposed regulations should any be attached to an Omnibus Appropriations bill this year.

I welcome each of the witnesses who have come to testify on the proposed regulations at this morning's hearing. I look forward to their testimony and answers to any questions that may follow.

Thank you.

Senator VOINOVICH. But I would like to put up a poster that we had in Ohio, if we could. "So you want to build a highway?" It's an 8-year hitch. We'd like to put it up here.

As you mentioned, we had two hearings on the 1309 process, and I came here to Congress with the idea that we might be able to shorten it up, and we had hoped that we maybe would have, "So you want to build a highway," maybe just a 5-year hitch, you know, maybe 3 years off of it.

But I must tell you that, after reading these proposed rules, that I don't think that chart is going to be changed one iota and that we'll still have the same problems and, in fact, in some instances more problems than we have now to move forward with major highway problems.

I'm interested in the answers to the same questions that you asked. They say 3 percent, but the 3-percent probably are 80 percent of the major highway projects in the country.

Senator SMITH. Is the next panel here? Come on up, please.

The next panel consists of: Ms. Carol Murray, the assistant commissioner of the New Hampshire Department of Transportation; Mr. Jim Currie, the chief of staff of the Montana Department of Transportation; Mr. Gordon D. Proctor, the director of transportation of the Ohio Department of Transportation; and Mr. Thomas Warne, the president of the American Association of State Highway and Transportation Officials.

Welcome to all of you. Why don't we start with you, Mr. Proctor, and work down the table.

**STATEMENT OF GORDON D. PROCTOR, DIRECTOR OF TRANSPORTATION, OHIO DEPARTMENT OF TRANSPORTATION**

Mr. PROCTOR. Mr. Chairman, members of the committee, my name is Gordon Proctor. I am the director of the Ohio Department of Transportation.

Senator SMITH. Excuse me for interrupting. Let me just say all of your statements will be made part of the permanent record, and please summarize in a few minutes, if you can.

Mr. PROCTOR. Yes, Mr. Chairman, I will.

On behalf of Governor Bob Taft, I appreciate this opportunity to be here. I will summarize even my summarized statements.

I came here today trying to convince you that these regulations needed to be sent back for fundamental revision, and I can see that the committee is certainly ahead of me there, so I will not belabor the point.

I will touch on just a few highlights, though, and one is that I think the vast majority of the AASHTO States have called upon USDOT to fundamentally rewrite these provisions.

As you know, the current process is one of excessive overlap, delay, and redundancy. We think that with these additional requirements that have been added that there will be more delay, more redundancy, and more overlap.

As other speakers have said, the new rulemaking attempts some streamlining; however, these attempts are more than offset by establishing broad and very vague new tests which must be met before transportation projects can be approved. These new tests far exceed anything currently in law.

Ironically, when Congress ordered USDOT to streamline its current regulations, the DOT, instead, created some new regulations and new tests for transportation projects to meet. Instead of mak-

ing the process more efficient, these rules can make it more excessive.

Just three quick examples. The MIS requirement, as we have heard—we think the implication is that MIS type studies will need to be done for a broader array of projects, and I think this clearly is not the intent that the committee or the Congress had.

Second, the proposed regulations greatly expand the role for non-elected, unaccountable advocates to establish themselves as decisionmakers in the transportation process. We think that direction seriously erodes the ability of State, city, county, and other local elected officials who participate in the planning process.

Currently, the people who are accountable to the local electorate make the zoning plans, they make the annexation plans, they comprise the metropolitan planning organization boards which vote on transportation plans and programs. Even in Ohio, where we have home rule before we can build a project in a community, we must get consent legislation from that community, which takes a specific vote by city council.

All of that is not taken into consideration in these rules, and so we then create a duplicative Federal process to second guess the local decisionmakers who have already set their priorities, and we think this clearly goes beyond the intent of the committee.

Third, the regulations commingle the explicit congressional intent under title six with the ambiguous Executive order for environmental justice, and it creates a new field of litigation for transportation projects that has never existed.

Under the title of environmental justice, the new rules seem to create new protected classes which have special standing in the transportation process.

We do not have clear definition on who these groups are or how they are identified; however, State DOT's will have to become census-like agencies who analyze these demographic groups and ensure that not only do we not discriminate against them, but that there are no unintended consequences of projects which could create "disproportionately high and adverse impacts."

We applaud title six and all that it stands for. As Senator Voinovich knows, when he was mayor of Cleveland and then Ohio's Governor, Ohio went to great lengths to create opportunity for all protected classes; however, these new rules provide endless fodder for lawsuits by any group which can infer that it has received disproportionately high and adverse impacts by any action taken by a department of transportation, or, more importantly, by any action not taken by a DOT.

Any presumed reduction in benefit by a DOT could be actionable under this overly broad and vague environmental justice requirement. In effect, a decision not to fund a project could become actionable under this regulation. This new concept that a reduction in benefit was created, that new concept is not recognized in the President's Executive order, and I think it clearly goes beyond the intent of this Congress.

I know that there are a lot of speakers still ahead of me, and I will try to be very brief.

The Federal decisionmaking process for transportation projects churns endlessly. It never stops. The rule book never stops changing. No sooner do we adapt to a new Federal rule than it changes.

Ohio just published our new policy for complying with the President's Executive order on environmental justice. Now these new proposed changes change the environmental justice policy. We at the DOT are wrestling with new Corps of Engineers nationwide permits for wetlands. Those, in turn, triggered new water quality interpretations, which are further clouding our decisionmaking process, and we are also waiting new rules on something called "total daily maximum load" for storm water runoff.

We, at the State Department of Transportation, try to be sensitive and responsive to environmental concerns; however, these new regulations are yet another example of the endlessly changing and increasingly complicated Federal rules which evolve each year.

I applaud you for holding this hearing and for listening to our concerns. I appreciate your efforts at streamlining. Streamlining certainly is needed. A good way to start is to reject these proposed regulations.

Thank you for this opportunity. At the appropriate time and at the wish of the chair, we will be happy to answer any questions.

Senator VOINOVICH [assuming the chair]. Thank you very much.

We will now hear from our next panelist. We appreciate the fact that you are limiting your time so we can ask some questions.

Mr. Warne.

**STATEMENT OF THOMAS R. WARNE, PRESIDENT, AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS (AASHTO), AND DIRECTOR, UTAH DEPARTMENT OF TRANSPORTATION**

Mr. WARNE. Thank you very much.

Mr. Chairman, members of the committee, I am Tom Warne. I am the executive director of the Utah Department of Transportation and currently serving as the president of the American Association of State Highway and Transportation Officials, AASHTO. AASHTO is an association of the 50 State Departments of Transportation and Puerto Rico and the District of Columbia.

Let me state up front here that we care deeply about the environment and we take our responsibility of stewardship for transportation and the environment very, very seriously.

Two years ago, when TEA-21 was enacted, the Congress had a very good idea. You not only increased highway and transit funding by 40 percent; you also recognized that in order for these investments to pay off in real transportation improvements, we in the States have to have some help in overcoming the layer upon layer of Federal reviews that can add 5 and 10 years to the life of a project.

You directed the Department of Transportation to work with other agencies to trim and streamline the Federal red tape.

We are here today to tell you that these 235 pages of proposed regulations are not streamlining.

I have no doubt that our partners at the Federal Highway Administration and the Federal Transit Administration started out with the best of intentions, but after toiling on this proposal for 2

years what they have produced are regulations that will add still more delays to what we are already experiencing, introduce new requirements, and, frankly, expose us to new mine fields of potential litigation.

We feel so strongly about the threats these regulations contain that the AASHTO Board of Directors, representing the 50 States, passed a resolution asking for your intervention and clarification during these hearings to return the agencies to the original course that you set in TEA-21.

We also urge that the regulations be substantially rewritten and put out for a new round of public comment.

We have provided for the record details of our concerns and only highlight a few of what we see as the sins of omission and commission in these regulations.

Let me just State briefly, in terms of what you said versus what we got.

You said you wanted to see the requirement for the major investment studies of large metropolitan projects eliminated as a stand-alone planning component, but integrated as a linkage between the regular planning and the NEPA process without expanding the scope of the previous MIS requirements. What we got was an even broader mandate that requires MIS-type analysis. Yes, the word "MIS" has been eliminated from the regulations, but, in fact, what is required is exactly the same set of conditions for all projects in metropolitan areas, regardless of size, scope, and cost. Frankly, we don't see that as streamlining.

You said that you wanted States to consult with their local governments and to document how they do so, but you did not dictate the one-size-fits-all approach requiring local sign-off, subject to Federal review and approval. What we got was a rule that requires that the local government sign off on the consultation process and allows the USDOT to subjectively approve or reject statewide transportation improvement programs based on whether they have local concurrence or not. Frankly, we don't see that as streamlining.

You did not ask for any new requirements in TEA-21 for data gathering to demonstrate how States comply with the non-discrimination requirements of Title six of the Civil Rights Act. What we got was a new mandate requiring States to show not only that we have not discriminated, but also that the impacts and the benefits of the transportation system are distributed proportionately across an entire State or metropolitan area.

Unfortunately, it may prove to be virtually impossible to define even the basic concepts of terms like "proportionality," "benefits," "burdens," and "reduction," across large population groups or geographic areas and time periods in any meaningful way. These terms are vague. They are ambiguous. They certainly will be the subject of litigation.

We believe that this new proportionality test is unworkable, would impose enormous new data collection and analysis requirements, and would expose the States and MPO's to major new legal risks. Frankly, that's not streamlining.

You said you wanted specific timeframes established for reviews to be completed by Federal agencies and disputes to be resolved so

that projects would not languish for months or even years. That was not even addressed in the regulations.

We also believe that the regulations have totally missed the mark in applying the NEPA process to projects both large and small. Based on the FHWA's own 1998 data on environmental impact statements, 84 percent of such statements—these are the EISes, the most complicated documents—84 percent of those statements required 4 to 10 years to complete the process.

Completing sign-off by the Corps of Engineers on wetlands permits, section 4F, historic review processes, and endangered species review takes years longer.

We believe these regulations would only worsen that record. For large projects, the regulations require that enhancements get major engineering analysis and that every possible alternative, regardless of cost or applicability or rational approach, would be given equal amounts of engineering and environmental analysis in this EIS process, further complicating the EIS process.

For small and uncontroversial projects, the regulations mandate that the same kind of coordinated review process required for a full-scale EIS also would now be conducted for hundreds and hundreds of projects now handled by the categorical exclusion in our environmental assessment.

Section 4F—that's a review process for historical sites—is in urgent need of reform and should be a top priority. This regulation asks for comments but makes no efforts to streamline that very, very cumbersome process which has become tremendously burdensome to us.

Let me just give you a couple of examples of how this is proceeding.

In Tucson, AZ, the MPO, the Pima Association of Governments, they have 300 projects a year. They've never done an MIS. Under these regulations, they would have to do the MIS-like work for every one of those projects.

In Illinois, they estimate that, in fact, these regulations will infuse a 2-year delay into their urban projects, increasing the cost by 5 percent a year because of that delay.

What I've said this morning, Mr. Chairman, is that this proposal is just not streamlining. We know that it was intended to help. We appreciate your language that was the genesis for this effort, but this is the kind of help we don't need, frankly. We're looking for streamlining.

We appreciate the interest of this committee and hope that, in fact, the process here will take us to the point where we can go back and start over and work with our partners at the Federal Highway Administration and Federal Transit Administration to, in fact, produce regulations that will help us deliver the products and services you expect us to deliver to our customers.

Thank you very much.

Senator VOINOVICH. Thank you very much.

Ms. Murray, assistant commissioner, New Hampshire Department of Transportation.

**STATEMENT OF CAROL MURRAY, ASSISTANT COMMISSIONER  
AND CHIEF ENGINEER, NEW HAMPSHIRE DEPARTMENT OF  
TRANSPORTATION**

Ms. MURRAY. Thank you very much.

Mr. Chairman and members of the committee, I am Carol Murray, the assistant commissioner and also the chief engineer of the New Hampshire Department of Transportation. The New Hampshire DOT joins with the other State Departments of Transportation from across the country in objecting to the impact of the proposed rules from the Department of Transportation addressing both the planning process and the process for environmental review of proposed transportation projects.

Without getting into detail, we believe these rules to be contrary to the spirit of the Transportation Equity Act for the 21st Century, TEA-21, and would further set back efforts aimed at making these processes more timely and efficient.

In spite of noble intentions and considerable efforts, the current project development process remains complicated, overly burdensome, and frustrating. Objective reviews of project impacts and consensus building are often severely hampered by the failure of the resource agencies to be appropriately represented at meetings during project development. This also results in the need to revisit issues, which leads to delays and additional costs.

Also, resource agencies often defer decisions until very late in project development, rather than to sign off at major milestones.

The current process is, frankly, not very good, but it remains better than what is being proposed. We are all in the business of serving the public, yet this process is viewed by the public as very complex and frustrating, a sort of endless series of loops.

The proposed rules do nothing to relieve these frustrations and will, in fact, make them worse.

I would like to focus for a few minutes on the direction where we believe the transportation planning and environmental process should be headed to better serve the American public.

TEA-21 espouses the concept of environmental streamlining, emphasizing the need for timely and responsible decisionmaking. This is a concept that I know Chairman Smith strongly supports. The goal of environmental streamlining is to advance worthy transportation improvement projects that support and nurture the economy, without unnecessary detrimental effects on the environment.

Environmental streamlining is not foreign to the New Hampshire DOT. A number of initiatives have been advanced through the years to facilitate project development and expedite inter-agency coordination. Monthly project review meetings with the resource and regulatory agencies have been in place for more than a dozen years. These meetings afford the opportunity for the project purpose and need, alternative courses of action, environmental effects, and mitigation strategies to be discussed in open forums. It is about building trust, to get all agencies and parties involved sooner.

I would like to offer two examples in New Hampshire of how we see the concept of environmental streamlining improving the quality of life in the State.

The first, in which Senator Smith has taken a leadership role, is the proposed expansion of 18 miles of Interstate 93 from the Massachusetts border north to Manchester, the State's largest city. This busy stretch of four-lane divided highway handles 100,000 vehicles a day and experiences serious congestion during peak driving hours.

In early August, Senator Smith coordinated a meeting of State and Federal regulators aimed at streamlining the approval and construction process for the I-93 project. Among those attending the meeting were representatives of the Environmental Protection Agency, Federal Transit and Federal Highway Administrations, the Army Corps of Engineers, Fish and Wildlife, and the State Departments of Transportation, Environmental Services, Fish and Game, and the Offices of Emergency Management and State Planning.

Senator Smith made it clear that he wanted regulators to come up with transportation and environmental goals, to establish timelines and milestones for the project, and to establish a dispute resolution process. All of the agencies in attendance signed a partnering agreement pledging mutual cooperation, open and honest communication toward delivering a safe, effective, environmentally sensitive solution for transportation in the I-93 corridor.

This is a very positive step that we hope will expedite the review of this project and will, in fact, be a pilot that can be expanded into other States.

Another example is in Concord, the State's capital, where a project called "Concord 20/20" is an effort by the city to look at a vision for the future of the city 20 years from now. This project includes three quality of life issues: Economic development, the natural environment, and, of course, transportation.

The goal is to look at the interaction of those issues and achieving improvements within each without negatively affecting any of the others.

This is a TCSP-funded project that I believe meets the purpose and goals of that program.

It is time to work toward building these kinds of cooperative efforts. When it comes to reviewing proposed transportation projects, it is not in the public interest to delay, frustrate, and increase the price tag of worthwhile transportation projects.

To be effective, incentives for resource agency involvement and cooperation must be tangible. The threat of the big stick may bring short-term results, but will only engender mistrust and resentment. Through inter-agency forums, cross-training of agency personnel is essential to develop a mutual understanding and appreciation of agency initiative, plans, and goals.

The aim is not to convert each other, but to work collaboratively and responsively to pursue our separate yet related public mandates and to integrate them effectively. Again, the key is building a trust between all parties.

These regulations do not speak to those goals.

Thank you for the opportunity to appear before you today. When appropriate, I would be glad to answer any questions you may have.

Senator VOINOVICH. Thank you very much, Ms. Murray.

Senator BAUCUS. Mr. Chairman, can I introduce the next witness?

Senator VOINOVICH. Absolutely.

Senator BAUCUS. He is from the great State of Montana.

Jim Currie is the chief of staff to the administrator of our State Highway Department, Marvin Dye. They do excellent work, and I am very honored that Jim is here.

It is good to have you here, Jim.

**STATEMENT OF JIM CURRIE, DEPUTY DIRECTOR, MONTANA DEPARTMENT OF TRANSPORTATION; ACCOMPANIED BY JOHN DeVIERNO**

Mr. CURRIE. Thank you. Thank you, Mr. Chairman, Senator Baucus, and members of the committee. My name is Jim Currie, and I am the deputy director for the Montana Department of Transportation. With me today is John DeVierno, who advises our department and four other State DOT's. We appreciate the opportunity to appear here today.

Montana and seven other States, including Wyoming, Idaho, Nevada, North and South Dakota, Arizona, and Michigan, have jointly submitted a statement to the record on this issue.

Our position on the proposed rules is straightforward: We strongly oppose these proposals and want help from Congress to prevent them from becoming final rules. Why? Because the proposed rules will add burdensome and costly requirements. Even worse, the proposed rules are vague and open-ended. This means confusion, delay, and even uncertainty that systems planning, programming, and project-level decisions could ever be reached and, if reached, it is uncertain whether they could be defended in court.

This is certainly not what Congress intended, and in several key places the proposals are directly contrary to statutory provisions.

Let me be specific. First, Montana is also concerned about the alternatives analysis provisions of the proposals, which look a lot like major investment study provisions of the current regulations, except they are broader.

Senators to date there has never been an MIS required for any urban project in Montana, and when we recently met with all of our larger cities, there was not a single local official advocating more planning-level studies. To the contrary, our local officials want the process speeded up.

We estimate that this single aspect of the proposed rules would cost an average of \$2 million a year in Montana, expand the bureaucracy at both the urban area and State DOT levels, and take 3 years to comply with. Moreover, it would effectively move money from real projects to unnecessary paperwork and process. This is not what our citizens want.

Our second area of concern is that the proposed rules will confer important rights on new groups, including undefined planning process participants, at the expense of elected local officials and State authority. We are committed to working closely with local officials and all interested parties, but the proposed changes would alter the inter-governmental balance established by Congress in TEA-21.

These proposals also seem likely to confer leveraging or veto authority on a wide range of unelected officials and groups over decisions Congress vested with States and MPO's.

We are particularly concerned that when a large number of new entities are essentially given cooperative or joint decisionmaking authority in the process, the ability of the States to address state-wide transportation priorities or to invest in major projects is seriously diminished. We are fearful that any decision could be held hostage.

I'd like to read you a quote from Vern Peterson, the chairman of the Montana Association of Counties' Transportation Committee and a commissioner from Fergus County, MT. In February 2000, he wrote the following to FHWA regarding its study on rural transportation consultative processes.

We are confident that as problems arise within the transportation planning process in Montana it will be much easier to resolve issues by working at the State level rather than through a Federal process. Consequently, we urge USDOT to respect current relationships between local governments and State transportation departments and in no way require additional procedures or bureaucratic processes.

In addition, since we have State statute regarding transportation planning with our counties, I'm concerned these proposed rules could preempt the existing process and downgrade the authority of our elected county commissions.

The last topic I will touch on is an across-the-board concern that there could well be a vast increase in litigation against project and planning decisions because the rules are vague, open-ended, and contain undefined terms related to various tests.

For example, while NEPA has always been found to be procedural, the proposed rules would now require management of NEPA to substantively maximize things like environmental ethic and integrated decisionmaking. This kind of language is an engraved invitation to lawsuits to test whether or not these aspirational goals are maximized in any decision.

NEPA decisions would now also have to be made through maximizing decisionmaking through a collaborative partnership, including all regulatory agencies, involved governmental entities, communities, interest groups, interested individuals, and private businesses.

With such a test, we are concerned that it will never be possible even to reach a decision, and if one is reached anyone could obstruct it by claiming they were excluded from the collaborative decisionmaking process.

Montana DOT, along with all other State DOT's, strongly opposes discrimination and supports title six. We firmly believe there is no systemic discrimination within the Federal aid transportation program. Certainly, the additional program risk and additional data burden provided by the provisions in the proposed rules is not warranted. No case has been made for such a massive change in the present rules in this area.

In summary, we support a thorough planning and environmental review process, but we oppose processes that are unjustifiably complicated, costly, and likely to delay the delivery of sorely needed transportation improvements. That's why we oppose the proposed planning and environmental rules.

Finally, I want to make clear why we think Congress has an important role to play in this matter. We, AASHTO, and other States will submit comments to FHWA and FTA on these and other topics of concern on this proposal, but, frankly, we have no confidence that the substantive changes that need to be made will be made.

In 1999, in response to USDOT's paper on options for implementing TEA-21, AASHTO and the individual States made their views known on these very issues, and the proposed rules still turned out as they have, so we are far from certain that USDOT will change its approach to these regulations in response to our comments.

Accordingly, we respectfully request Congress' assistance in preventing these counter-productive proposals from becoming final rules.

Thank you again for the opportunity to appear today. When appropriate, I'll take questions.

Senator SMITH [resuming the chair]. Thank you very much, Mr. Currie.

Mr. Warne, let me start with you.

Would you say that the testimony that we've heard here this morning from your fellow panelists represents the other States, as well, across the country?

Mr. WARNE. Yes, Mr. Chairman, it certainly does. We've had the regional associations—the four regions in the country have banded together and, in fact, we have a resolution that the AASHTO Board of Directors has passed, and that has allowed me to speak and offer this testimony here as the president of AASHTO today.

Senator SMITH. Have you, in that capacity, presented any formal response from the States collectively on this issue?

Mr. WARNE. Mr. Chairman, we are in the process of preparing our response. It is actually a very detailed document, given how detailed the proposed regulations are, and we plan to submit that prior to September 23, which is the filing deadline.

Senator SMITH. That's all 50 States have been put into that?

Mr. WARNE. It will be a combined statement from the 50 AASHTO States. Yes, sir.

Senator SMITH. I think that would be very helpful.

I want to point out, too, that Mr. Wykle, to his credit, has stayed. Oftentimes witnesses from a previous panel leave, but I think he is obviously interested in your testimony and also interested in listening to what your concerns are.

I don't think I've ever seen a hearing where it has been this unanimous or this overwhelming, anyway, on the concerns raised by what the intent of Congress was by those who are basically going to be the beneficiaries or the victims of our legislation. Sometimes it is both, unfortunately.

Ms. Murray, it is hard to call you that. I think, Carol, we've tramped over so many roads and by-ways up in the cold and the heat of New Hampshire over the years. I appreciated your comments on I-93.

Let me just ask you if you could be specific—not necessarily specific to the highway. We all know what the situation is there with the widening. But if you could demonstrate specifically how these

regulations, as proposed, might impact what we are trying to do there as a streamlining pilot program for I-93.

Ms. MURRAY. Certainly, Senator. I'm much more comfortable when you call me Carol, I must say.

Senator SMITH. That's fine.

Ms. MURRAY. It feels much more comfortable and much more in spirit with our past relationships.

The regulations, in a number of ways, would disrupt what we are doing on I-93, but let me pull out a couple of immediate concerns that I would have.

First off, the MIS-like requirement—yes, it is not an MIS requirement, but it is close enough—would build in a delay of 2 to 3 years into that project while we step back to prepare that document. The rules, as proposed, do not have a grandfather provision, so it would apply immediately to the work on I-93.

The other concern, and perhaps the larger concern, is the role of the new consultation partners. They are given a new name, and I feel, from reading the regulations, a new status. As you know, we have a number of advocacy groups in New Hampshire that would very much love an opportunity to, for lack of a better phrase, rise to the status of a regulatory body. These regulations would give them that inroad.

I also share the concern, if you excluded a group through oversight or through not even knowing of their existence, very late in the process they could then stand up and say, "Excuse me. We were not included in the consultation and in the outreach."

All of our projects, I-93 included, involve a large public outreach component. Those groups that are not formally recognized in the process have every opportunity to State their concerns. To formalize that relationship and actually provide them with an inroad into the process I think would be extremely detrimental to the I-93 project.

Senator SMITH. Do all of you view these proposed rules as going beyond advisory in capacity and more into direct involvement in the decisionmaking?

Mr. PROCTOR. Right.

Ms. MURRAY. Yes.

Mr. WARNE. Yes, sir.

Mr. CURRIE. Yes.

Senator SMITH. I think that is my concern, as well, as I read them, but we heard differently from the witnesses on the other panel, but I think it seems to me that's the way the language reads.

Senator Baucus.

Senator BAUCUS. Yes. Thank you, Mr. Chairman.

Jim, could you just give us a sense of how much more costly you believe these regulations will be to, say, the State of Montana, or generally to other States as they try to go through this process and take projects from concept design out to bid and actually moving dirt?

Mr. CURRIE. Yes, Senator Baucus, it is kind of hard to say exactly how costly it will be with regard to every project. For the MIS component of the regulations, alone, we have calculated the cost to be about \$2 million a year.

One thing that we are very concerned about is that there will be project delays. As you know, an issue in our State right now is the time it takes to get a major project out. With these regulations, we will have further delays, particularly in the complicated projects, and delays mean increased costs on projects.

We anticipate that, if, in fact, the MIS provisions go through, we would not only be doing the alternative analysis at the planning stage, but we would also have to again do those same analyses at the project stage. That would add cost and delay to the project.

We feel that, with the language that is currently in these rules, there would certainly be more legal challenges to our decisions. Of course, when you get into litigation, the costs skyrocket. So this certainly would be a significant impact from that point of view.

Senator BAUCUS. What process does the State have in prior consultation with affected groups? We all want to make sure that we talk to people in advance in a solid, legitimate way. It's not just a brush-off, but it is really serious, because that's what our job is.

Could you outline for us what Montana does and what other States do, as best you can?

Mr. CURRIE. Yes, Senator. We are very aggressive in Montana to try to reach out to all groups and get their views on projects, and we use a number of different ways to do this. We have formed focus groups, as you are aware, in the Bitterroot Valley, to try to get citizen input on what they would like to see for projects through their communities. We use public hearings. We have advisory committees. We have an 800-line that we publish so people can call with their concerns. We use the Internet. We use customer surveys. Our Transportation Commission meets six times a year. Of course, that's the policy body for the Department. That's a meeting that is advertised, and it is very rare that our Transportation Commission meets that we don't have several delegations there providing input on transportation issues for their particular areas.

We were specific in making sure that our local governments, cities and counties, received proportionate increases in TEA-21. We wanted to make sure that the TEA-21 increase for our State was spread around to the local governments.

Our concern is not that we don't want input from all of these different groups and people. We do want their input. We want to consider their views. Our concern is that if all of these parties have decisionmaking authority, then we are going to be into a situation where there is chaos, and perhaps no decision can be made that would be defensible.

Senator BAUCUS. These proposed regulations have been criticized a bit today, to say the least. Is there anything good in them? Is there some part of the regulations that you think is a step forward? Can you find anything in there that might make some sense, you know, "That's not bad, but the rest of it is not so good"?

Mr. CURRIE. Senator, what I think needs to happen to these regulations is they need to be put on hold, they need to be reviewed by Congress, and FHWA needs to start over with regulations that truly streamline the process and not make it more difficult for us to deliver this program.

It is hard enough now with the environmental regulations. We go through endangered species, as you know. That's a major issue

in Montana. It is difficult enough to deliver a construction program with the existing regulations, let alone having rules that are promulgated that will make the job more difficult.

These rules will make our job more difficult. We will have a very difficult time delivering the transportation program, and it will take longer to do so. We need rules that truly streamline.

Senator BAUCUS. You're right about delay in our State. Just coincidentally, I was looking at some clips from Montana newspapers of yesterday, and there is a big article about this very subject in the paper.

When you gave your comments to the Federal DOT, did you get comments back? Was there any give and take?

Mr. CURRIE. Senator, we are in the process of the comment period. We haven't yet submitted comments. We're working with AASHTO and other States on that. So we have not yet received comments back.

I will say, though, that in 1999 all States had the option of commenting on the options paper.

Senator BAUCUS. That's what I was referring to.

Mr. CURRIE. I'm not aware that we got comments back on that. The rules, I think, that are before you today are the comments that came back, and they certainly did not take into account the input that came from most States.

Senator BAUCUS. Mr. Chairman, I see other heads at the table nodding affirmatively. They must have had the same experience.

Is there someone, some State who did get a response back on the options paper, to your comments on the options paper?

Mr. WARNE. Senator, may I comment—

Senator BAUCUS. Sure.

Mr. WARNE [continuing]. That AASHTO did, in fact, comment to the options paper, which is essentially the precursor to these regulations.

Senator BAUCUS. Right.

Mr. WARNE. But to my knowledge we received no formal feedback to that.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

Senator SMITH. Senator Chafee.

Senator CHAFEE. I'd like to ask Mr. Warne—you reacted to these regulations with your resolution. Do you have the staffing to be proactive and to propose your own regulations that would streamline the process, your organization, AASHTO?

Mr. WARNE. If that's an invitation to essentially propose and submit for adoption, we would be happy to engage in that. Yes, Senator.

Senator SMITH. Senator Voinovich.

Senator VOINOVICH. Yes, Mr. Chairman.

I was just thinking that we have the Federal gas tax that is collected by the Federal Government and we redistribute it back to the States, and there seems to be an arrogance in Washington that they care more about people and problems and issues than we do on the State and local level. The idea of someone—one of the panelists brought up the issue of all of the requirements that we have—we have our A95 process, we have to get city council resolutions,

we go through this whole process and people have input, and yet we have this Federal Government that comes in and says, you know, "What you guys are doing isn't adequate to protect this group, that group, this issue, that issue," and so on and so forth ad infinitum.

I thought that one of the reasons why we put 1309 into the TEA-21 was to try to work at streamlining that process and moving it along so that we didn't have this gigantic maze that one has to go through to get anything done.

I know in our State, Mr. Chairman, Gordon Proctor was part of our management team in the Department of Transportation. Gordon, we reduced your budget, I think, \$55 million a year so that they could put the money—that's money in the department. They take that money and put it in the highway construction. When you finally get to a certain point, you can't reduce any more because you have to have these people to comply with all these Federal regulations that one has to comply with in order to get a project done.

There seems to be a disconnect with what Mr. Wykle had to say and what I heard from you at this table in regard to this MIS, and I would like any one of you to comment about what he has said to me—and previously, I guess, to Senator Baucus. I wasn't here to hear that—because what I heard was that there isn't—MIS has been eliminated in the new rules and regulations, and what I hear from you and what I hear from Gordon and your people is that that MIS now is being required on just about every urban project.

Could you explain this to me so I can more fully understand it?

Mr. WARNE. Senator, do you want me to respond to that?

Senator VOINOVICH. Sure, or anybody.

Mr. WARNE. Let me just speak from the AASHTO perspective on this. In fact, the AASHTO States have found that under the original requirement for the MIS, essentially when you went through the NEPA process and then you ended up redoing everything you did in the MIS, which is essentially the reason why we said this is a duplicative process and it should be eliminated.

What has been stated here earlier is that this MIS-like process would help some controversial projects go through.

The fact is, I use the example in Tucson, AZ. Of those 300 projects, in fact, the vast majority of them, if not all of them each year are not controversial, and they just go right through the process and you're not lacking any more public involvement and you're not lacking any more analysis that this MIS-type requirement would add, and yet now you put this requirement on those projects. You essentially delay projects that wouldn't have been delayed otherwise.

Senator VOINOVICH. Mr. Wykle said that the MIS is not mentioned in the rules.

Mr. WARNE. It is an MIS-like process, but it walks like a duck and it quacks like a duck.

Mr. DEVIerno. Senator Voinovich, I'm John DeVerno. I'm here with Jim Currie. I guess I may as well really try to be pretty specific to nail this down. The proposed rule literally struck the definition. There is a definition for "major investment" in the rules. And it really is for major projects. It talks about whole corridors and

large amounts of money. That was struck as a definition in the proposal.

The operative place where the definition works is still the same section. It is .318(a). It requires right there a major investment study, and the essence of the major investment study is an alternatives analysis. That's the essence.

So now what you have proposed in .318(a) is that States shall provide alternative analysis with respect to investments, and they deleted—what you had is deletion not of requirement but of an adjective.

So now for all investments we would have to do an alternatives analysis, and that is what we are talking about. It is right in the same section. It is the successor. They deleted the adjective, deleted the definition, but the whole requirement is an alternatives analysis, and it is right there.

Senator VOINOVICH. So the alternatives analysis is basically an MIS?

Mr. DEVIerno. Yes. That was what it was about.

One other thing I guess I'll add in comment. I appreciate that there were some sympathetic sounds that came out of the first panel, and a comment was made that somehow requiring this further analysis at the first stage would be helpful. The point is that you do have a requirement to do alternatives analysis in NEPA, as you know. So, by writing in an alternatives analysis in the first section, the only thing you've definitely done is required it twice. You may or may not get to subtract anything out at the back end.

If the rules were really to do something constructive, what really has to be done is some kind of very strong provision at the back end, for NEPA, that says that if anything is done in the front end it will be accepted.

You don't have to actually write in any requirement that something be done in the front end in planning, which is, unfortunately, what has been done in these proposed regulations, because the point is that if the authorities would actually accept the analysis in the back end the States would do it voluntarily. They wouldn't have to require it.

Senator VOINOVICH. Does anyone else want to comment on that?  
[No response.]

Senator SMITH. Thank you, Senator Voinovich.

I think the record is pretty clear here, from not only Members but the panelists, in terms of the concern.

Picking up on Senator Voinovich's line of questioning, I would just point out that on proposed rule 1410.318, relation of planning and project development processes, under the intention, the intention of the Congress was to make this an advisory matter, yet it says,

In order to coordinate and streamline the planning of NEPA processes, the planning process, through the cooperation of MPO, the State DOT and the transit operator shall provide the following to the NEPA process.

We then have two long pages of requirements, which is classic bureaucratise. It goes just on and on, with even sub-categories of each.

I'm just going to enter this as part of the record and not read it all.

[The information referred to follows:]

§ 1410.318 RELATION OF PLANNING AND PROJECT DEVELOPMENT PROCESSES

(a) In order to coordinate and streamline the planning and NEPA processes, the planning process, through the cooperation of the MPO, the State DOT and the transit operator, shall provide the following to the NEPA process.

(1) An identification of an initial statement of purpose and need for transportation investments;

(2) Findings and conclusions regarding purpose and need, identification and evaluation of alternatives studied in planning activities (including but not limited to the relevant design concepts and scope of the proposed action), and identification of the alternative included in the plan;

(3) An identification of the planning documents that provide the basis for paragraphs (a)(1) and (a)(2) of this section; and

(4) Formal expressions of policy support or comment by the planning process participants on paragraphs (a)(1) and (a)(2) of this section.

(b) The following sources of information shall be utilized to satisfy paragraph (a) of this section at a level of detail agreed to by the MPO, the State DOT, and the transit operator:

(1) Inventories of social, economic and environmental resources and conditions;

(2) Analyses of economic, social and environmental consequences;

(3) Evaluation(s) of transportation benefits, other benefits, costs, and consequences, at a geographic scale agreed to by the planning participants, of alternatives, including but not limited to the relevant design concepts and scope of the proposed action;

(4) Data and supporting analyses to facilitate funding related decisions by Federal agencies where appropriate or required, including but not limited to 49 CFR part 611.

(c) The products resulting from paragraphs (a) and (b) of this section shall be reviewed early in the NEPA process in accordance with § 1420.201 to determine their appropriate use.

(d) In order to streamline subsequent project development analyses and studies, and promote better decisionmaking, the FTA and FHWA strongly encourage all Federal, State, and local agencies with subsequent project level responsibilities for investments included in a transportation plan to do the following:

(1) Participate in planning analyses and studies to the extent possible;

(2) Provide early identification of key concerns for later consideration and analysis as needed; and

(3) Utilize the sources of information identified in paragraph (b) of this section.

(e) The analyses conducted under paragraph (b)(3) of this section may serve as the alternatives analysis required by 49 U.S.C. 5309(e) for new fixed guideway transit systems and extensions and the information required under 49 CFR part 611 shall be generated.

(f) Any decision by the Secretary concerning a transportation plan or transportation improvement program developed in accordance with this part shall not be considered to be a Federal action subject to review under NEPA (42 U.S.C. 4321 et seq.). At the discretion of the MPO, in cooperation with the State DOT and the transit operator, an environmental analysis may be conducted on a transportation plan.

(g) The FHWA and the FTA project level actions, including but not limited to issuance of a categorical exclusion, finding of no significant impact or final environmental impact statement under 23 CFR part 1420, approval of right of way acquisition, interstate interchange approvals, approvals of HOV conversions, funding of ITS projects, final design and construction, and transit vehicle acquisition, may not be completed unless the proposed project is included in a plan and the phase of the project for which Federal action is sought is included in the metropolitan TIP. None of these project-level actions can occur in nonattainment and maintenance areas unless the project conforms according to the requirements of the US EPA conformity regulation (40 CFR parts 51 and 93).

§ 1410.320 CONGESTION MANAGEMENT SYSTEM AND PLANNING PROCESSES

(a) In TMSs designated as nonattainment for ozone or carbon monoxide, Federal funds may not be programmed for any project that will result in a significant increase in carrying capacity for single occupant vehicles (a new general purpose highway on a new location or adding general purpose lanes, with the exception of safety improvements or the elimination of bottlenecks) unless the project results from a

congestion management system (CMS) meeting the requirements of 23 CFR part 500. Such projects shall incorporate all reasonably available strategies to manage the single occupant vehicle (SOV) facility effectively (or to facilitate its management in the future). Other travel demand reduction and operational management strategies, as appropriate for the corridor, but not appropriate for incorporation into the SOV facility itself, shall be committed to by the State and the MPO for implementation in a timely manner, but not later than the completion date for the SOV project.

Senator SMITH. Whether these people want to participate or not, they shall. This is really unbelievable to me that we are at this point.

I would just, in closing, say to Mr. Wykle, who is still here, you know, there is a billboard that I saw when I was traveling around the country a few years ago. I saw it in Iowa, actually. It said, "Don't make me go down there. God." I think, "Don't make us go there and block a rule that you shouldn't implement."

I think you've heard a lot of information here. I think you need to go back to the drawing board after you get the input by September 23 from the State folks and the Senate. You've already gotten that, so I hope that you will go back to the drawing board and not force us to go into blocking a rule rather than implementing what we wanted to do, which was to streamline.

Does anybody have any further comments?

Ms. MURRAY. Mr. Chairman, if I might, the States certainly appreciate the congressional intent of environmental streamlining. That was certainly a ray of hope that came to us as part of TEA-21. On behalf of certainly the New Hampshire DOT, and I think the other States, I'd like to express our appreciation.

Senator SMITH. That was our intention. We're going to do our best to make the intention of the Congress prevail here.

Thank you all for coming. I know many of you traveled long distances. Thank you for being here. We appreciate it.

Just a reminder that FHA and CEQ and others had asked for the opportunity to respond to the witnesses here. The record will be kept open until close of business Friday for appropriate response to that for the record.

The hearing is adjourned.

[Whereupon, at 11:53 a.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, thank you for holding this hearing today. I think it is important that we examine these proposed rules thoroughly and convince the Department of Transportation and other interested Federal agencies to substantially re-write these rules.

The current planning and environmental review process is extremely thorough. The question we face is how do we make it work better and faster, while not cutting out any necessary analysis.

During the consideration of TEA-21, Congress passed several provisions directing the executive branch to streamline the process of environmental review of transportation projects. Unfortunately, the proposed rules by DoT go in the opposite direction and would delay rather than speed up project delivery. It seems that this is yet another example of the executive branch defying the intent of Congress.

I see that the State of Wyoming has joined the testimony of Jim Currie, head of the Montana Department of Transportation. I look forward to hearing his testimony.

The bottom line is that TEA-21 provides with the opportunity to streamline and simplify the project delivery process while maintaining substantive environmental protections. We should take advantage of it. That will ensure that American taxpayers will get more for their fuel tax dollars.

Again, Mr. Chairman, thank you for holding this hearing.

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STATEMENT OF HON. CHRISTOPHER S. BOND, U.S. SENATOR FROM THE STATE OF MISSOURI

Mr. Chairman—I thank you for holding this hearing today. It is imperative that we not only work on crafting good legislation and work on its passage, it is imperative that we follow and monitor the actions of the implementing agencies to ensure that congressional intent, and the intent of the statute, is complied with.

I know that it must be a difficult job trying to revise regulations to reflect all the changes that have occurred in transportation laws, environmental laws, and unfortunately court-interpretations of laws. However, it is often not difficult to see and hear the opposition to what one might be doing. In the case of why we are here today, it would be impossible not to hear the concerns and opposition to the proposed planning and environmental rules issued by the DOT.

My State DOT contacted me right after the issuance of the proposed rules expressing their dismay and frustration. I have read the testimony that is on behalf of the American Association of State Highway and Transportation Officials and this statement sums it up. “. . . the bottom line is that the proposed rules will not fundamentally reform and streamline the planning and project development process as Congress intended; rather, the proposed rules could add years to the process, significantly increase costs, and could cause some projects to simply be abandoned.”

Quite honestly, I often wonder if that isn't the intent of this Administration. There are too many examples of where this Administration's actions would cause significant delays, increased costs, and other unnecessary hurdles related to transportation projects. These proposed rules and the conformity issue are two such areas that come to mind.

I guarantee you that delays, hurdles, and increased costs are not my intent and not the intent of TEA-21. I spent countless hours and a tremendous amount of energy working on TEA-21 with the goals being increased resources, streamlining, and flexibility provided to those “on the ground”.

Mr. Chairman—I believe that the DOT and the other Federal agencies involved must do a better job on these rules and in following the intent of TEA-21. They must not miss the opportunity to make the improvements and to utilize the experts in the States to make the necessary changes.

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STATEMENT OF GEORGE T. FRAMPTON, JR., CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY

Thank you for the invitation to testify before you today regarding the U.S. Department of Transportation's Proposed Regulations on Planning and Environment. I greatly appreciate the courtesy the Committee has shown in accommodating my schedule this morning.

This spring, the Department of Transportation published notices of proposed rule-making: for metropolitan and statewide transportation planning rules and for rules implementing the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and related procedures for transportation decisionmaking, protection of public parks, wildlife and waterfowl refuges, and historic sites. My testimony will focus specifically on the proposed NEPA regulations, how they relate to the environmental streamlining provisions of the Transportation Equity Act for the 21st Century (TEA-21), P.L. 105-178 (1998), and some concerns that I understand have been raised about the proposed regulations. Having said that, I note that at, as I understand it, the request of the American Association of State Highway and Transportation Officials (AASHTO), among others, the comment period was extended to September 23, 2000, so we do not yet have the benefit of full public input.

CEQ worked closely with staff of this Committee in crafting the environmental streamlining provisions of TEA-21, and the Administration supported the provisions. In spirit and in many places the language of the provisions mirror CEQ's interpretation of the procedural provisions of NEPA. As the CEQ regulations themselves state, “Federal agencies shall to the fullest extent possible . . . implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives.” 40 C.F.R. §15002(b). The environmental streamlining provisions capture the direction in the CEQ regulations for close interagency coordination among the various levels of affected government, the desirability of concurrent reviews, and the need for an efficient dispute resolution process.

Following passage of TEA-21, CEQ worked with FHWA and FTA in reviewing their draft regulations prior to publication for review and comment. From my perspective, the Department of Transportation and the other Federal agencies involved in the environmental streamlining effort—the Department of Agriculture, the Department of the Army, the Department of Commerce, the Department of Interior, the Environmental Protection Agency and the Advisory Council on Historic Preservation—have engaged with vigor and sincerity in attempting to translate the mandates of Section 1309 into workable regulations that will achieve the goals of TEA-21. Many of these efforts are not directly reflected in the proposed regulation because they involve the kind of administrative, programmatic or implementation activities that are not typically the subject of regulation but are key to successful management. For example, the Department of Transportation has engaged the U.S. Institute for Environmental Dispute Resolution to develop a specific model for an efficient dispute resolution process and to engage stakeholders in a series of executive summits on environmental streamlining. There are other actions underway, and I believe Administrator Wykle will speak to some of those.

Let me turn now to the proposed NEPA regulations themselves. Generally speaking, we believe they are going in the right direction. They can and will be improved. However, we concluded this spring that the time was ripe to publish them for comment so that further changes would be informed by the reactions of the interested public, State, tribal and local agencies, and we encouraged the Department to do so.

I understand that one of the concerns that has been raised is the fear that some provisions of the proposed regulations would turn NEPA from a procedural statute into a substantive law. CEQ believes this fear is misguided. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the U.S. Supreme Court stated that:

NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute. *Id.* At 558.

Literally hundreds, if not thousands, of NEPA decisions cite this statement in the context of decision in a case challenging an agency's compliance with NEPA. It is by now black letter law that Federal courts only enforce the procedural provisions of NEPA.

The issue, of course, is whether these proposed regulations will change that black letter case law. I believe they would not do so. I also believe that they are consistent with both NEPA and the CEQ implementing regulations.

The NEPA process was not intended to be a paperwork production process as a goal unto itself. The congressionally-mandated purposes of this statute—often referred to as America's environmental magna carte—are to declare a national policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 USC § 4321. The law goes on to eloquently articulate national policy intended to achieve a balance between human beings and nature and fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. 42 USC § 4331. The NEPA process was intended to be a mechanism to ensure that Federal agencies would incorporate those goals into their policies and regulations and everyday decisionmaking. The CEQ NEPA regulations sum up the relationship between the substance and process of NEPA by stating that:

Ultimately, of course, it is not better documents, but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. 40 CFR §1500.1.

CEQ's regulations explicitly state that the purpose of the NEPA process is to achieve the substantive requirements of section 101. CEQ's authority to interpret NEPA in general and in the context of the regulations binding on all Federal agencies has been upheld several times by the U.S. Supreme Court. *Andrus v. Sierra Club*, 442 U.S. 347 (1979), *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), and

numerous lower court cases have reflected these holdings. No court has interpreted these provisions of CEQ's regulations as subjecting Federal agencies to judicial scrutiny for failure to achieve NEPA's substantive goals.

On the other hand, the fact that NEPA's goals are not reviewed by Federal courts does not make them meaningless. When Congress wrote NEPA, it clearly intended for agencies to strive toward fulfillment of those goals. Indeed, to go through the NEPA process without the underlying policy rationale would be a hollow reflection of this august body's deliberations. Nor would it seem to be a wise use of the taxpayer's funds. Merely going through the process for the sake of process or a defensible administrative record leads to the very kind of conflict, delay and litigation decried by this Committee. However, taken seriously in the course of decisionmaking, the policy goals of NEPA can help to avoid those kinds of conflicts.

Section 1420.107 of the proposed regulations addresses the "Goals of the NEPA process." It states that the DOT agencies will manage the NEPA process to maximize attainment of seven goals: environmental streamlining, environmental ethic, environmental justice, integrated decisionmaking, collaboration, transportation problem solving, and financial stewardship. This is precisely the kind of broad policy articulation that takes NEPA's even broader policy mandates and translates them into goals specific to the mandate of the DOT agencies. The language of the regulation is crafted to avoid the articulation of any regulatory standard, and is very much the type of language the courts have already indicated is unenforceable in the statute itself.

Section 1420.109, "The NEPA umbrella," is an environmental streamlining provision. It provides the agency and the public with the mandate to use the NEPA process as an organizational mechanism for compliance with Federal responsibilities applicable to the decision for a proposed action. The CEQ regulations require agencies, to the fullest extent possible, to prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by other environmental review laws and executive orders. Failure to do so is certainly one of the principal causes for administrative delays, and will certainly doom environmental streamlining efforts. The draft DOT regulation does not alter in any way the agencies' responsibilities regarding compliance with these laws; it does implement CEQ's mandate for concurrent review.

I also understand that there is concern regarding a statement in the proposed regulation that defines "practicable" as meaning a "common sense balancing of environmental values with safety, transportation needs, costs, and other relevant factors in decisionmaking." The proposed regulation specifically states that no additional findings or paperwork are required to demonstrate this balancing. I find it impossible to discern any judicially enforceable law to apply this language. Indeed, it reflects Congress' mandate to the Federal agencies, "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 USC § 4331(a).

I know that Committee members have expressed frustration that DOT has not done more in the way of streamlining. However, I must note that DOT has incorporated into the proposed regulations some provisions that are unprecedented in that regard. For example, Section 1420.209 provides that an applicant may propose alternative procedures to the DOT agency for compliance with NEPA and related responsibilities. No other Federal agency has ever proposed this invitation to regulatory creativity before in the context of NEPA procedures. DOT also has spent considerable time crafting and updating their categorical exclusions.

I would be remiss if I did not take note of the growing number of success stories that are emerging as the Federal agencies begin implementing environmental streamlining measures. The "Best Practices in Environmental Partnering" cases spotlighted by AASHTO last year showcased excellent examples of transportation decisionmaking from State transportation agencies in Florida, Kentucky, Nevada, New York, Pennsylvania, South Carolina, Washington, and Wisconsin. As AASHTO President Tom Warne stated in the context of that national competition, these examples "demonstrate that collaboration, not polarization, breaks down barriers so that projects can be expedited while protecting the environment." I encourage AASHTO to continue this program and I urge the Committee to look at those case studies in detail. I believe you will find that they reflect an achievement of NEPA's goals and the objectives of DOT's proposed regulations.

I have no doubt that the DOT regulations can and will be improved with the benefit of the public's comments. CEQ will work with DOT as they move toward pro-

mulgation of final NEPA regulations. We will pay close attention to this Committee's concerns and views as we do so.

RESPONSES BY GEORGE FRAMPTON TO ADDITIONAL QUESTIONS FROM SENATOR  
BOB SMITH

*Question 1.* In the proposed NEPA regulations the term "environmental enhancement" is introduced as something to be incorporated in transportation projects. Although the preamble uses the examples of transportation enhancement activities—projects such as bikepaths, historic preservation and landscaping—the regulations define an environmental enhancement as "a measure which contributes to blending the proposed project harmoniously with its surrounding human communities and the natural environment, and extends beyond those measures necessary to mitigate the specific adverse impacts." Environmental enhancements are made eligible for Federal funds to the fullest extent authorized by law.

What basis is there in law is there to introduce environmental enhancements, beyond what is necessary for mitigation, as a required element of transportation projects?

Response. CEQ had not interpreted the regulation to mandate the addition of "environmental enhancements" in all projects. Our understanding of the intent of the regulation is that environmental enhancement measures could be included in proposals to the extent considered appropriate by the applicants and FHWA or FTA.

There are provisions in the various transportation authorities that refer specifically to enhancement activities (for example, 23 U.S.C. § 133(b)(8), 23 U.S.C. § 149, 49 U.S.C. § 5324). "Transportation enhancement activities" are defined quite specifically in some of these provisions; for example, in the Federal Intermodal Surface Transportation Act (ISTEA), 23 U.S.C. § 101(35), states that the term "transportation enhancement activities" means, with respect to any project or the area to be served by the project, any of the following activities if such activity relates to surface transportation: provision of facilities for pedestrians and bicycles, provision of safety and educational activities for pedestrians and bicyclists, acquisition of scenic easements and scenic or historic sites, scenic or historic highway programs (including the provision of tourist and welcome center facilities), landscaping and other scenic beautification, historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals), preservation of abandoned railway corridors (including the conservation and use thereof for pedestrian or bicycle trails), control and removal of outdoor advertising, archaeological planning and research, environmental mitigation to address water pollution due to highway runoff or reduce vehicle-caused wildlife mortality while maintaining habitat connectivity, and establishment of transportation museums."

As the question notes, the examples pointed in the preamble were in the context of transportation enhancement activities, and we understood the intent of the regulation to be reflected by that language. We do believe that the intent can be more specifically spelled out in the regulation, and we will urge the agencies to do so in their final rulemaking.

*Question 2.* Early involvement of the environmental community in project development is a goal of the proposed regulations. If issues are raised and resolved early, better decisions can be made in a collaborative way. This idea is reflected in the Memorandum of Understanding between the Federal transportation and environmental resource agencies signed last year. Has the MOU succeeded in bringing environmental agency staff together with transportation agency staff earlier in the process? What steps are you taking to see that the regional staff if the Federal environmental agencies follow through on the commitments in the MOU?

Response. The DOT agencies have told CEQ that they are generally very pleased with the seriousness of purpose and commitment by the environmental resources to the principles set forth in the Memorandum of Understanding signed last year. That said, there are, of course, issues that inevitably arise and need to be resolved. One such issue involving the appropriate interpretation of cumulative effects and connected actions under the National Environmental Policy Act surfaced earlier this year between regional staff of the Federal Highway Administration and the Environmental Protection Agency. CEQ convened a series of meetings to address the issues, including both regional and headquarters staff. The immediate issues were resolved and we continue to meet to ensure that steps are put into place to avoid future problems of this nature. We also look forward to participating in a workshop on National Environmental Streamlining for Federal Agencies in St. Louis next month. The workshop will include participation from the Advisory Council on Historic Preservation, the Environmental Protection Agency, the National Marine Fish-

eries Service, the Forest Service, the Fish and Wildlife Service and the Army Corps of Engineers, as well as the DOT agencies. The workshop will focus on identifying and implementing improvements under the MOU.

*Question 3.* Although the proposed regulations were supposed to have been issued in the spring of 1999, they were delayed until this May by ongoing consultations between the FHWA, FTA, the Environmental Protection Agency, the Council on Environmental Quality, US DOT and other administration agencies.

Can you explain why such extensive consultations have not resulted in more concrete proposals to streamline excessive and overlapping laws and regulations?

Response. Our interpretation of the environmental streamlining mandate, shared by the DOT agencies and other Federal agencies involved in this process, was that Section 1309 called for regulations that put into place an efficient, effective mechanism for implementing the broad spectrum of laws and regulations applicable to these projects. We realize that many Members believe the regulations miss the mark, and CEQ will work with FHWA, FTA and the other agencies to improve the regulations prior to publication in final form.

*Question 4.* From your perspective, why have the NEPA regulations failed to implement the congressional intent for Federal agencies to develop and establish time periods for environmental reviews?

Response. CEQ did not interpret the Congressional intention to be that the DOT agencies establish across-the-board timelines, nor do we think that would be advisable. In fact, the vast majority of DOT projects proceed through the NEPA process very quickly. At our request, the FHWA and FTA recently tasked the Volpe National Transportation Systems Center to perform a nationwide review of recent past use (1998 and 1999) of projects that were categorically excluded from NEPA documentation requirements. That review shows that from 85–90 percent of Federal Highway Administration projects were categorically excluded from NEPA documentation during 1998 and 1999, and that those categorical exclusions were processed, on the average, in under 3 weeks. For the Federal Transit Administration, approximately 80–95 percent of projects during the same period fell under categorical exclusions, with processing running between one and three months. While the report contains some modest and worthy suggestions for improvements and suggestions for the final NEPA regulations, FHWA and FTA staff did not suggest anything that they indicated would substantially reduce these time periods.

Obviously, the concern that led to passage of Section 1309 was not these projects, but the remaining five to fifteen percent of highway projects that take substantially longer. Our interpretation of the mandate to establish time periods was that for these more complicated, controversial projects, the DOT agencies, along with the other Federal permitting and environmental resource agencies and their partners, would develop a project specific time schedule. CEQ's regulations already require an agency to set time limits if an applicant for a proposed action requests them, but in our experience, very few applicants make such requests. Our view is that the specific mandate in Section 1309 shifts the burden to set timelines to the Federal agencies rather than waiting for an applicant to ask the agency to do so, but that the schedule would be set in the context of a particular proposal.

*Question 5.* How will a dispute resolution process as called for in Section 1309 of TEA-21 be incorporated into these existing regulations?

Response. The U.S. Institute for Environmental Conflict Resolution, a Congressionally established agency that has expertise in conflict resolution processes, is developing such a process now for FHWA and FTA. CEQ understands that they will have a proposed to circulate in November. Apparently some stakeholders recommending developing this process outside of the regulatory procedures to provide for more flexibility. CEQ believes an assessment should be made of whether this process should be added to the rulemaking process once the Institute's initial proposal is available.

RESPONSES BY GEORGE FRAMPTON TO ADDITIONAL QUESTIONS FROM  
SENATOR VOINOVICH

*Question 1.* Would you please comment on how you believe the Administration's proposed regulations will shorten, rather than lengthen the process of highway consultation? Do you believe your proposed regulations reflect Congressional intent to Sections 1308 and 1309 of TEA-21?

Response. CEQ believes the proposed regulations were intended to reflect what was understood to be the Congressional intent of Sections 1308 and 1309 of TEA-21. Given the reaction to the proposed regulations from Members of the Committee, we also understand that additional work is needed. Features of the proposed regula-

tions that CEQ believes would streamline the environmental review requirements include the proposed requirements to involve other Federal agencies early in the process regarding issues, methodologies, information requirements, timeframes and constraints, to establish a process schedule for the project at the beginning of the process, early identification and resolution of interagency disputes, the optional inclusion of State agencies in the above actions, explicit direction not to include analysis in NEPA documents to issues that are not implicated in the proposed action and need not make explicit findings on such issues, quality assurance steps, and the ability of an applicant to propose alternative procedures for NEPA compliance should a State transportation agency have a proposal that it believes will expedite the process more than the process outlined in the proposed regulations.

*Question 2.* What is your timetable for implementation of the proposed regulations at this point?

Response. The timetable for implementation depends on when DOT publishes final regulations. Given the very recent closure of the comment period and the need to review the extensive comments, DOT has not announced its schedule for publishing a final regulation. In general, implementation would occur thirty days following publication of a final regulation.

*Question 3.* What are your feelings about the role of elected officials versus unelected officials in the planning process for highway construction? Do you believe that there is a difference?

Response. There is a difference between State and local officials and others in that they represent another level of government within the Federal system. Under NEPA, State highway departments, for example, are authorized to prepare NEPA analysis, and both State and local agencies may be designated as either joint or cooperating agencies. I have strongly encouraged Federal agencies to proactively solicit the participation of State and local agencies as partners in the NEPA process. Non-governmental entities and citizens certainly participate in the public involvement aspects of these processes, but not in the same manner as governmental entities.

Within the context of State and local agencies, there appears to be wide variance between which officials are elected and which are appointed. Ultimately, of course, all government employees work for someone who is elected by the people. To the extent the law makes a specific distinction between elected and non-elected officials, the implementing regulations should, of course, reflect that direction.

*Question 4.* What do you think are the most significant impediments which make it difficult to move forward with a road project? Do you believe that the proposed regulations address these impediments?

Response. CEQ defers to the Federal Highway Administration's expertise and experience in addressing this question. We understand from them that lack of agreement on the need for a project and community support for it, right of way acquisition issues, lack of funding and environmental issues identified late in the process are among the contributing factors for delay. CEQ does believe that the proposed regulations addressed the major causes delay in the context of the environmental review process, although we believe the specific wording of the regulations can be improved in final regulations.

*Question 5.* How do you measure performance in terms of the average project? What length of time do you believe should be a target of goal?

Response. The FHWA is currently developing baseline data so that performance in terms of timelines can be responsibly measured. We do have information from the FHWA, developed by the Volpe National Transportation Systems Center, that shows that the vast majority (85–90 percent) of projects during 1998 and 1999 were handled under categorical exclusions in under three weeks. Obviously, the concern is not focused on these projects, but rather the few projects that are large, controversial and complex. FHWA is working to refine data about these types of projects.

I am reluctant to suggest an overall timeframe for completion of transportation projects, because many of the factors that influence such projects are outside of CEQ's area of expertise. Certainly, some projects are substantially delayed by factors having nothing to do with the environment. In other cases, environmental issues are a major concern. The NEPA process serves to identify all of those concerns. To the extent that the DOT agencies can resolve significant environmental issues in a manner that unites interested and affected parties in support of the project, I would consider that time well spent. To the extent that achieving such unity is not possible, the agencies must proceed in a manner that ensures they have

the best information possible on which to base their decision and a defensible record on which to base that decision.

*Question 6.* What provisions do the proposed regulations include to ensure that environmental review, permits, licenses, and approvals are conducted concurrently, rather than sequentially?

Response. The DOT agencies have submitted a specific list of the citations in the context of the proposed regulations that were intended to ensure concurrent rather than sequential review. I would like to add to that the CEQ regulation at 40 CFR § 1502.25 that requires that to the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by environmental review laws and executive orders. The regulation also requires agencies to identify in a draft EIS all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal.

*Question 7.* What mechanisms will be used to deal with disputes between Federal agencies so that such disputes can be resolved in a timely manner?

Response. The DOT agencies have engaged the U.S. Institute for Environmental Conflict Resolution to help develop this mechanism. The Institute was established by Congress in 1999 and employs dispute resolution experts to work on these types of issues. The Institute has been working with a number of transportation stakeholders in developing a proposed mechanism, and we understand they will be distributing a draft to stakeholders for review next month.

*Question 7.* Did you look at pilot projects when developing these proposed regulations? Do you think there would be any benefit to pilots in areas of major disagreement to streamlining, for example, a wetland pilot project, a National Historic Preservation pilot, etc.?

Response. CEQ has discussed this issue with FHWA. FHWA is proceeding with pilot projects in several parts of the country, and CEQ has had an opportunity to review some of these projects in the context of the "Best Practices in Environmental Partnering" cases highlighted by the American Association of State Highway and Transportation Officials. The rationale for not including pilot projects as a discrete section of the proposed regulations was simply the DOT agencies interpretation that environmental streamlining practices were supposed to apply to all DOT projects, not just a select few. CEQ concurred with this rationale.

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RESPONSE BY GEORGE FRAMPTON TO ADDITIONAL QUESTION FROM SENATOR CHAFEE

*Question 1.* If reducing time is the most important factor to environmental streamlining, then do you believe that the environmental community must be brought into the planning process early in order to be effective?

Response. Yes. Public interest organizations, whether neighborhood associations, or those focused on the environment or historic preservation, clearly have a high degree of interest and often valuable perspectives that can contribute to the transportation planning process. Developing a common understanding and acceptance of the purpose and need of a proposal at the beginning of the process can go a long way in setting the stage for constructive dialogue about alternative means of achieving the transportation need to be addressed by the proposal. Virtually all of the "best practices" studies in the transportation field and elsewhere show that this kind of early involvement is a good indicator of likely completion of a project in an efficient and effective way that avoids post-decisional conflict.

DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AFFAIRS,  
Washington, DC, October 20, 2000.

Hon. ROBERT C. SMITH, *Chairman,*  
*Committee on Environment and Public Works,*  
*Washington, DC.*

DEAR MR. CHAIRMAN: This letter responds to your letter of September 21, 2000, to Lois Schiffer, Assistant Attorney General for Environment and Natural Resources. You posed questions relating to the hearing of September 12, 2000, before the Committee concerning the Department of Transportation's proposed NEPA streamlining regulations. We have enclosed responses to your inquiry.

If you have any questions regarding the submission of this package, please do not hesitate to contact this office. The Office of Management and Budget has advised

us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

ROBERT RABEN,  
*Assistant Attorney General.*

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RESPONSES BY ROBERT RABEN TO ADDITIONAL QUESTIONS FROM SENATOR  
BOB SMITH

*Question 1.* The proposed regulations require transportation projects to avoid impacts to low income and minority populations. If Title VI is the statutory basis for these environmental justice regulations, do these regulations attempt to create a new protected class?

Response. The statutory basis for the regulations is 23 U.S.C. §109(h). Section 109(h) authorizes the Secretary to promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed transportation project are fully considered, and that the final decisions on the project are made in the best overall public interest.

The environmental analyses of transportation projects have been required to address the impacts on affected communities, including low income areas for years prior to the environmental justice Executive Order. For example, Section 3 of FHWA Technical Advisory T6640.8A (October 30, 1987), which provides guidance in the preparation of environmental documents, indicates that the documents should discuss "changes in the neighborhood or community cohesion for various social groups" specially benefited or harmed by the proposed project. Section 4 states that discussions regarding relocation impacts normally should include an "estimate of the number of households to be displaced, including the family characteristics (*e.g.*, minority, . . . income levels . . .)," unless the low number of displacees would raise a privacy issue. These documents also are directed to include a "discussion of the measures to be taken where the existing housing inventory . . . is not within the financial capability of the displacees."

The focus on environmental justice in the proposed regulations is simply an emphasis on an existing obligation. It is also consistent with Executive Order 12898 and the Council on Environmental Quality's 1997 Environmental Justice Guidance under the National Environmental Policy Act.

*Question 2.* The Environmental Justice executive order and these regulations (Section 1420.11) specifically do not create any judicial review of any agency action. Are the States likewise protected from potential legal actions, which would be yet another source of project delay?

Response. The Executive Order applies only to Federal agencies and it does not create a cause of action, so no lawsuit could be brought against a State for alleged violations of the Executive Order. The proposed NEPA regulation also applies only to the FHWA and the FTA, so no cause of action would be created against the State. Furthermore, most challenges to highway projects, including all NEPA challenges, are brought under the Administrative Procedure Act which applies only to actions by Federal—not State—agencies. Of course, a State may have its own laws that impose NEPA-like and other obligations on that State and such obligations can be the subject of actions against the State under State law.

*Question 3a.* With the increased threat of litigation under these proposed regulations, there is interest in the transportation community for a statute of limitations on challenges to transportation projects. Environmental plaintiffs typically wait as long as possible to bring legal challenges in order to delay transportation projects.

Is there a statute of limitations for lawsuits that can be brought under NEPA as a challenge to a transportation projects?

Response. At the outset we do not agree that there is an increased threat of litigation under the proposed regulations. The draft rules' emphasis on early planning and early inclusion of all interested and affected agencies and officials should help to reduce, not increase, litigation.

There is no specific statute of limitations applicable to lawsuits brought under NEPA as a challenge to transportation projects. The 6-year statute of limitations under 28 U.S.C. 2401(a), which is applicable to all challenges of agency action under the Administrative Procedure Act, would apply to challenges to transportation projects under NEPA.

*Question 3b.* What would you consider to be a timely filing for a lawsuit on challenges to a transportation project?

Response. A “timely filing” is one that is commenced within the applicable statute of limitations and if the plaintiff is seeking equitable relief and does not seek it promptly the government may have a defense of laches. Laches is an affirmative defense against an equitable relief claim based on findings that plaintiff delayed inexcusably and unreasonably, and that the delay was prejudicial to the defendant. The analysis is in large part fact-based and addressed to the discretion of the trial court.

*Question 3c.* What is the typical statute of limitations for lawsuits under other environmental laws, such as the Clean Water Act or the Clean Air Act?

Response. Citizen suits against the Federal Government under the Clean Water Act (33 U.S.C. 1365), the Resource Conservation and Recovery Act (42 U.S.C. 6972), and the Clean Air Act (42 U.S.C. 7604) are governed by the same 6-year statute of limitations as NEPA—28 U.S.C. § 2401(a). As in response to (b), a laches defense may also be available.

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AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS,  
Washington, DC, October 6, 2000.

Hon. BOB SMITH, *Chairman,*  
*Committee on Environment and Public Works,*  
*Washington, DC.*

DEAR CHAIRMAN SMITH: On behalf of the American Association of State Highway and Transportation Officials, I wish to express our sincere appreciation for your leadership in conducting a hearing to consider the Department of Transportation’s proposed regulations regarding statewide and metropolitan transportation planning and NEPA. As I indicated at the hearing, we are concerned that the proposed regulations add layers of requirements and complexity beyond the current rules, and should be revised and reissued for public comment.

AASHTO’s member transportation departments are committed to upholding their responsibilities for preserving and protecting the environment. We believe that we can streamline and simplify the project development process without sacrificing our commitment to environmental stewardship. We look forward to working with the Administration, Congress, our partners and stakeholders to move forward with developing and implementing commonsense regulations.

Enclosed is our answer to the question submitted by Senator Lincoln Chafee for the hearing record. If you, your staff or Senator Chafee need additional information or wish to discuss this further, please contact John Horsley, AASHTO’s Executive Director or Janet Oakley, Director of Policy and Government Relations at 202-624-5800.

Sincerely yours,

THOMAS R. WARNE,  
*Director, Utah Department of Transportation,*  
*President, AASHTO.*

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RESPONSE BY THOMAS R. WARNE TO ADDITIONAL QUESTION FROM SENATOR CHAFEE

*Question 1.* If timely permitting is your critical issue for environmental streamlining success, then how do you ensure that the environmental mandates required by Congress, which often require time to analyze and understand the impacts, are not compromised?

Response. AASHTO believes that environmental streamlining can be accomplished in a manner that will not compromise Congressional environmental mandates. We believe that the best way to ensure both thorough and complete analysis and understanding of impacts and avoidance, minimization and mitigation opportunities is for the studies necessary for permitting to be done as part of and simultaneously with the National Environmental Policy Act (NEPA) studies for transportation projects. If the appropriate Federal and State environmental resource agency staff participate as part of the NEPA process, then their issues and concerns can be raised early in the process, when there is time to ensure that the issues can be studied and understood in detail. Too often what happens today is that these issues are not raised until after decisions have been made and there is less flexibility or time to deal with the issues.

The key to environmental streamlining is that all environmental resource agencies are involved early, raise issues and concerns early, and that these issues and concerns are dealt with and resolved when there is time to ensure they can be dealt with effectively. Too often today, because there are not requirements for early participation and early identification and resolution of issues, environmental resource

agencies wait until the subsequent permitting processes to raise issues or concerns, and the effect is to delay the process and increase the likelihood of conflict. The effect can be that there is less environmental protection in the end than there would have been with earlier participation.

In those States where environmental streamlining agreements have been implemented and resource agencies have agreed to early participation and early identification and resolution of issues, the environmental mandates required by Congress have been more thoroughly analyzed and more thoroughly understood before transportation decisions have been made. Environmental resource agencies have also been more involved in the actual transportation decision making process. The net effect in these cases has been that environmental streamlining has worked to increase environmental protection, rather than compromising it.

In the enclosed publication AASHTO has documented examples of successful environmental streamlining practices. These case studies are from States that were identified in a national competition organized and sponsored by AASHTO to recognize excellence in environmental streamlining practices. These case studies demonstrate that environmental streamlining can be successful without compromising Congressional mandates.

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STATEMENT OF KENNETH R. WYKLE, ADMINISTRATOR, FEDERAL HIGHWAY  
ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

Mr. Chairman and Members of the Committee, I am pleased to appear before you today to discuss the Department of Transportation's (DOT) implementation of the Transportation Equity Act for the 21st Century (TEA-21), focusing on proposed revisions to planning and National Environmental Policy Act of 1969 (NEPA) rules.

PLANNING, NEPA, ITS NPRM'S

On May 25, 2000, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) issued three interrelated notices of proposed rulemaking (NPRM's). The proposed regulatory revisions reflect statutory changes made by TEA-21 in the areas of: (1) metropolitan and statewide planning, (2) consistency with the National Intelligent Transportation System (ITS) Architecture and Standards, and (3) NEPA implementation, for projects funded or approved by FHWA and FTA. Through this coordinated approach to rulemaking, the Department of Transportation seeks to ensure that environmental concerns are addressed efficiently and effectively, that the planning and NEPA processes are better integrated, and that ITS is appropriately considered throughout the process.

The proposed revisions respond to new statutory requirements under TEA-21, while attempting to align our regulations with other laws, court decisions, and Presidential directives. In drafting these NPRM's, we sought to: (1) implement statutory provisions and reflect congressional intent; (2) provide flexibility to transit operators, States and Metropolitan Planning Organizations (MPO's), emphasizing outcomes and not procedures; and (3) reflect key Federal priorities: Environmental Justice, Environmental Streamlining, and Intelligent Transportation Systems. We have attempted to offer options for State and local decisionmakers that give them the flexibility to operate most efficiently. One of our principal aims with these proposed rules is to streamline transportation decisionmaking by strengthening the link between the planning and environmental processes, thus improving project delivery while maintaining environmental protections.

The proposed rules were developed by an interagency task force of planners and environmental specialists from FHWA and FTA, with input from the Office of the Secretary of Transportation, other DOT modal agencies, and other Federal agencies, including the Environmental Protection Agency (EPA). The task force relied on comments received through an open and inclusive outreach process. This outreach listening to a variety of stakeholders, partners to and customers of our regulations began shortly after the enactment of TEA-21 on June 9, 1998. The outreach effort included a series of regional forums, focus group sessions, and workshops, which resulted in the "Options Paper for Discussion on the Planning and Environmental Streamlining Provisions of TEA-21" released in February 1999. We then used the approximately 150 comments received on the options paper, along with additional suggestions made through consultation with our Federal partner agencies, to create our proposal. Several themes emerged from our outreach effort. They are: early involvement of a variety of parties in the transportation planning process done by States, maximum flexibility for States to create their own custom-tailored processes and procedures, and improved linkage between the planning and NEPA processes.

*Early Involvement.*—One primary objective of our proposals is to facilitate better and earlier involvement of all interested parties in planning and project development, including early consultation with other agencies that may have jurisdiction over a federally assisted transportation activity. This objective is reflected in many of our draft provisions, including proposals that a cooperatively developed process for consultation with local officials in rural areas be developed; that a cooperative, interagency approach to early estimation of revenues available to support project implementation priorities set forth in plans and programs be used; and that special efforts to reach out and engage all communities in planning processes be made. The proposals also support initiating decisionmaking for ITS investments during the planning process to enhance interagency cooperation in management and development of the transportation system, and ensure systems that work together without equipment conflicts. In project development, the NPRM's propose involvement of resource agencies early in the planning of a project that is likely to involve detailed environmental review.

*Flexibility.*—The draft rules seek to provide a framework for planning and NEPA review that allows flexibility. The intent of our revised regulations is to provide options that will assist States, local units of government, and transit operators in identifying efficiencies that they can build into their transportation planning and decisionmaking processes. State and local agencies can determine the means of accommodating TEA-21 statutory requirements that best work for them. The section of the NPRM addressing Alternate Procedures would specifically allow for innovation in meeting NEPA requirements; applicants can propose alternate procedures that more effectively integrate with State or local project development processes. New Hampshire, for example, in its I-93 Pilot Project, offers a model for a more streamlined NEPA review using "Partnering" concepts that have been effectively used in the construction industry to expedite decisionmaking. Our proposed regulations provide the flexibility for this and other such innovative approaches.

*Integration of Planning and Environmental Review Processes.*—By linking the NEPA and planning processes, our proposal would allow the results of planning stage analysis to be more effectively used to support project development. We aim to provide a policy and regulatory framework to allow decisions made in the planning process to be utilized in the NEPA process. Documentation of planning actions would eliminate redundancy and enable States, MPO's, and transit operators to advance environmentally sound projects more expeditiously.

The Planning and NEPA linkage is also intended to encourage consideration of environmental and economic impacts earlier and on a systems level, and to involve the environmental agencies and affected communities earlier in the planning process. For example, in Montana, Oregon, Idaho, Washington, and Wyoming, collaboration with the Fish and Wildlife Service to address endangered species on a systems level promises to give us a streamlined approach that can shorten the required coordination on individual projects. This approach offers options for increasing project development efficiency where States, MPO's, and transit agencies deem such systems-level action appropriate and desirable. As TEA-21 confirms, we would not require the NEPA process to be done in planning, and the degree of detail in the planning analyses is left to the planning participants' discretion.

It is clear that achieving some of these desired outcomes will be difficult. An example is our proposed elimination of the Major Investment Study (MIS) as a stand-alone requirement. We dropped all references to studies for major projects and instead focused simply on improving the relationship between the planning and environmental processes. In our view, being able to use planning products more effectively in the environmental process should reduce redundancy, duplication of effort, and costs in transportation decisionmaking. We know that the American Association of State Highway and Transportation Officials (AASHTO) has several concerns regarding perceived "broadening" in the range of projects affected, or subjecting the planning process to NEPA analyses. We will review these and other comments to ensure that, in our effort to reflect congressional intent, we have not created unintended consequences nor failed to give appropriate recognition to the many interests affected by transportation decisionmaking. We want to work with our stakeholders to resolve their issues.

#### STREAMLINING ACTIONS

In TEA-21, Congress directed the Department to streamline both the planning process and the environmental review process for transportation projects funded by FHWA and FTA. Our proposed regulatory changes, however, are only a part of our streamlining efforts. Guiding projects through the planning and review processes faster, without compromising environmental and civil rights safeguards, is a com-

plex undertaking for which there is no easy solution. DOT regulatory revisions alone will not provide a total solution for reducing delays that is not within our regulatory power because the majority of environmental laws and regulations are under the authority of other Federal agencies. Instead, we are working with our Federal partners, State DOT's, and other stakeholders on multiple approaches.

In addition to the proposed regulations, we are developing national and regional memoranda of understanding, programmatic agreements, dispute resolution procedures, reimbursement procedures for Federal staffing, and performance measures so that we can report back to you on streamlining progress over time.

Although Federal resource agencies have been working with us to implement streamlining, we have to recognize that TEA-21 brought a 40 percent increase in highway-transit funding, which generates a roughly comparable increase in the highway-transit project workload for environmental agencies. This has occurred during a time when there has been a significant increase in the complexity of environmental issues and the environmental expectations of the American public. We support use of the TEA-21 provision that allows States to reimburse Federal resource agencies to augment their staff to address this additional workload.

In July 1999, DOT and Federal environmental review and permitting agencies entered into a national Memorandum of Understanding (MOU). The MOU formalized the agencies' commitment to streamline the environmental review process to expedite Federal highway and transit projects, while fulfilling their responsibilities to protect the environment. An interagency group was then formed to develop an Environmental Streamlining Action Plan. This Action Plan provides a national framework for activities that require national leadership for successful implementation. It calls for issuance of an annual report to assess how deadlines are being met and will serve as a tracking tool. The plan is a living document that will be regularly updated to reflect State and local activities. FHWA and FTA are pleased that AASHTO, at our request, designated a streamlining working group to coordinate with the Federal interagency streamlining group. AASHTO also hosted the first of our Environmental Streamlining Executive Sessions with State and Federal agencies and with transportation and environmental stakeholder groups to facilitate an open dialog on streamlining best practices. We believe that working collaboratively we will be able to define appropriate national and local solutions for reducing project delays. For example, the Mid-Atlantic States have worked with our field offices and with a number of other Federal agencies at the field level to develop a guide for environmental streamlining in this part of the country. By all accounts, this has been a highly successful endeavor.

Additionally, we are working with State DOT's to improve the quality of their environmental analysis, mitigation measures, and planning in the area of environmental issues. We are working with Federal, State, local, and transit planning partners to create and enhance intermodal systems and to support projects that can improve the natural and human environments for low income and minority communities. We are encouraging the expanded use of Federal agencies' administrative authorities to achieve process efficiencies and concurrent reviews. This includes delegation of authority from Federal agencies, such as the Army Corps of Engineers and the Advisory Council on Historic Preservation, to State agencies to act on their behalf in carrying out Federal regulations, partnership agreements for conducting concurrent reviews, and project agreements for specific time commitments. In Vermont, for example, certain Federal historic preservation responsibilities have been delegated to the Vermont Agency of Transportation. We are especially focusing on coordination with EPA and other Federal environmental agencies to get their field staff involved early in planning and project development, to ensure that field staff carry out environmental streamlining commitments, and to elevate and resolve differences quickly.

The Federal agencies initiated regional streamlining summits in which more than half the States participated. Many of the State and Federal executives met face-to-face with their counterparts for the first time. These meetings have led to at least 15 States initiating pilot efforts and another 12 developing programmatic agreements for process streamlining.

In testimony before Congress earlier this year, the Department committed to improving the streamlining process. But, we still have a long way to go. Environmental streamlining merits the continued close attention of all of us if we are to fulfill the American people's interest in both improved transportation and an improved environment. We are definitely open to all your suggestions for accomplishing this.

## CURRENT STATUS OF RULEMAKING

Our proposals are now in the public review and comment stage. FHWA and FTA have conducted a series of public briefings on our proposals in seven locations with more than 700 participants; hosted a national teleconference on June 15 with approximately 4,000 video participants; and made several presentations at national and regional transportation conferences and meetings. The purpose of these outreach sessions was to clarify the content of the NPRM's and encourage public input. We are now continuing to solicit and accept comments to the docket from all interested parties. We are hopeful that the intense interest shown in commenting on the proposed regulations is indicative of the level of constructive recommendations that we will find in the comments.

In response to numerous requests received from State DOT's, transit operators, MPO's, and other interested groups and individuals, we have extended the comment period for the proposed planning, environmental, and ITS rules, from August 23, 2000, until September 23, 2000. We recognize the complexity of the proposed revisions and believe that more time for in-depth analysis is beneficial. However, we must continue moving forward on these issues, as TEA-21 requires. I can assure you that the Department will carefully evaluate all of the concerns and the proposed changes that are submitted.

## CONCLUSION

We look forward to continued cooperation to improve the planning and the environmental review processes, with this Committee, with the organizations and agencies represented here today, and with the other interested parties that have commented on our NPRM. We believe that this cooperative effort can lead to development of regulations that will successfully implement our shared streamlining goals. Let me reemphasize that we have issued proposals not final rules. You have my assurance that we are open to all sound alternatives and that the outcome of this rule-making process is in no way predetermined.

This concludes my testimony, Mr. Chairman. I would be happy to answer any questions you, or other members of the committee, may have.

## RESPONSES BY MR. WYKLE TO ADDITIONAL QUESTIONS FROM SENATOR VOINOVICH

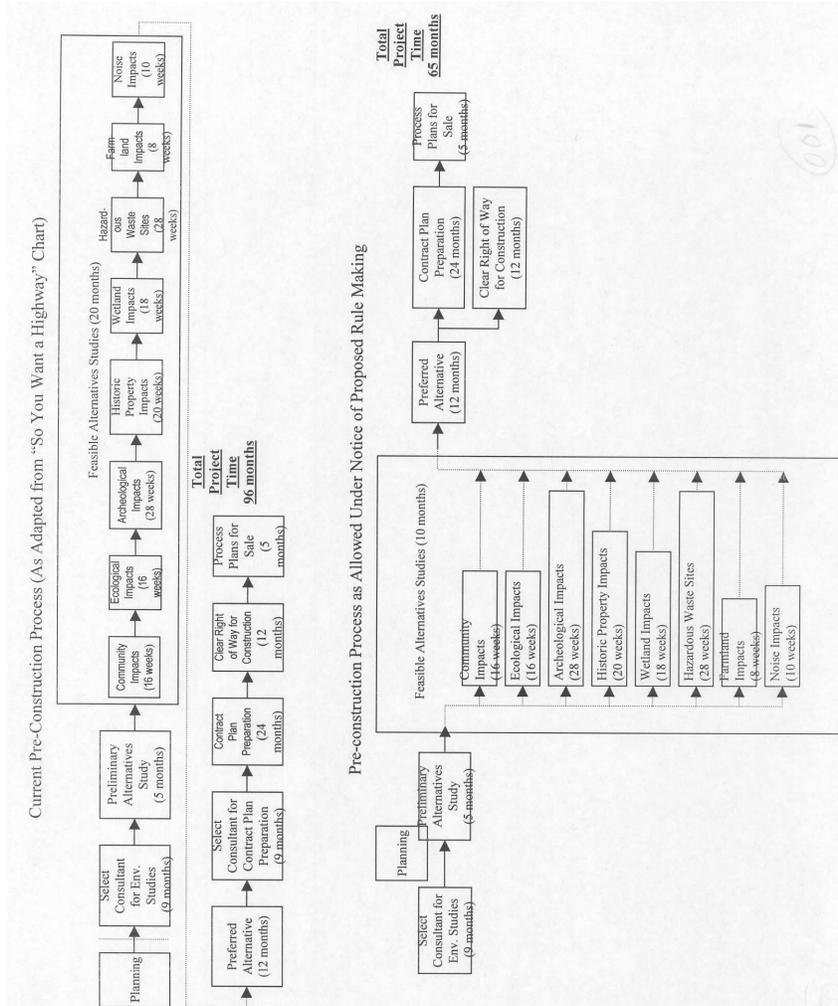
*Question 1.* Would you please comment on how you believe the Administration's proposed regulations will shorten, rather than lengthen the process of highway construction? Do you believe that your proposed regulations reflect Congressional intent in Sections 1308 and 1309 of TEA-21?

Response. The Department of Transportation's proposed regulations will shorten the environmental review process by: (1) establishing an environmental streamlining process that calls on the Department, in partnership with the applicant, to coordinate Federal environmental reviews and to use dispute resolution measures to reduce delays; (2) offering applicants the opportunity to use alternate procedures tailor-made to their business practices; (3) establishing by regulation the option of using programmatic approvals as a faster way of dealing with recurrent situations; (4) allowing States the time-saving option of using the same contractor for NEPA work and subsequent design work; (5) integrating the planning process with the NEPA process; (6) encouraging early involvement of resource agencies; (7) expanding the use of categorical exclusions; and (8) allowing the use of the highly expedited "automatic" categorical exclusion for some actions, such as routine resurfacing projects.

However, while the proposed regulations actively encourage the engagement of other Federal agencies in early coordination activities, the Department cannot, as a matter of law, issue regulations which require such engagement. Congress has enacted over 40 environmental laws that incidentally apply to transportation, and these laws are carried out by other Federal agencies. For example, the Army Corps of Engineers must approve a Clean Water Act Section 404 permit for projects involving the discharge of dredged and fill materials in waters of the United States. Similarly, the Fish and Wildlife Service or the National Marine Fisheries Service must make explicit legal findings under the Endangered Species Act for projects affecting threatened or endangered species or their habitat. Without these approvals and findings, such projects cannot move forward whether they are federally funded or not.

It was our goal to have our proposed regulations fully reflect Congressional intent, as manifested in Sections 1308 and 1309 of the Transportation Equity Act for the 21st Century (TEA-21). The following chart, an adaptation of an exhibit used by

Senator Voinovich at the hearing, illustrates how our proposed rules can shorten the pre-construction process.



**Question 2.** What is your timetable for implementation of the proposed regulations at this point?

**Response.** The comment period for the FHWA/FTA proposed rules on planning and the National Environmental Policy Act (NEPA) process closed on 9/23/00. As is standard practice, we will consider comments that come in after the deadline, to the extent feasible. We will be analyzing the comments in more detail in the coming weeks.

We know that you, other members of Congress, State Departments of Transportation (DOT's), the American Association of State Highway and Transportation Officials (AASHTO), and other interested parties have requested that we reconsider our proposed rules. We are weighing those requests, along with the comments to the docket, and we assure you that we appreciate the depth of concern expressed. The Department could proceed to issue a final rule these areas, or could decide that further procedures to obtain information and views would be beneficial. We will make every effort to reconcile the differences among the comments before deciding the next steps to take.

*Question 3.* What are your feelings about the role of elected officials versus unelected officials in the planning process for highway construction? Do you believe that there is a difference?

Response. TEA-21 provided increased emphasis on the participation/involvement of local officials in transportation planning and programming. It emphasized the importance of consultation in the transportation planning process, while not changing the basic decisionmaking "balance of power."

There is a difference in the roles of elected and unelected officials, in that elected officials are basically decisionmakers while unelected officials serve basically in an advisory or consulting role. However, unelected officials might be delegated decision-making authority at times. When this is the case, the unelected officials should be treated as elected officials, since they are acting on the behalf of the elected officials.

*Question 4.* What do you think are the most significant impediments which make it difficult to move forward with a road project? Do you believe that the proposed regulations address these impediments?

Response. Factors that can make it difficult to move forward with a road project include: lack of available funding; lack of consensus on the need for the project or the alternative to be selected, right-of-way acquisition, particularly if the parcels are held in trusts or under multiple ownerships; the comprehensive set of environmental regulations that impact highway projects, whether or not Federal funds are used; and changing priorities, which cause projects to be shelved and later reinstated, triggering a new NEPA process. The following table, "So You want a Highway," summarizes the current processes and the opportunities offered in our proposed rule for overcoming some impediments.

## So You Want a Highway ??

Phase	Duration	Approval Authority	NPRM Flexibility
<b>Contracting</b>	23 months	State/FHWA	NPRM allows use of same contractor for NEPA and design. Procurement time savings: 9-12 months (depending on state's procedures).
<b>Engineering</b>	36 months	State/FHWA	Title 23 allows certification acceptance process for engineering work. Savings driven by state defined process (existing flexibility).
<b>Public Involvement</b>	6 months	State/FHWA	NPRM allows applicable planning and NEPA public involvement requirements (of all affected agencies) to be met concurrently. Time savings potentially high. Will reduce redundant processes and increase quality of involvement since related issues can be coordinated.
<b>Environment</b>	27 months	FHWA, EPA, COE, NMFS, ACHP, FWS, NPS	NPRM promotes early, concurrent, and timely reviews by promoting use of maximum allowable authority under NEPA, Clean Water Act, Endangered Species Act, Historic Preservation laws and other statutory mandates to delegate authority to states or to expedited federal agency approvals. Links planning products to NEPA for highway and transit projects. Time savings potential high.
<b>Right of Way</b>	12 months	State/FHWA	NPRM allows states to proceed with acquisitions using state dollars before NEPA process is complete.

*Question 5.* How do you measure performance in terms of average project? What length of time do you believe should be a target or a goal?

Response. First, we have to establish good baseline data to measure performance before we can set a goal. Currently there is some anecdotal information but little quantitative data available for measuring performance of the "average project" on a national scale. FHWA is working to identify performance indicators that can be used to track baseline information and evaluate future actions. Our initial data is limited to information about pre-construction activities, primarily the NEPA process, because most of the activities that streamlining targets occur during the NEPA process. The results of a baseline study of historical trends, conducted over the past year by an outside consultant, will be available by the end of the year. FHWA also

intends to examine the quality and effectiveness of the environmental review process in setting performance targets or goals.

Response. To get some understanding of timeframes required for an “average project” to complete pre-construction activities, FHWA reviewed basic data on those projects requiring the most rigorous level of environmental review, *i.e.*, those requiring Environmental Impact Statements (EIS). Timeframes were tracked for all FHWA projects that had received a record of decision in 1998, beginning with the date the notice of intent (NOI) was announced. The NOI formally initiates the NEPA process. Of the 37 projects that fell into this category, most of the projects (51 percent) took 4–6 years to process the EIS. The 4–6 year timeframe is probably typical for highway construction projects requiring an EIS. A comparison of the same baseline assessment for projects that completed the NEPA process in 1999 revealed a similar range of results. Please bear in mind, however, that only about 2.4 percent of projects require an EIS. Projects that are categorically excluded, or found to have no significant impact following an environmental assessment, usually clear the environmental processes in about 2 years. (Charts following Question 2 from Senator Graham show the percentage of projects under each NEPA class of action and compare timeframes for completing the NEPA process.)

While it is too early to identify a target length of time for processing average projects, we do believe that there are opportunities to shorten the average time for all projects.

*Question 6.* What provisions do the proposed regulations include to ensure that the environmental review, permits, licenses and approvals are conducted concurrently rather than sequentially?

Response. Section 1420.109 of the draft NEPA regulation, “The NEPA Umbrella,” proposes using the NEPA process as a means of satisfying the various Federal environmental mandates in a single, coordinated process. Section 1420.203, “Environmental Streamlining,” indicates how DOT and the project sponsor will work together to assure that projects faithfully execute this coordinated environmental review. Based on comments received, we see the need to further underscore the concurrent nature of this process.

In addition, our proposed NEPA regulation allows planning products to be used in the NEPA process. The extent to which a State or project sponsor chooses to engage in rigorous planning, that includes some environmental analysis, will determine how much information will be needed in the NEPA process. We point out that a State can open the NEPA process while conducting the planning study, but a State is not required to do this. By doing so, however, all of the planning decisions and analysis become part of the NEPA record. This can narrow the range of alternatives explored in detail during NEPA, would reduce duplication, and would encourage concurrent reviews.

Provisions in our proposed regulations which create opportunities, to the extent our authority allows, for moving the participating agencies toward a concurrent review process include:

#### FLEXIBILITY IN PROPOSED NEPA REGULATIONS

- State is encouraged to conduct activities within framework of integrated and efficient decisionmaking (NEPA umbrella) (1420.109(b)).
- State may request all State agencies with environmental review/approval to coordinate in NEPA process (1420.203(b)).
- Coordinated environmental review process need not be applied to actions not requiring EIS (1420.203(c)).
- Nothing shall prohibit approvals which apply to future actions consistent with conditions established for programmatic approvals (1420.205(a)).
- Applicant may propose alternate procedures for complying with the intent of this part (1420.209).
- Other USDOT agencies may use specific actions/categories of actions under this part (1420.211).
- May select contractors for NEPA process (1420.301(c)(1)).
- May procure services of consultant under single contract for NEPA and engineering/design work (1420.301(c)(2)).

#### FLEXIBILITY IN PLANNING/NEPA LINKAGE

- Planning products shall be considered early in NEPA process (1420.201(a)); applicants shall, to the maximum extent useful and practicable, incorporate and utilize analyses, studies, documents, developed in the planning process (1420.201(b))—these provisions intend to maximize the usefulness of the planning products for the NEPA process and eliminate duplication.

- As to the coordination with agencies consulted in planning, appropriate frequency and timing of coordination will depend on interest of agencies consulted (1420.303(a)).
- Shall use products of public involvement from planning whenever it is reasonably available and relevant (1420.305(a)).

## EXISTING FLEXIBILITY

- Proposed actions be developed to fullest extent practicable (1420.113);
- Categorical Exclusions;
  - List of actions reflect changes in FHWA/FTA programs and incorporate new actions, such as ITS, transportation enhancement activities, mitigation banking, resurfacing (1420.311(c));
  - List of actions include additions such as some approaches to bridges and tunnels, parking facilities, ferry facilities, advance land acquisitions, storm water retention ponds, transportation enhancement activities (1420.311(d));
- Able to issue revised Record of Decision if wishes to approve alternative not selected as preferred yet fully evaluated in FEIS (1420.321 (b));
- Lists circumstances when supplemental EIS is not necessary (1420.325(b)).

*Question 7.* What mechanisms will be used to deal with disputes between Federal agencies so that such disputes will be resolved in a timely manner?

Response. We are in the process of developing a policy and procedures for expediting conflict resolution among Federal agencies, as directed in Section 1309(c) of TEA-21. We are using the Institute for Environmental Conflict Resolution to help us develop this policy. We have obtained ideas from other Federal agencies, State transportation and resource agencies, MPO's and other interested parties who helped us to pinpoint key elements that need to be addressed in the policy. A draft dispute resolution policy is expected to be ready for review by our stakeholders in November.

Besides the specific policy and procedures that fulfill the intent of Section 1309(c), we will be working with the Federal agencies and State agencies to compile guidance, strategies, and approaches, including benchmarking, to give interested parties insights on how to manage conflict and potentially controversial project issues early in the process.

*Question 8.* Did you look at pilot projects when developing these proposed regulations? Do you think that there would be any benefit to pilots in areas of major disagreement to streamlining, for example a wetland pilot project, a National Historic Preservation pilot, etc.?

Response. FHWA did look at pilot projects and other streamlining initiatives underway when developing the proposed regulations. We opted not to initiate a formalized pilot program because a number of stakeholders feared that this would slow down the broad scale implementation of environmental streamlining provisions of TEA-21. Instead, we are participating in pilot efforts on a case-by-case basis. We were active participants in the Mid-Atlantic Transportation and Environment Task Force (MATE) effort. We facilitated streamlining projects in Florida and North Carolina and provided technical assistance to the selection of the AASHTO pilot efforts. We are currently serving on a Transportation Research Board panel with AASHTO to oversee pilot implementation and evaluation efforts.

Each pilot uses a very different approach, each has different goals, and each uses some different criteria for measuring success. For example, the Mid-Atlantic States adapted their merged NEPA and 404 permitting processes to incorporate the entire project development process under a streamlined approach. In doing so, the affected agencies pledged to get involved early and have committed to reach a consensus on major NEPA decision points. They defined a time-limited review period for each of the major steps, which, if not honored, would trigger a dispute resolution process at the State level. They have cut out two steps from their normal process. They were able to do this because of an existing level of trust and positive relationships among the agencies. The MATE process represents a process improvement that can be useful for States who have or who are willing to work through a NEPA/404 merger process, but it will not work for all States.

Florida has chosen to integrate its environmental resources inventory as part of its long-range transportation planning process. They are doing this to pursue flexible mitigation packages that result in better environmental protection in priority locations. In return they will do less mitigation at specific project sites. This results in faster approval of a mitigation package and use of mitigation and avoidance investments on higher priority resources. Not everyone can, nor wants to, follow Florida's example. But, it works for them.

In North Carolina, State laws emphasize stream bed restoration. North Carolina has invested State DOT dollars in stream bed protection as a way to receive mitigation credit for projects. This is one aspect of their approach to streamlining. It works for them because the State determined that stream protection is a high priority. In other States, their streamlining priorities for environmental resource impact mitigation may incorporate watershed management approaches or flood plain restoration or wetlands banking. These examples are the reasons why FHWA has avoided one size fits all streamlining specifics. We believe good practices and pilot experiences show what works. By not constraining the environmental streamlining provisions with predetermined timeframes and tightly prescribed procedures, our proposed rules attempt to offer the kind of flexibility that adapts innovations as States propose them.

We believe that continuing to support pilots is beneficial. Because there are so many factors that may vary from State to State, or project to project, pilots on wetlands or pilots on historic preservation would have to be customized for a project or State effort to really have an impact. A number of generalized approaches, to the extent they can be useful, are being advanced outside the regulatory process through the interagency streamlining group or by various agencies.

RESPONSES BY MR. WYKLE TO ADDITIONAL QUESTIONS FROM SENATOR GRAHAM

*Question 1.* We discussed during your testimony your feeling that current law and current regulation do not give the Department of Transportation the authority to require other Federal agencies to come to the table early in the planning process. As I understand it, nor do you feel that current law or regulation gives the DOT the authority to require that Federal agencies either approve, disapprove, or “conditionally” approve a project, and then be bound by that commitment. Can you indicate who would be best in the Department of Transportation to submit suggestions to me and the Committee on what legislative language would be needed to accomplish these goals? Would you task that point-person to submit such language to me for review?

Response. Federal agencies are charged with administering Federal statutes in their areas of responsibility. The Department of Transportation (DOT) does not have the authority to require other Federal agencies to either approve, disapprove, or “conditionally” approve a project, and then be bound by that commitment.

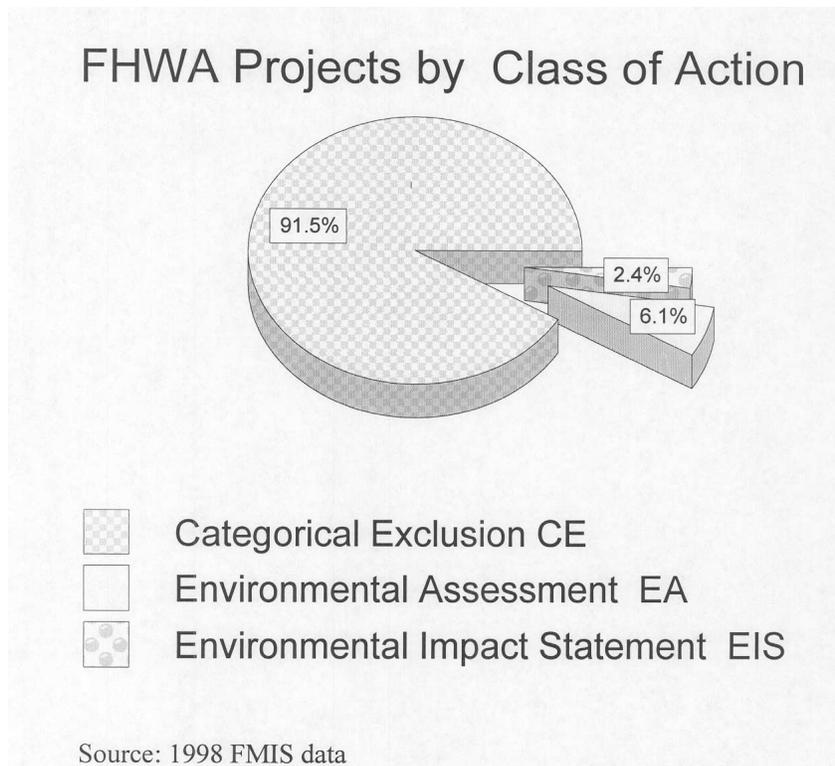
In response to your request for a contact person at DOT on this matter, I will ask Rosalind A. Knapp, Acting General Counsel, to ask our legislative counsel to call your office to discuss these issues further with your staff.

*Question 2.* You indicated during your testimony that, as I understand it, all but a small percentage of transportation projects are approved by the needed Federal agencies during a two year time-frame. Could you share with me the data that supports that conclusion? Do you have data to show the number of transportation projects that are withdrawn, or given up, because of the complexity of getting needed permits? Do you have data that would show how many transportation projects that seek appropriate Federal permits eventually shift to using all State funding because of difficulties or time delays in the Federal process?

Response. The percentage of projects that do not require a review process that goes beyond 2 years was derived from a review of FHWA’s 1998 Federal Management Information System database which tracks information provided by the States to our Federal-aid program office. We conducted an initial baseline assessment through our field offices to arrive at the data shown in the attached charts. (4 Charts attached.)

The data shows that 91.5 percent of federally funded projects are categorically excluded from detailed environmental analysis, 6.1 percent are found to have no significant impact after an environmental assessment is completed, and only 2.4 percent of all federally funded projects require a full environmental impact statement. Our data further shows that federally funded projects that are categorically excluded or found to have no significant impact following an environmental assessment, usually clear the environmental processes in about 2 years. Typical projects that require an environmental impact statement can be processed in about 4–6 years, although there are examples of projects which have taken much longer and others that have taken less time. Future research will attempt to identify the reasons for delay.

We currently do not have data that tracks how many projects are withdrawn or given up or shift to State funding because of difficulties and delays in the permitting process.



#### RESPONSES BY MR. WYKLE TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

*Question 1.* If reducing time is the most important factor to environmental streamlining, then do you believe that the environmental community must be brought into the planning process early in order to be effective?

Response. We believe the environmental community must be involved early in the process to be effective in reducing environmental review time. The Federal resource and permitting agencies, many State Departments of Transportation (DOT's), and Metropolitan Planning Organizations (MPO's) also believe this. Our interagency National Memorandum of Understanding (MOU) on streamlining, executed July 1, 1999, and our action plan reflect these goals and commitments.

*Question 2.* In your view, what assurances can be provided to the environmental community that a State Department of Transportation does not change the subject of a project in the design stage that was reviewed under the early planning scenario?

Response. The State cannot refine the subject of a project in the design stage that was reviewed under the early planning scenario without triggering a NEPA re-evaluation. Consultation early and throughout the process, and documentation of the consultation and decisions made during the process, should minimize the likelihood of such design changes occurring late in the process.

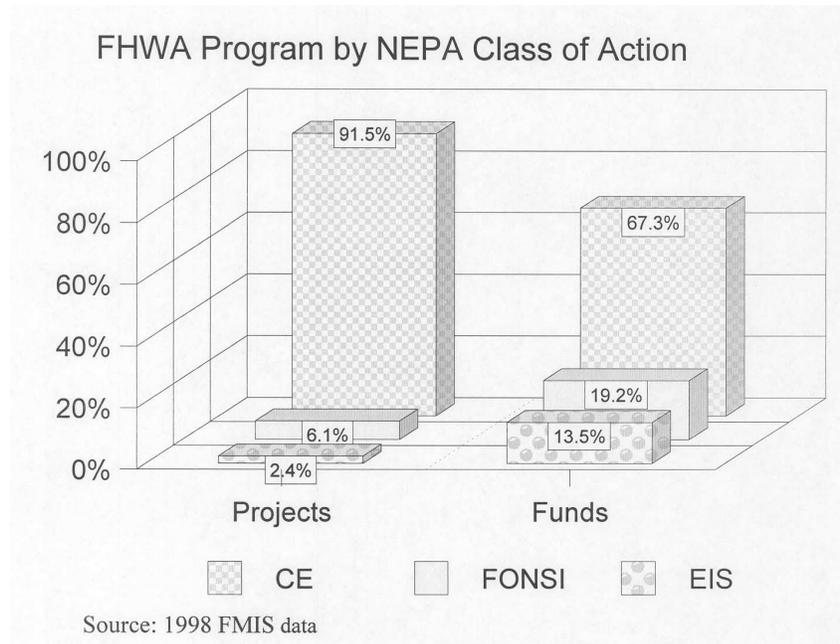
*Question 3.* How can a conflict resolution process be developed that meets the needs of all of the policies?

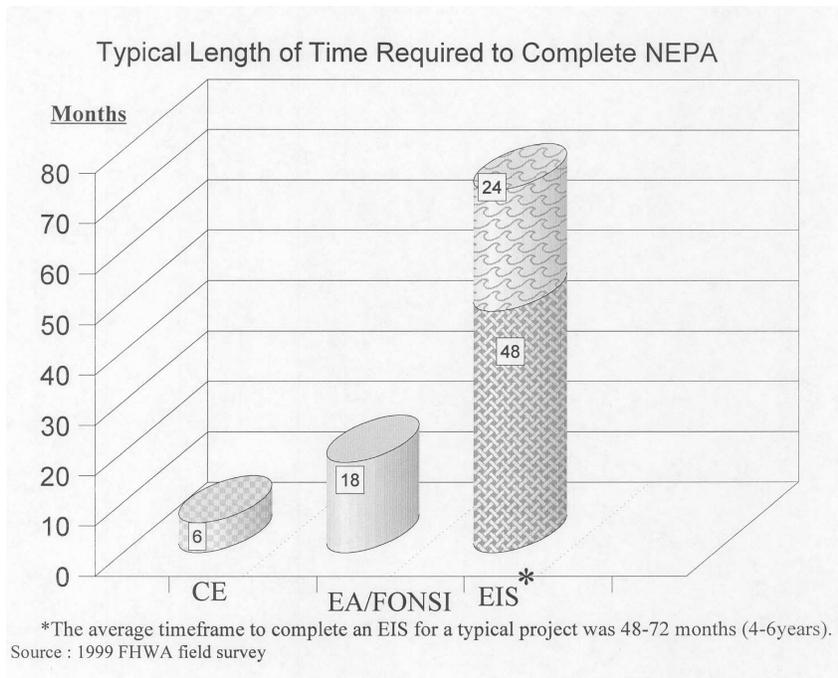
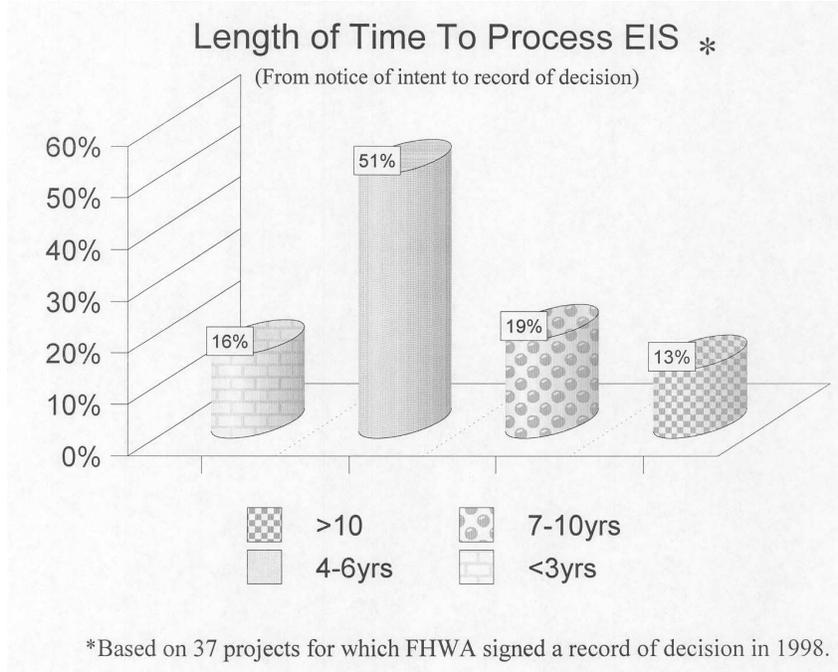
Response. In accordance with TEA-21, the conflict resolution process must meet the needs of all of the policies. The language of 1309(c) calls for the Secretary to make a finding and close the record only after notice and consultation with the Federal agency which has jurisdiction over the environmental issue causing the conflict. The conference report language further clarifies that the Secretary's authority to

close the record does not extend to analyses, opinions, or decisions conducted by another agency on any permit license or approval issued by that agency.

We are in the process of developing a policy and procedures for expediting conflict resolution among federal agencies, as directed in Section 1309(c) of TEA-21. We are using the Institute for Environmental Conflict Resolution to help us develop the policy. We have obtained ideas from other Federal agencies, State transportation and resource agencies, MPO's and others who helped us to pinpoint key elements that need to be addressed in the policy. A draft dispute resolution policy is expected to be ready for review by our stakeholders in November.

Besides the specific policy and procedures that fulfill the intent of Section 1309(c), we will be working with the Federal agencies and State agencies to compile guidance, strategies, and approaches, including benchmarking, to give interested parties insights on how to manage conflict and potentially controversial project issues early in the process.





STATEMENT OF LOIS SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND  
NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Good morning. Mr. Chairman and Members of the Committee, I am pleased to appear before you today regarding the Department of Transportation proposed rule on environmental review. Federal agency compliance with the environmental review requirements of the National Environmental Policy Act, 42 U.S.C 4321 *et seq.*, ("NEPA") is a topic I have worked on for well over 20 years.

On May 25, 2000, the Department of Transportation issued two related notices of proposed rulemaking to revise both its NEPA and related procedures for transportation decisionmaking, and also its statewide and metropolitan transportation planning procedures. (65 Fed. Reg. 33959 and 65 Fed. Reg. 33922, respectively). These proposed rules were drafted in response to the recent passage of the Transportation Equity Act for the 21st Century ("TEA-21", P.L. 105-178 (1998), to update the existing environmental review procedures that were last amended in 1987.

With the comment period on the draft regulations still open, it is premature to discuss in any detail the Department of Transportation's revisions to its NEPA rules. At the Department of Justice we do not ordinarily comment publicly before regulations become final because we often must defend final regulations under court challenge.

Today, my statement will focus on: (1) NEPA's continued importance in Federal agency decisionmaking more than 30 years after it was enacted; (2) why the NEPA process is well suited and so important for assessing transportation projects and including the public in such assessment; and (3) the concern I understand has been raised about incorporating environmental justice guidance into the new NEPA regulations.

As detailed below, a strong NEPA process is extremely important for reviewing major proposed Federal transportation projects. NEPA has two central components: (1) careful consideration by the decisionmaker of the environmental consequences of a proposed major Federal action that may significantly affect the quality of the human environment by the decisionmaker, and (2) meaningful public participation during the project review process. Properly done, a successful NEPA process better informs the decisionmaker and gives the public an effective channel to express concerns and influence what is before the Department. These are both important requirements, and compliance can help to streamline project review and reduce litigation and litigation risk.

NEPA was enacted in 1969 as part of a response to increasing public concern over the worsening state of the environment. NEPA's legislative history notes that by 1969, Congress had already passed "a procession of landmark conservation measures on behalf of recreation and wilderness, national recreational planning, . . . air and water pollution control, noise abatement, preservation of endangered wildlife . . . and other related areas." And in fact, long before the environmental crises of the 1960's, many States had passed various measures addressing the management, protection and regulation of water and other natural resources, such as forests and wildlife. But NEPA was different from many of these resource-specific statutes.

What made NEPA different from other environmental statutes enacted to protect specific resources, such as clean air and clean water, was the growing sense that the Nation needed an overarching national policy on the environment. As NEPA's legislative history further describes, Congress was establishing "a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment." NEPA thus became a legal expression of something that scientists had already known for a long time—to arrive at the "overall goal of a quality life in a quality environment for all Americans," we cannot look at or, for that matter, protect one aspect of the environment in isolation from other environmental factors. NEPA arose not so much out of the aftermath of disaster as out of a growing sense that we needed a national environmental policy that would take a longer and broader view of where we were going, and this statement of policy formed the nucleus of the Act.

The early focus of NEPA was Section 102(2)(C), the section that requires Federal agencies proposing major Federal actions significantly affecting the quality of the human environment to undertake environmental reviews. That process, through court decisions and regulations issued by the President's Council on Environmental Quality (CEQ), has evolved over the past 30 years into a well-defined set of procedures. The 1978 CEQ regulations reflected the early experience with the NEPA process and issues that were addressed by the courts. The regulations continue to serve as a guide for agencies and are a model upon which agencies develop their own agency-specific regulations. Since their first publication, the CEQ regulations have been modified to keep them up to date. They have withstood legal challenge

and are accorded deference by the courts. Since 1978, virtually all Federal agencies have adopted their own regulations based on the CEQ model.

One indication that NEPA continues to have vitality today can be seen by examining how thoroughly agencies have embraced NEPA's requirements. It has not always been this way. In the beginning, agencies were hesitant, and even resistant, to complying with NEPA. NEPA was essentially thrust upon a reluctant bureaucracy committed to missions that traditionally regarded environmental values (if regarded at all) as subordinate to the specific statutory goals of the agency. Over time, however, it has become clear that NEPA, in effect, has been grafted into all Federal agency goals. This transition took some time, but has generally been successful.

The Federal Government has made great strides since the early 1970's in promoting and improving NEPA compliance. While agencies sometimes find themselves behind the curve and subject to a court injunction for non-compliance, most agencies have made great progress. Agencies have come to know that if they comply with NEPA effectively, courts will scrutinize their decisions less closely, and the proposed action will likely proceed more quickly. Our experience with implementing the statute includes three decades of defending Federal agencies' NEPA decisions when they are challenged in court. Thorough environmental reviews are an effective way to reduce litigation and litigation risk. An ounce of prevention is worth a pound of cure.

NEPA compliance is critical for transportation projects because of the widespread impacts transportation decisions can have on the physical environment and on communities. These projects affect many people on a daily basis. Through the NEPA process, effectively coordinated with the States, careful consideration can be given to developing and assessing: the environmental impacts of a proposed project, alternatives with varying impacts, how the proposed project meets a community's needs, where will the project be constructed, how it is constructed, and who is affected by the project during and upon completion.

The NEPA process also provides a good mechanism for public involvement. Because of the profound impacts that a transportation project can have on communities and the physical environment, hearing from the public about possible concerns before a final agency action is selected can result in better informed decisions. It can also provide an outlet for the public to present perspectives that may otherwise not be known to the decisionmaker. From a streamlining perspective it is also preferable to provide meaningful public participation during the NEPA process to reduce the likelihood that a citizen will challenge a decision in court.

The goal of streamlining the environmental review process is to assure better compliance with NEPA, not to weaken the NEPA. Streamlining NEPA cannot be about cutting corners, or trying to narrow artificially the environmental and social consequences that must be studied. Rather, streamlining means making sure that, from the earliest stages of project scoping through issuance of a record of decision, agencies meet NEPA's important analysis and public participation requirements. Early and effective coordination between State and Federal agencies, for example, is an effective streamlining approach.

One of the most effective ways for an agency to meet NEPA's goals and requirements is to have sufficient staff, in addition to the designated NEPA liaison required by CEQ regulations, to assist with educating co-workers about NEPA and achieving compliance. Several of our client agencies have recently assigned individuals specifically to fill these roles and this assignment should make a positive difference in how those agencies implement their NEPA obligations. There is the added benefit of creating an institutional framework within the agency for considering environmental issues in decisionmaking, thereby weaving NEPA compliance into the fabric of the agency.

The NEPA process is also a good tool to develop and provide information that is useful to decisionmakers trying to address and limit urban sprawl. Newspapers reflect the contemporary public concern about urban sprawl, and there continues to be a healthy debate about the role of the Federal Government in responding to this issue. During an environmental review of a proposed major Federal action a decisionmaker must consider the environmental and ecological impacts, as well as other effects, including economic and social impacts. These are precisely the types of impacts that are typically implicated in any discussion of urban sprawl.

As a flexible decisionmaking framework, NEPA is also well tested to address another issue: environmental justice. On this point I am responding, in particular, to questions raised about the appropriateness of including environmental justice considerations in the proposed regulations. Executive Order 12898 and the CEQ guidance on environmental justice already require that Federal agencies take these matters seriously and address them in environmental reviews. In addition, CEQ's guidance will be given deference by the courts. By revising its NEPA regulations to re-

quire consideration of environmental justice concerns, DOT is simply reflecting the requirements that already exist under the Executive Order and CEQ Guidance.

In addition to the Executive Order and CEQ Guidance, agencies have good policy reasons to take environmental justice concerns seriously. There are well documented instances where environmental costs are disproportionately borne by low-income and minority populations. For example, there is a much higher rate of lead poisoning among African-American and low-income children than in other populations. There is also anecdotal evidence, including right here in Washington, DC, that low-income and minority populations endure higher rates of illegal dumping, dilapidated housing, and a lack of safe parks for their children.

A proposed transportation project may implicate environmental justice in a variety of ways. There may be an issue about how environmental burdens resulting from a proposal, such as air and noise pollution, may be distributed. Another commonly cited environmental justice concern is the lack of public participation from low-income and minority populations during project review. Careful consideration of these, and other environmental justice concerns, is consistent with the President's Executive Order and the CEQ guidance. With the dramatic funding increases approved in TEA-21 and the enhanced concerns about links between transportation projects and environmental justice, the proposed rule appropriately clarifies that the affected public, including minority and low-income citizens, has an opportunity to participate and present their views during the planning and environmental review processes. The CEQ Guidance emphasizes the importance of meaningful public participation throughout the NEPA process, and how better to reach traditionally under-represented groups by using nontraditional means of providing notice, and accessible and convenient meeting times and locations. Just as NEPA can provide a framework for providing meaningful information to a decisionmaker about the urban sprawl implications of transportation investments, it also can assist in improving the participation from minority and low-income populations, and assuring careful consideration of their environmental concerns.

NEPA has brought about enormous changes in the last 30 years it has led to widespread consideration of environmental values in decisionmaking, increased public participation and involvement, and has made a substantive, positive difference in how the Federal Government acts. Implementing the projects funded by TEA-21 in conjunction with strong NEPA compliance will help DOT to fulfill Congress' mandate declared more than 30 years ago that: "It is the continuing policy of the Federal Government [in cooperation with others] . . . to use all practicable means and measures . . . to create and maintain conditions under which [hu]man[s] and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."

STATEMENT OF CAROL A. MURRAY, ASSISTANT COMMISSIONER, NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION

Mr. Chairman and members of the committee. I am Carol Murray, Assistant Commissioner and Chief Engineer of the New Hampshire Department of Transportation.

The New Hampshire DOT joins with other State Departments of Transportation from across the country in objecting to the impact of the proposed rules from the US Department of Transportation addressing both the transportation planning process and the process for environmental review of proposed transportation projects.

Without getting into detail, as some of my colleagues are effectively making the argument against the proposed rules revisions before you today, we believe these rules would be contrary to the spirit of the Transportation Equity Act for the 21st Century (TEA-21) and would further set back efforts aimed at making these processes more timely and efficient.

The New Hampshire DOT is concerned about the adoption of any one-size-fits-all approach to the transportation planning and environmental process across the country.

In spite of noble intentions and considerable efforts, the current project development process remains complicated, overly burdensome and frustrating. Objective reviews of project impacts, and consensus building, are often severely hampered by the failure of resource agencies to be appropriately represented at meetings during project development. This results in the need to revisit issues, which leads to delays and additional costs. Also, resource agencies often defer decisions until very late in project development, rather than sign off at major milestones.

The current process is not very good, but it remains better than what is being proposed. We are all in the business of serving the public. Yet this process is viewed by the public as very complex and frustrating, sort of an endless series of loops. The

proposed rules do nothing to relieve these frustrations and in fact will make them worse.

I would like to focus for a few minutes on the direction where we believe the transportation planning and environmental process should be heading to better serve the American people.

TEA-21 espouses the concept of environmental streamlining, emphasizing the need for timely and responsible decisionmaking. This is a concept that I know Chairman Smith strongly supports. The goal of environmental streamlining is to advance worthy transportation improvement projects that support and nurture the economy, without unnecessary detrimental effects on the environment.

Environmental streamlining is not foreign to the New Hampshire Department of Transportation. A number of initiatives have been advanced through the years to facilitate project development and expedite interagency coordination. Monthly project review meetings with the resource and regulatory agencies have been in place for more than a dozen years. These meetings afford the opportunity for the project purpose and need, alternative courses of action, environmental effects and mitigation strategies to be discussed in open forums. It's about building trust to get all agencies and parties involved sooner.

I would offer two examples in New Hampshire of how we see the concept of environmental streamlining improving quality of life in the State. The first, in which Senator Smith has taken a leadership role, is the proposed expansion of 18 miles of Interstate 93 from the Massachusetts border north to Manchester, the State's largest city. This busy stretch of four lane, divided highway handles 100,000 thousand vehicles a day and experiences serious congestion during peak driving hours.

In early August, Senator Smith coordinated a meeting of State and Federal regulators aimed at streamlining the approval and construction process for the I-93 project. Among those attending the meeting were representatives of the Environmental Protection Agency, Federal Transit and Federal Highway Administrations, the Army Corps of Engineers, U.S. Fish and Wildlife, and State Departments of Transportation, Environmental Services, Fish and Game, and the Offices of Emergency Management and State Planning.

Senator Smith made it clear that he wanted regulators to come up with transportation and environmental goals, to establish timelines and milestones for the project, and to establish a dispute resolution process. All of the agencies in attendance signed a "partnering agreement" pledging mutual cooperation, open and honest communication toward delivering a safe, effective, environmentally sensitive solution for transportation in the I-93 corridor. This is a very positive step that we hope will expedite the review of this project.

Another example is in Concord, the State capital, where a project called "Concord 20/20" is an effort by the city to look at a vision for the future of the city 20 years from now. This project includes three quality of life issues—economic development, the natural environment, and transportation. The goal is to look at the interaction of those issues and achieving improvements within each without negatively affecting one of the others.

It is time to work toward building these kinds of cooperative efforts when it comes to reviewing proposed transportation projects. It is not in the public interest to delay, frustrate and increase the price tag of worthwhile transportation projects.

To be effective, incentives for resource agency involvement and cooperation must be tangible. The threat of the "big stick" may bring short-term results, but will only engender mistrust and resentment. Through interagency forums, cross training of agency personnel is essential to develop a mutual understanding and appreciation of agency initiatives, plans and goals. The aim is not to convert each other, but to work collaboratively and responsibly to pursue our separate, yet related public mandates to integrate them effectively. Again, the key is building a trust between all parties.

Thank you for the opportunity to appear before you today. I will be glad to answer any questions you may have.

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STATEMENT OF THE TRANSPORTATION DEPARTMENTS OF MONTANA, WYOMING, NEVADA, IDAHO, NORTH DAKOTA, SOUTH DAKOTA, ARIZONA, AND MICHIGAN, PRESENTED BY JIM CURRIE, DEPUTY DIRECTOR, MONTANA DEPT. OF TRANSPORTATION

Mr. Chairman, Senator Baucus, and Members of the Committee: I am Jim Currie, Deputy Director of the Montana Department of Transportation. I am pleased to appear here today and pleased that the transportation departments of seven other States—Wyoming, Nevada, Idaho, North Dakota, South Dakota, Arizona, and Michigan—have joined in the statement I am presenting. With me today is John

DeVierno, who serves as counsel to our Department and four of the other State transportation departments that have joined in this statement.

We have been asked to address proposed rules issued by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) that would revise the transportation planning process and the process for environmental review of proposed transportation projects.<sup>1</sup>

Let me get right to the point. We strongly oppose these proposals and want help from the Congress to prevent them from becoming final rules.

Why? Because the proposed rules would add burdensome requirements and uncertainty to planning and environmental review for transportation projects. They would increase overhead and delay—and delay usually means increased project costs. Frankly, these proposed rules could make it difficult for States to deliver their programs. We support a thorough planning and environmental review process, but today's process is already too long and complex. Adding requirements to it is contrary to sound policy—and contrary to the course charted by Congress when it passed TEA-21.

For these and other reasons we hope the Congress will join us in working to prevent these proposals from becoming final rules.

#### MAJOR PROBLEM AREAS AND OVERVIEW

Let me turn now to an overview of our concerns, including four major problems with the proposed rules.

*New Alternatives Analysis Requirement.*—Most projects in metropolitan areas would be subject to new, excessive planning requirements, particularly preparation of alternatives analyses. Today only “major” projects are subjected to these analyses at the planning stage. This expansion of regulation is contrary to very clear language in the major investment study (MIS) provision of TEA-21.

*Process Complications Would Burden States and Diminish the Relative importance of Elected Local Officials.*—The authority of States would be severely undercut as the proposed rules would confer new procedural or substantive powers upon various entities, including unnamed “planning process participants.” States are committed to working closely with local officials and interested parties. But the proposed changes would upset the intergovernmental balance set by Congress in the law. These proposals could effectively confer on a wide range of unelected officials or groups, the ability to veto or leverage project decisions that Congress vested in the States. These changes would overburden a process already replete with comment and consultation requirements. They would put many unelected officials on the same level as elected ones in the planning process. They would make it hard for States to address statewide concerns or major projects. Again, many of these proposed changes are directly contrary to statute.

*Vague New Data Development and Analysis Requirements Would Increase Costs and Uncertainty.* The proposed rules would impose upon States and metropolitan planning organizations (MPO's) new, unfunded mandates to develop data and prepare analyses on the relationship of transportation spending to various socioeconomic classes of persons, or locations where such persons live. These proposed “environmental justice” requirements are not well defined. They use highly judgmental phrases like “reduction in benefits” and “interrelated social and economic impacts” of environmental impacts. Yet these proposals would require States and MPO's to develop data to address those issues. States could well be required to become mini-Census agencies, and develop data beyond that which is available from the Census Bureau. Failure to comply, which seems to include not being able to satisfy USDOT officials with respect to transportation investment patterns, could result in disapproval of plans and programs and the cutoff of Federal highway or transit funds. Senators, States abhor discrimination and strongly support Federal and State anti-discrimination laws. We are aware of no record presented to Congress, in the development of TEA-21, indicating that States were not in compliance with anti-discrimination laws. Yet the proposed rules would impose undefined new burdens on States, and do so in a way that does not seem to provide States standard procedural protections against the cut off of funds.

*Confusing New Substantive Environmental “Goals” Seem More Likely to Increase Rather Than Decrease Disputes and Litigation.*—The proposed environmental rules would inject new substantive considerations into the NEPA process. One section would require USDOT to “manage” the NEPA process in order to “maximize attainment” of, among other goals, an “environmental ethic.” Another stated “goal,” “col-

<sup>1</sup>The proposed planning rules were published at 65 Federal Register 33921 (May 25, 2000); the proposed environmental rules at 65 Federal Register 33959 (May 25, 2000).

laboration,” is that “transportation decisions are made through a collaborative partnership involving Federal, State, local and tribal agencies, communities, interest groups, private businesses and interested individuals.” Congress already delineated in the planning statutes that States must “consult” with certain entities and “cooperate” with others. And NEPA has long provided the public with the right to comment. Yet here the proposal seems to be to manage the NEPA process to make every person in the country a “partner” in making transportation “decisions.” Needless to say, these kinds of vague rules could open a Pandora’s Box of disputes and litigation, as parties challenge whether the NEPA process was “managed” to maximize such goals.

These problems are the heart of our objections to the rules. However, before addressing them more specifically, let us take a moment to put these objections in context.

Mr. Chairman, Federal law and regulations have established a process for transportation planning and for environmental review of proposed highway and transit projects that is not just thorough. It is also complicated, costly and slow. This is not something that happened since TEA-21 was enacted. It was the case when Congress was developing TEA-21.

Having considered the situation, Congress made clear, in the 1998 Conference Report accompanying TEA-21, that it had “concerns” with “the delays, unnecessary duplication of effort, and added costs often associated with the current process for reviewing and approving surface transportation projects.”<sup>2</sup> And Congress did more in TEA-21 than agree on report language that expressed concerns. Congress:

- passed a provision directing the Executive Branch to streamline the process for environmental review of transportation projects;
- protected the planning process from complication by prohibiting the application of NEPA to planning/programming approvals;
- eliminated a separate planning step known as a “major investment study” (MIS);
- reduced the number of planning factors States and MPO’s must consider from roughly 20 down to 7, and precluded court challenges based on alleged lack of consideration of any planning factor; and
- protected the planning process from complication by not enacting proposals to dilute State authority, such as proposals to newly require States to “cooperate with” (regulatory-speak for “agree with”) certain entities in formulating portions of the State’s transportation program.

As a result, we were pleased with the planning and environmental review provisions of TEA-21. Congress recognized the need for a thorough planning and environmental review process—but also recognized the need to expedite that process. This is certainly the view of States. As the American Association of State Highway and Transportation Officials (AASHTO) explained in its recent resolution regarding these proposed rules:

“States agree that the planning and environmental review process for transportation projects should include ample public participation and careful review of impacts and issues, and further agree that present processes already go beyond this standard.” Accordingly, AASHTO called for final rules that would “streamline” present processes.

The proposed FHWA/FTA rules, however, go in the opposite direction. Key elements of these proposals would complicate and delay current processes. Most troubling, in several instances, the rules would add major requirements that are contrary to statutory provisions.

In considering both the proposed rules and our suggestions, we also ask that Congress keep in mind that States are the primary subject of regulation under these proposed rules. States are public entities. They do not have a profit motive or other narrow focus. State DOT’s are vitally concerned with the full range of public policy issues in transportation—from providing efficient transportation to meet the mobility needs of people and business, to protecting the environment, to ensuring that all interested parties have the opportunity to comment on proposals. And we should not lose sight of the fact that States take steps that are not required by Federal law or rule. States have features in their individual planning processes, some required by State statute, that respond to particular circumstances. For these and other reasons, we believe that it represents sound Federal policy for Federal agencies to refrain from regulating States except where clearly directed to do so by Congress. The proposed rules do not follow that approach. The final rules should.

Before turning to specifics of the proposed rules, we’d also like to make clear that we see the issues raised by these proposed rules as readily distinct from the envi-

<sup>2</sup>Conference Report on TEA-21, H. Rep. No. 105-550, at 450 (1998).

ronmental streamlining issues that were the focus of the hearings held in April 1999 by the Transportation and Infrastructure Subcommittee of this Committee. At that time the focus was improvement of the environmental review process for transportation projects that require NEPA or other environmental approval by Federal agencies in addition to USDOT. That is an important area of concern. We feel much more needs to be done in that area, in terms of deadlines and other issues, even though we do see some reports of improved communication between agencies.

Today, however, the focus is on USDOT's own rules pertaining to alarming and environmental review. Whether or not other agencies have a role with respect to a particular project, USDOT rules are always very important to the ability of States and others to move projects from concept to reality. That is why we are so concerned about these proposed rules, independent of the also important need to improve the coordination of the environmental review process when more than one agency is involved.

#### MAJOR PROBLEMS WITH PROPOSED REGULATIONS

Let us turn now to a more specific explanation of our concerns.

#### MAJOR INVESTMENT STUDY REFORM HAS BEEN RECAST INTO AN INCREASE IN REGULATION

After passage of ISTEA in 1991, FHWA and FTA administratively developed a non-statutory requirement known as the "major investment study" (MIS). This requirement, 23 CFR Sec. 450.318, is an extra layer of planning for major projects in metropolitan areas.

The requirement has been unpopular and for good reason. States and MPO's have long done planning and have long conducted alternatives analysis at the project level as part of the NEPA process. The MIS was essentially an extra layer of alternatives analysis, undertaken at the planning stage, that did not eliminate the need to do alternatives analysis at the project level, as required by NEPA.

Appropriately, Congress, in Section 1308 of TEA-21, directed USDOT to eliminate this extra layer of review and integrate MIS requirements into the planning or NEPA process "as appropriate."

Mr. Chairman, integrating MIS into the regular processes to the extent "appropriate" raises a very serious concern. If it is not done properly, the result could be that all metropolitan area projects, not just major ones, become subject to MIS type review, on top of other reviews.

Congress, however, anticipated this problem and further directed, in Section 1308, that after integration of any retained MIS requirements into planning or other rules, "[applicability of such regulations shall be no broader than the scope of [the former MIS regulation]." In short, Congress made clear that, to the extent USDOT found it "appropriate" to continue MIS-type requirements as part of the regular planning regulations, the MIS aspects of the planning regulations could not apply beyond so-called "major" projects.

The proposed rule, however, completely misses this requirement. Proposed 23 CFR Sec. 1410.318 would amend the planning rules to require preparation of an "initial statement of purpose and need" and an "evaluation" of "alternatives" for "investments," not just major investments. This is a very major regulatory increase for all non-major projects, contrary to an explicit statutory directive.

This portion of the proposed planning rule is particularly disappointing to us because, after the passage of TEA-21, but before the rules were proposed, we wrote to FHWA on future rules and one of our points was that Congress had precluded expansion of the reach of MIS requirements.

#### INTEGRATION OF NEPA AND PLANNING CAN BE A PROBLEM, NOT A SOLUTION

Let us add that our opposition to this regulatory expansion is not diminished because the proposed planning rules have couched it in the superficially appealing language of an effort to "coordinate and streamline the planning and NEPA processes."

It is our experience that discussion of the "coordination" or "integration" of NEPA and planning focuses too much on labels and not enough on what that means in practice. Simply put, when someone says he or she is for "coordinating" or "integrating" NEPA review and planning, we don't agree or disagree. Instead, we ask what it really means. We have seen two very different approaches to integrating planning and NEPA: one that advances streamlining, and one that sets it far back.

The positive approach to integration of planning and NEPA is to allow a State or MPO to take relevant work done in the planning process and use it in the NEPA process, so that the work is done only once, not twice.

A very different way of integrating planning and NEPA is taken in the proposed rules. The proposal would require increased work at the planning level (development of a purpose and need statement and alternatives analysis), but would not guarantee any reduction in work at the NEPA level. In essence, a significant amount of work likely would have to be done twice, not once.

This is a u-turn from the direction set by Congress, and we would oppose it even if it were not directly contrary to Section 1308 of TEA-21.

To actually advance streamlining in the planning rules, those rules should not require any new analysis by the States or MPO's at the planning level. Nor should the MIS-type analysis continue to be required for major projects. What USDOT needs to do is provide States and MPO's incentives to perform further analysis at the planning level voluntarily.

How? Simply by providing real assurance that any relevant work done at the planning stage will receive credit in the form of streamlined or expedited processing at the project NEPA stage.

And if, in practice, USDOT does not give States or MPO's meaningful credit at the NEPA stage for planning work, States and MPO's would at least be free to fashion a response. As long as any additional planning work is voluntary, streamlining will not be undercut because States and MPO's would still be free to choose not to do that work at the planning stage and move more quickly to the NEPA stage. Work would still be done thoroughly—but just once.

#### COMPLICATING AND SLOWING DOWN THE PLANNING PROCESS BY REDUCING THE AUTHORITY OF STATES

Public participation is a hallmark of the transportation planning process. Literally everyone is invited to comment on plans and projects. States and MPO's make major efforts to be sure citizens and groups are aware of their chance to comment.

Beyond the opportunity to comment, Congress has specified that States cooperate or consult with certain entities with respect to certain transportation issues. "Consultation" and "cooperation" are not defined by statute, but they were defined by regulation in the early '90s, shortly after the enactment of ISTEA.

As currently defined, a "consultation" requirement imposed on a State with respect to an entity, such as an elected local official representing a unit of general purpose local government, means that the State must "confer" with that entity and "consider" its views.

Under the Federal rules "cooperation" is a much stronger requirement than "consultation." It requires parties to "work together to achieve a common goal or objective." It can be a very time consuming process. In practice, it has been hard to distinguish "cooperation" from a requirement that a State reach agreement with the "cooperating" party.

These were the established meanings of these terms when Congress developed and drafted TEA-21.

The degree to which consultation or cooperation rights are bestowed is a critical issue in the planning process. If a State has to consult with or reach agreement with an ever-larger number of groups, on a greater number of issues, the planning process inevitably is overburdened. It is also balkanized. As individual groups or entities leverage their consultation or cooperation authority to insist on solutions (usually money) for their own areas, the ability of a State to address statewide priorities or invest in major projects is seriously diminished.

In developing TEA-21, one area that Congress considered closely was the relationship between States and officials in non-metropolitan areas. Congress decided that, in non-metropolitan areas, with respect to certain projects, States should "consult" with "local elected officials representing units of general purpose local government" and also with "affected local officials with responsibility for transportation." Congress did not adopt proposals to require States to "cooperate" with such officials.

FHWA and FTA have proposed a major change from the legislation. The proposed rules would also require States to consult with officials, whether elected or appointed, "with jurisdiction/responsibility over community development activities that impact transportation" and "elected officials for special transportation and planning agencies, such as economic development districts and land use planning agencies." The precise limits of the types of officials that would newly receive consultation status are not clear, but it is definitely a large group. Many, many cities and counties have economic and land use officials.

The proposed rules also would effectively change the meaning of consultation by requiring that the State and the non-metropolitan officials being consulted with must "cooperate" in developing the form of the consultation and provide documentation to USDOT that they have agreed on the form of consultation.

So, under the proposal, every single consultation would become a two-step process, one consultation, preceded by another of “cooperation” on the form of consultation. And the proposed rules would also newly require that both parties document to USDOT their agreement on the process. So, “consultation” parties would be provided the power to withhold agreement, and documentation of agreement on the consultation process to USDOT. So, the two parts of the process are hardly unrelated and not purely procedural. Parties will inevitably leverage the “cooperation” status on the form of consultation to obtain funding, project priority, or other favorable action from the State.

Let us be absolutely clear. We think it is good practice to consult with and listen to local officials. We consult with local officials throughout our States beyond the extent required by Federal law. We certainly consider all comments and funding requests that we receive from local officials, even if they are not designated as consultation parties. States also work with local officials in important ways not addressed by the rules. In Montana and many other States, for example, we have statutory guarantees that local units of government receive certain portions of Federal and State highway funds. So, we support working closely with local governments and other interested parties.

But we do object to regulatory changes that could make the overall process unworkable. When very large number of entities are given “cooperation” power in the process, power that can be used as leverage for more funding, it is hard to see how States can make effective decisions on statewide issues. We’re aware of no State DOT that has enough funding to come close to meeting the project funding requests it receives from every area of the State. Yet every area would seem to be empowered to withhold documentation of agreement on the form of consultation. It is not clear that, under this system, States would be empowered to provide areas less than they demand. In particular, States would be at risk of losing the ability to address large and costly projects if planning becomes nothing more than several hundred negotiations—if we can even complete that many negotiations.

Fortunately, there is a straightforward response to these problems. Congress should order the agency to follow the law. In TEA–21, Congress required each State to submit to USDOT “the details of the consultative process developed by the State for non-metropolitan areas.” The Congress further provided that USDOT “shall not review or approve such process.” See 23 USC 135(f)(1)(B)(ii). In short, Congress made clear that States develop the consultative process, not USDOT. The proposed rules are not in accord with this provision.

The listing of land use officials as required consultation entities is particularly contrary to congressional action. Before TEA–21, States and MPO’s were required by statute to consider land use issues in planning. The new list of seven planning factors does not reference land use. And that omission was deliberate. Many State DOT’s had advised Congress that, in their States, they did not have authority over land use issues. So, Congress deleted that requirement, allowing States to decide whether they will consider that issue in transportation planning.<sup>3</sup> Now, the agency proposes a regulation that requires consultation with land use agencies and provides those authorities a de facto veto over the form of consultation. Thus, the proposed rules would essentially write in a requirement that the Congress struck.

Mr. Chairman, the proposed rules contain other changes that would be contrary to law or sound policy by reducing the authority of States and complicating the planning process.

Perhaps most startling, at a number of points the proposed rules would confer authority to make procedural decisions upon an undefined group of “planning process participants” rather than maintaining State authority. Under these proposals, Federal land management agencies and Indian tribes also would be given “cooperation” status as to the form by which a State “consults” with them. So, with respect to these entities the proposed rules present the same issues of substantive leverage on States that was discussed earlier with respect to various local officials.

Another section in the proposed planning rules would require the development of State transportation plans to be “coordinated” with “related planning activities” being undertaken outside of metropolitan areas. “Coordination” is another term defined by regulation and it means that the coordinating agencies adjust their plans “to achieve general consistency.” So, States would be required to adjust transportation plans for consistency with an undefined set of “related” planning activities. This is not in accord with the planning statute, which specifies that States are to “consider” such coordination. See 23 USC Sec. 135(d). The proposed rules would turn a consideration into a requirement.

<sup>3</sup>See former 23 U.S.C. Secs. 135(c)(14) and 134(f)(4).

We will not try to list here all the aspects of the proposals that would restrict States or dilute their authority. We wanted to identify a number of them, however, so that the Committee could appreciate our concern that proposed rules would undercut the authority of States in a significant and pervasive way. We feel strongly that such changes would not advance our Nation's transportation system. They would, instead, delay and complicate, perhaps greatly, the ability of States to deliver—and citizens to benefit from—transportation projects and programs.

*The Proposed Rules Would Impose Unfunded Mandates Upon States to Implement an Executive Order on Environmental Justice and Would Do So in Ways That Exceed Statutory Authority and May Deny States Basic Procedural Protections.*

In a variety of ways, the proposed rules would transpose into regulatory requirements concepts contained in a 1994 Executive Order on “Environmental Justice,” (Executive Order 12898).

The proposed rules would require States and MPO's to collect and analyze data comparing the distribution of transportation funds to various socioeconomic classes of persons, or places where they live. Failure to comply with these environmental justice (EJ) initiatives, which appears to include not being able to satisfy USDOT staff with respect to how States or MPO's invest transportation funds, can mean disapproval of the transportation investment program. This means the cutoff of Federal funds.

We have both general and specific objections to these proposed requirements.

As an across-the-board matter, we disagree with the apparent implication that State transportation departments are not adequately enforcing or implementing the Civil Rights Act of 1964 or other anti-discrimination statutes. States abhor discrimination and are committed to full compliance with anti-discrimination laws. If a claim of discrimination should arise, it can be dealt with under existing rules. No case has been made for major change in the present rules in this area.

More specifically, several aspects of the EJ proposals are particularly objectionable and suggest to us that the proposal may not be workable.

The data collection requirements are open ended and undefined. In response to questions, we have been told informally that the proposed rules would certainly require States and MPO's to collect and review existing data, such as Census data, but could also require them to go further and develop new data. So, there is a real prospect of grant recipients being forced to act as mini-Census agencies and develop demographic data that do not currently exist. We're not sure that there are any limits as to how much we could be asked to do in this regard.

States and MPO's also would be required to develop data and perform analyses regarding “low income” populations as well as other classes of individuals. Aside from the fact that this term is not defined in the proposed rules, “low income” people are not a protected class under the Civil Rights laws, making the proposed data and analysis requirements even more problematic.

Another troubling feature of the proposal is the requirement for assessment of “any denial or reduction in benefits.”<sup>4</sup> If a State makes a significant transportation investment that might be said to have benefited a particular group, as well as the population as a whole, then, the year after that investment, there usually is a reduction in the level of investment made in that area. Is that a “reduction in benefits?” Analysis of these types of issues is conceptually very difficult and highly judgmental. Consider some possibilities:

- Will States feel coerced into not making large investments in certain areas so that they don't have to explain “reductions?”

- Transportation investments have long life spans and the planning and project delivery process is lengthy already. When does further investment have to occur (or not occur) to satisfy these proposals?

- Will investments be considered “benefits?” We certainly believe that all the investments we make have been carefully considered and confer benefits. But there are some who perceive burdens and adverse impacts from projects. What are the ground rules here? Will different USDOT officials charged with oversight of different States see the same project type as a benefit in one case and as adverse in another? The proposed rules create such possibilities.

We doubt we have identified all the questions raised by these data and analysis requirements, but have identified enough to be concerned about the burden and uncertainty they would cause. We are also concerned that such uncertainty could lead to litigation and other program disrupting disputes.

Beyond problems with substantive EJ requirements that would be imposed, there are serious procedural concerns.

<sup>4</sup>Proposed 23 CFR Sec. 1410.206(a)(6)(i)(D); see also proposed Sec. 1410.316(c)(1)(iii) as to MPO's.

The EJ Executive Order included Section 6–609, a provision typical of Executive Orders. It specified that the order was intended for the internal management of the Executive Branch and was not intended to “create any right to judicial review.”

However, the proposed rules are not an internal matter for the Executive Branch. They are expressly intended to regulate States and MPO’s. Thus, we were troubled by provisions such as proposed 23 CFR 1410.206(a)(6)(vi), which states that no aspects of the paragraphs in the proposed rule requiring States to develop and analyze data “are intended to nor shall they create any right to judicial review of any action taken [to comply with Executive Branch Orders].”

The Civil Rights Act of 1964 has long provided for judicial review of any rules implementing that act. 42 USC Sec. 2000d–2. And the law also clearly extends the right of judicial review to any USDOT decision to deny Federal funds to a State for noncompliance with the act. 42 USC Secs. 2000d–1, 2000d–2.

Moreover, the law has long provided that, in the case of any agency action “terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section” a State is entitled to an on-the-record hearing. Further, even when such a hearing finds a violation, no cut off of funds may take effect until 30 days after the Department files a written report with the Congress. See 42 USC Sec. 2000d–1.

Mr. Chairman, the point behind these legal citations is that we are concerned that these proposed rules seem to leave open the prospect of USDOT staff cutting off a State’s funding without providing a hearing. There is no indication in the proposals that acknowledges the procedural rights of States in this area. Of course, if pressed, USDOT would certainly say that it would not violate the law. Nevertheless, the provisions proclaiming no intent to provide judicial review and the absence of any express affirmation of States’ procedural rights make us concerned that USDOT may try to implement EJ requirements without providing States with standard procedural rights that Congress established long ago.

#### REVISION OF ENVIRONMENTAL RULES CREATES LITIGATION RISK

We are also very concerned about the uncertainty and litigation risk that we see in proposed changes to the rules implementing NEPA.

The courts have long held that NEPA is a procedural statute. It ensures consideration of environmental impacts before decisions are made—but does not require any particular substantive result.

The proposed rules, however, set forth “goals” for the NEPA process that are substantive in nature, such as “maximizing attainment” of an “environmental ethic,” “environmental justice,” “transportation problem-solving,” “financial stewardship,” and “collaborative decision making.” See proposed 23 CFR Sec. 1420.107.

We are very concerned that promulgating these “goals” as final rules could lead to confusion, revised administrative process, litigation, and other disputes as parties struggle over what the goals mean, how to apply them, and the extent of their rights to have them applied. How many projects would be ensnared in the net of such changes, and for how long?

We have similar concerns with the directive that the final decision at the end of the NEPA process “shall be made in the best overall public interest.” See proposed 23 CFR Sec. 1420.109. And also of concern are repetitive references to environmental “enhancements” that appear to push expenditures on enhancement features in a project in the direction of being a requirement rather than a State option.

89Further Concerns  
While we have tried today to highlight major concerns with the proposals, we have others. Many, many wording changes have been made in these proposed rules. So that the Committee can more readily appreciate the scope of these changes, we have provided Committee staff with lengthy comparative text documents that enable the reader to see, without embellishment, the wording changes that would be made in the proposed rules.

This, we think, is an important tool, for it allows a reader to go behind our statements that the proposals would result in significant, adverse change and look at the changes directly. We are confident that anyone who undertakes that exercise will see that the extent of proposed changes is very significant.

We also want to be clear that we believe that these rules would impose significant costs, even if hard to estimate precisely. The additional process, data, and analysis requirements in these proposals are major. They cannot be absorbed for free. Yet, as I’m sure Congress knows, the mood in State capitols does not favor increased administrative budgets to enable civil servants to comply with Federal directives. We are being asked to do more with the same, or less. Simply, these are costly rules, and we will either have to give up other activities, or redirect project funds to over-

head in order to comply. And we see an impact on projects. When projects are delayed, costs usually go up, sometimes a lot. So, we expect that, under these rules, we won't be able to do as much with the increased funding that Congress worked so hard to provide in TEA-21. Some of the funding may well have to be redirected to process compliance.

Let me say again that we necessarily can't be specific about how to price the cost of compliance with these proposals. But we will say that we are frustrated to even have to think about it. To achieve streamlining, the proposed rules should have provided positive answers to important questions, not more burdens and questions. Moreover, if questions were to be raised, they should have been questions about the extent to which the proposals would expedite and simplify the process.

Before concluding, we also note that, despite its many changes, the proposed rules (with one minor exception) would not provide for any transition or delay before they take effect. We raise this point with mixed feelings, because we want to be clear that we oppose these rules, period.

Providing a transition period before they take effect will not address our basic concerns. However, even if all our major objections are properly addressed in the final rules, the scope of changes at issue here is such that a transition should be provided.

#### CONCLUSION

We support a thorough planning and environmental review process, but we oppose processes that are unduly complicated and costly, and that would delay the delivery of sorely needed transportation improvements. That is why we oppose these proposed planning and environmental review rules.

Later this month, before the comment period closes, AASHTO and individual States will file hundreds of pages of comments with FHWA and FTA regarding these proposed rules. Senators, if every suggestion made by the States in their comments is accepted by USDOT, we would still have a very thorough Federal process for planning and environmental review of transportation projects, but a more streamlined one. That is what we should be trying to achieve.

We hope that FHWA and FTA, upon review of our comments, AASHTO's comments and others, will make major changes and issue a substantially revised notice of proposed rulemaking that will accommodate our concerns and that we can review before it becomes final.

However, we have made our views clear to USDOT before, and the proposed rules still turned out as they did. Thus, we are far from certain that USDOT will change its views. Accordingly, we respectfully request the assistance of Congress in preventing the promulgation of these counterproductive proposals as final rules.

Thank you again for the opportunity to appear today. We'd be pleased to respond to any questions the Committee may have.

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#### STATEMENT OF GORDON PROCTOR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION

Mr. Chairman, members of the Committee, I am Gordon Proctor, Director of the Ohio Department of Transportation. On behalf of Governor Bob Taft, thank you for this opportunity to address you today regarding these draft rules published by the Federal Highway Administration.

I join my colleagues from the other states and from AASHTO in urging you to order the USDOT to halt this rulemaking and send it back to them for a fundamental revision. We at the State departments of transportation are grateful to Congress for ordering the Federal agencies to streamline the decisionmaking process for transportation projects. As you all well know, the current process is one of excessive overlap, redundancy and delay. Decisions made at one stage of the process are not recognized at the next stage. Decisions made in the transportation planning process are not recognized at the environmental impact analysis stage and decisions made in the environmental impact analysis stage may not be recognized when the project reaches the water-quality permitting stage. As cumbersome and confusing as the current process is, it is preferable to the process outlined in the proposed rulemaking. Instead of streamlining, the new rules create yet new hurdles which will lead to delay, litigation and uncertainty.

As other speakers have said, the new rulemaking attempts streamlining. However, those attempts are more than offset by establishing broad—and very vague—new tests which must be met for transportation projects before those projects can be approved. These new tests far exceed anything currently in law. Ironically, when Congress ordered the USDOT to streamline its current regulations it instead cre-

ated new regulations and new tests for transportation projects to meet. Instead of making the process more efficient, these rules make it more excessive.

Let me give you three examples. In TEA-21 Congress clearly told the USDOT to merge the Major Investment Study (MIS) into the transportation planning process and no longer require the MIS to be a redundant, stand-alone study. However, in the new rules, it appears that the MIS-type study will be required for all urban projects, not just major projects as the current rules require.

Secondly, these proposed regulations greatly expand the potential role for non-elected, unaccountable advocates to establish themselves as decisionmakers in the transportation process. This direction seriously erodes the ability of state, city, county and other local elected officials who participate in the transportation planning process. Currently, the people who are accountable to the electorate play a large role in the transportation planning process. Local elected officials comprise the boards of metropolitan planning organizations. Local elected officials develop city and county zoning plans and economic development strategies. These local aspirations, these local plans, these local decisionmakers all play a large role and help DOTs reach consensus on transportation decisionmaking. I firmly believe that local elected officials are best able to help states reach agreement on which projects and which solutions best serve their area. Under these rules, State and local elected officials can be reduced to just one-more participant—and not the primary decisionmakers—in the transportation process. I do not believe that democracy has failed the transportation process. Those elected by the people and those accountable to the people should be entrusted to lead the transportation planning process. Unaccountable bureaucrats and self-appointed advocates should not override the decisions of local elected officials.

Third, the regulations co-mingle explicit Congressional intent under Title VI with the ambiguous Executive Order for Environmental Justice and creates a new field of litigation for transportation projects that has never before existed. Under the title of Environmental Justice, the new rules seem to create new protected classes which have special standing in the transportation process. These classes are “minority populations” and “low-income populations.” These two new classes are not the same as those specifically referred to in Federal statute but are broader potential groups which will have to be identified on a case-by-case basis in the planning process. We do not have clear definitions on who these groups are and how they are identified. However, State DOTs will have to become census-like agencies who analyze these demographic groups and ensure not only do we not discriminate against them, but there are no unintended consequences of projects which could create “disproportionately high and adverse impacts” to them.

We applaud Title VI and all that it stands for. As Senator Voinovich knows, when he was Mayor of Cleveland and then Ohio’s Governor, Ohio went to great lengths to create opportunity for all protected classes. However, these new rules provide endless fodder for lawsuits by any group which can infer that it has received “disproportionately high and adverse impacts” by either an action taken by a department of transportation or more importantly by an action not taken by a DOT. Any presumed “reduction in benefit” by a DOT could be actionable under this overly broad and vague Environmental Justice requirement. In effect, a decision not to fund a project could be actionable under this regulation.

Also, under these proposed regulations there are no due process provisions for a state, as there are under Title VI. In other words, the USDOT could withhold funding from a State for violation of these expanded provisions without any appeal or review process. These regulations also create a new concept—that is a reduction in benefit—not recognized in either the President’s Executive order nor under Title VI. Clearly, this goes beyond the intent of Congress.

Let me close by pointing out what I think the Federal rule-writers have forgotten. State DOTs do not act in a vacuum. Every project Ohio funds is subject to approval by metropolitan planning organizations, by the city and county in which the project is located, by various State and Federal environmental agencies and ultimately by the Ohio General Assembly and the Governor of Ohio who appropriates our budget. On a daily basis, the Ohio Department of Transportation is involved in consultation with the states local elected officials and the citizenry. These new rules are not needed. They are a solution in search of a problem. This is very unfortunate because Congress clearly identified the problem which does need solved—that is the excessive and overlapping regulations which often stymie the wishes of local citizens for transportation projects to be provided reliably and predictably. Instead of streamlining the Federal process, these rules create new processes which will only further delay decisions and delay projects. I ask you to urge the USDOT to consider our concerns and to reject this proposed rulemaking.

Mr. Chairman, members of this committee, the Federal process for approving transportation projects churns endlessly. No sooner do we adapt to a new Federal rule, then it changes. Ohio just published our new policy for complying with the President's Executive Order on Environmental Justice. Now these new proposed rules change the Federal environmental justice policy. We at the Ohio DOT are now wrestling with the U.S. Army Corps of Engineer's new nationwide permits for wetlands. Those, in turn, triggered new interpretations regarding the Section 401 water quality standards. And we are also awaiting new rules on something called total daily maximum load for storm water runoff, which will also affect our projects in new ways. We at the State departments of transportation must be sensitive and responsive to environmental concerns. I believe we are. However, these new regulations are yet another example of the endlessly changing and increasingly complicated Federal rules which evolve each year. I applaud you for holding this hearing and listening to our concerns. I appreciate your efforts at streamlining. Streamlining is certainly needed. A good way to start is to reject these new proposed regulations.

Thank you again for this opportunity. At the appropriate time as the Chairman wishes, I will be happy to answer any questions.

STATEMENT OF THOMAS R. WARNE, EXECUTIVE DIRECTOR, UTAH DEPARTMENT  
OF TRANSPORTATION

Mr. Chairman and Members of the Committee, my name is Thomas Warne. I am Executive Director of the Utah Department of Transportation and President of the American Association of State Highway and Transportation Officials (AASHTO). I am here today to testify on behalf of AASHTO, and want to thank you for your leadership in holding this oversight hearing to address the U.S. Department of Transportation's proposed rule implementing the provisions of the Transportation Equity Act for the 21st Century (TEA-21).

Mr. Chairman, I want to begin by thanking you for your responsiveness in crafting a reauthorization bill that addressed our concerns about the unnecessary and intolerable delays in getting projects through the planning, environmental and permitting processes and into construction. Earlier this year the U.S. Federal Highway Administration identified 23 recent and pending environmental statutes, regulations and executive orders that have been added to our regulatory burden since TEA-21's enactment. Recognizing the challenges this presents to transportation project delivery, in TEA-21 you provided some useful tools to give the states additional flexibility to streamline the planning and project development process.

It has now been more than 2 years since TEA-21's enactment and we, as you, have been awaiting guidance to implement TEA-21's streamlining provisions. On May 25, 2000, the U.S. Department of Transportation (U.S. DOT) issued its proposed planning and environmental regulations. We are dismayed and disappointed with the results: the proposed rules are completely at odds with the planning and environmental review process reforms Congress intended to be implemented. Rather than reducing delays, costs and unnecessary duplication of effort, the proposed rules do just the opposite. We see complex and burdensome new requirements for data collection, analysis, and reporting as well as new procedural and policy hurdles to be cleared.

Mr. Chairman, the bottom line is that the proposed rules will not fundamentally reform and streamline the planning and project development process as Congress intended; rather, the proposed rules could add years to the process, significantly increase costs, and could cause some projects to simply be abandoned.

We feel so strongly about the problems with this regulation that the AASHTO Board of Directors passed a resolution asking for your intervention and clarification during these hearings, to return the agencies to the original course you had set in TEA-21. We also urged that the regulations be substantially rewritten and put out for a new round of public review and comment.

Let me provide you with some examples of our concerns.

*Major Investment Studies.*—In Section 1308 of TEA-21, the Congress directed the U.S. Secretary of Transportation "to eliminate the major investment study as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analysis required to be undertaken under NEPA. The scope of the applicability of such regulations shall be no broader than the scope of such section." The existing major investment study (MIS) regulations apply only to major investments and regionally significant projects.

However, the proposed rules replace the major investment study (MIS) with an even broader mandate that applies to all projects in metropolitan areas, regardless

of size, scope or cost. This clearly and directly violates the directions of Congress explicitly stated in TEA–21.

Perhaps more significant is the fact that this component of the rule does not treat the fundamental flaw of the MIS as originally conceived and implemented—that is, that the results of even the most rigorous planning studies are rarely given any significant weight in the NEPA process. Therefore, instead of reducing the total amount of time needed to make a decision, the process ends up taking longer and public confidence in the relevance and reliability of planning-level decisions is undermined.

AASHTO believes that the way to make real progress toward curing the defects of the MIS is to provide incentives for the development of an optional process that actually delivers on the promise of the MIS—that is, a process capable of producing planning-level decisions that are consistently accepted as the starting point for NEPA studies.

*Consulting Local Governments.*—In making changes to the transportation project planning process in TEA–21, Congress kept in place the institutional relationships that are currently involved in developing transportation projects. Recognizing the diversity among the states, Congress chose not to disrupt existing relationships with a one-size-fits-all mandate, but rather to let the states decide how best to structure their consultation processes. Congress simply said that states must document their processes, but explicitly required no U.S. DOT review and approval.

In its proposed rule, U.S. DOT made a number of changes that taken together will alter well-established existing institutional relationships and arrangements in the statewide planning process. For example, the proposed rule changes the “consultation” procedures and participants in a way that significantly expands the manner in which states and MPOs must consult with other parties. This becomes especially problematic because the proposed rule gives U.S. DOT the power to review and veto the States’ consultation procedures when making their planning finding called for in § 1410.222(b).

AASHTO recommends that existing definitions or new statutory definitions remain in place.

*Title VI and Environmental Justice.*—AASHTO members strongly support efforts to prevent discrimination and to promote fairness in transportation decisionmaking. Our members recognize the importance of strengthening the public involvement element of the transportation planning process, with particular emphasis on providing opportunities for involvement by low-income groups, minorities, and others that have traditionally been under-represented in the planning process. For this reason, AASHTO members are working on a variety of initiatives to increase opportunities for public participation in the planning process, and will continue to do so regardless of the outcome of the proposed rules.

Unfortunately, AASHTO members have significant reservations about the requirements included in the U.S. DOT’s proposed rule that would weave together Title VI requirements and Executive Order 12898, which guides Federal agencies on Environmental Justice (EJ). This weaving together expands the legal standard for demonstrating compliance with Title VI under which the states and MPOs can only certify Title VI compliance by showing that they comply with the Executive order.

The EJ Executive order extends beyond the well-established concept of non-discrimination, introducing the concept of disproportionate benefits and burdens. Under the proposed rule, states would have to show that the impacts and benefits of the transportation system are distributed proportionally across the entire State or metropolitan area. Unfortunately, it may prove to be virtually impossible to define even the basic concepts of “proportionality,” “benefits,” “burdens,” and “reduction” across large population groups, geographic areas, and time periods in any meaningful way.

We believe that this new proportionality test is conceptually unworkable; would impose enormous new data collection and analysis requirements; and would expose the states and MPOs to major new legal risks.

AASHTO will urge the FHWA and FTA to maintain the existing regulations relating to Title VI compliance, while addressing environmental justice issues through guidance materials. If this recommendation is not followed, AASHTO will recommend that the regulations be revised to establish clear, reasonable, consistent standards for data gathering and analysis. In addition, the regulations should be clarified so that they in no way expand the States’ or MPOs’ legal obligations, or undermine in any way the existing legal protections for States and MPOs.

*Expediting the NEPA Process for Large, Complex Projects.*—There has been considerable discussion about the percentage of all projects that represent the largest and most controversial projects, and the range of time frames for projects requiring an EIS. We appreciate U.S. DOT’s efforts to begin tracking this baseline informa-

tion. However, the fact remains that we can and should do more to reduce the time it takes to deliver projects. This was certainly the clear and unmistakable message that Congress sent in enacting TEA-21.

In Section 1309 of TEA-21, Congress directs the U.S. DOT and other Federal agencies to develop a “coordinated review process” that integrates all of the Federal environmental review requirements for transportation projects. Section 1309(b)(2) requires U.S. DOT and other Federal agencies to “jointly establish time periods for review” or enter into an agreement to establish such time for review with respect to a class of project.”

Unfortunately, U.S. DOT’s proposed rule simply fails to incorporate key elements of the “coordinated review process” mandated in TEA-21. There is no mention of deadlines for submission of agency comments; there is no mention of deadlines for dispute resolution; and no mention of U.S. DOT’s ability to “close the record.”

In addition, the proposed rule imposes new requirements for preparing an EIS. For example, the requirement to consider alternatives to avoid, minimize and mitigate impacts would be expanded to require consideration of enhancements. And equally detailed engineering and environmental analyses would be required of all alternatives. The net result will be to increase the size and complexity of every EIS.

AASHTO recommends that the regulation acknowledge and include the statutorily mandated elements of the coordinated review process, and that changes are made to reduce—not increase—the size and complexity of EISs.

*Expediting the NEPA Process for Small, Non-Controversial Projects.*—The vast majority of Federal-aid projects are uncontroversial and require limited review, usually in the form of a categorical exclusion (CE) or an environmental assessment (EA). Expediting the approval of these projects has attracted wide support, from transportation agencies and public interest groups alike.

There are several new provisions in the NPRM that will expedite the approval of small and uncontroversial projects. These include the use of programmatic approvals and allowing States to obtain U.S. DOT approval of alternative procedures.

However, several new requirements proposed in the rule will not prove helpful. For example, extending the TEA-21 mandated “coordinated review process” for EISs to CEs and EAs will involve a series of new consultation and documentation requirements. We believe that the process is not well suited for CEs and EAs, and more appropriately, should be limited to larger, complex projects that require an EIS.

In addition, there are several new notice and reporting requirements that collectively impose a substantial burden on the use of CEs, further complicating a process that is intended to be the simplest of all procedures for complying with NEPA. These will substantially increase the paperwork burden, given that many states have literally hundreds of CEs approved each year.

Overall, I think it is safe to say that states would prefer the current system remain in place for CEs and EAs rather than what has been proposed by the DOT. AASHTO is recommending that the new requirements be substantially reduced, and that steps be taken to strengthen, not reduce, the streamlining that currently exists.

*Section 4(f) Requirements Regarding Historical Sites.*—In issuing its final rule, we hope that the U.S. DOT does not miss a golden opportunity to reform a process that has been a substantial burden to states—the Section 4(f) review for projects that abut historical properties.

Planning for projects that involve historical sites are regulated under Section 4(f). It has been consistently cited by states as a major source of burdensome, unnecessary paperwork, and it also delays environmental reviews for transportation projects. Often, it adopts an “avoid at all costs” mentality, under which any impact on any resource must be avoided no matter the significance of the resource or the size of the impact. In some cases, this attitude has served not only to slow the process down and increase costs; it stands in the way of making sound, balanced transportation decisions.

Reformation of Section 4(f) is urgently needed and should be a top priority for the Department of Transportation. The proposed rule does invite suggestions for modifications to the program, which we have prepared and will be presenting to U.S. DOT as part of our comments on the proposed rule. AASHTO strongly recommends that the Section 4(f) regulations be comprehensively revised as an integral part of the overall streamlining effort. If necessary, this can begin with incremental improvements to the existing 4(f) regulations. However, a comprehensive, inclusive, high-priority effort aimed at fundamentally reforming the regulations should be initiated soon.

## CONCLUSION

Mr. Chairman, the bottom line is that the result of the proposed rules will be a more burdensome, costly and time-consuming planning and project development process. For example, we learned from the Tucson, Arizona MPO that out of the 300 projects per year they plan and program, no MISs have been done. Under this rule, they would be required to conduct MISs on all three hundred.

Similarly, neither Montana DOT nor its three MPOs have ever prepared an MIS. Under the proposed rules, 3 years would be added to the planning and project development process, costs would increase by \$5 million—\$7 million, and 5 additional staff would be needed.

Based on FHWA's 1998 data on environmental impact statements, 84 percent required from 4 to 10 years to complete the process. Completing sign off on Corps of Engineers wetlands permits, Section 4(f) historic review and endangered species review takes years longer. We believe these regulations would only worsen that record.

Mr. Chairman, this is just not streamlining. Therefore, we believe that the proposed rules need to be substantially modified and recommend, therefore, that modified rules be reissued for further public review and comment.

AASHTO stands ready to work with this Committee and the Administration to implement a common sense approach to reform of the current project delivery process. At the same time, we pledge to maintain our commitment to meeting transportation mobility needs while protecting the natural environment and the social fabric of our communities.

Thank you for the opportunity to testify. I am prepared to answer any questions you or the Members of this Committee may have.

## POLICY RESOLUTION PR-10-00

## TITLE: REGARDING THE PROPOSED STATEWIDE AND METROPOLITAN PLANNING AND NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS

WHEREAS, on May 25, 2000, the U.S. Department of Transportation issued a notice of proposed rulemaking to revise regulations governing the development of metropolitan and statewide transportation plans and improvement programs (proposed 23 CFR 1410); as well as a rulemaking to revise the implementing regulation for the National Environmental Policy Act of 1969 (NEPA) and related statutes with respect to projects funded or approved by FHWA and FTA (proposed 23 CFR 1420 and 1430); and

WHEREAS, States agree that the planning and environmental review process for transportation projects should include ample public participation and careful review of impacts and issues, and further agree that present practices already go beyond this standard; and

WHEREAS, these proposed regulations would significantly modify and disrupt the statewide and metropolitan planning process and the project development process for transportation and safety projects; and

WHEREAS, the Notices of Proposed Rulemaking state that no additional costs would be incurred due to these proposed regulations but, in fact, these proposed regulations will significantly increase both the time and expense of delivering transportation projects at the Federal, State and local agency levels; and

WHEREAS, the clear intent of Congress as illustrated by Section 1309 (Environmental Streamlining) of the Transportation Equity Act for the 21st Century (TEA-21) was to reduce the time it takes to conduct environmental reviews, but under these proposed regulations, the process will become significantly more complicated and time consuming; and

WHEREAS, in the treatment of many critical issues, particularly the replacement of major investment studies, local consultation requirements, and environmental justice, the proposed regulations exceed or contradict statutory requirements; and

WHEREAS, several of the anticipated consequences of implementing these proposed regulations include:

- increased project review requirements,
- erosion of authority of states and metropolitan planning organizations,
- new unfunded mandates to collect and analyze data, and
- significant risk of litigation which is likely to disrupt program delivery; and

WHEREAS, AASHTO strongly supports sound participative planning and full compliance with the letter and spirit of the environmental laws, but rushing to implement these proposed regulations fraught with additional requirements that both obscure and complicate the planning and NEPA processes will result in the unneces-

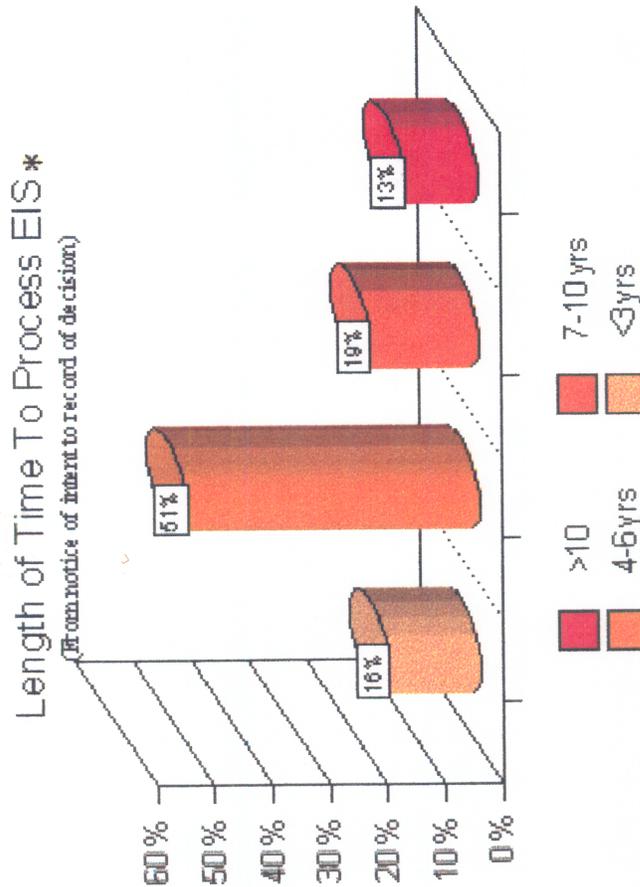
sary delay of transportation improvements that would otherwise improve transportation system safety and efficiency for the traveling public; and

WHEREAS, AASHTO stands ready to work with Congress, Federal agencies, and other appropriate groups to develop improved regulations that will efficiently deliver important transportation projects and services in an environmentally sound manner while providing for important communications with local officials and interested citizens.

NOW, THEREFORE, BE IT RESOLVED that AASHTO requests that (1) work on these proposed regulations be suspended; (2) the relevant committees of Congress hold oversight hearings; and (3) USDOT comprehensively revise the proposed planning and environmental regulations and then issue a revised notice of proposed rulemaking, before proceeding with a final rule; and

BE IT FURTHER RESOLVED, that Congress hold these hearings for the purpose of reviewing the content and direction of these proposed regulations and providing additional guidance to the responsible Federal agencies charged with implementing these regulations; and

BE IT FURTHER RESOLVED, that any final rules in the areas of statewide and metropolitan planning and environmental review must streamline, and not complicate or delay, the process of delivering transportation and safety projects.



\*Based on 37 projects for which FHWA signed a record of decision in 1998.

Source; U.S Federal Highway Administration

RESPONSES BY THOMAS R. WARNE TO ADDITIONAL QUESTIONS FROM  
SENATOR CHAFEE

*Question 1.* If timely permitting is your critical issue for environmental streamlining success, then how do you ensure that the environmental mandates required by Congress, which often require time to analyze and understand the impacts, are not compromised?

Response. AASHTO believes that environmental streamlining can be accomplished in a manner that will not compromise Congressional environmental mandates. We believe that the best way to ensure both thorough and complete analysis and understanding of impacts and avoidance, minimization and mitigation opportunities is for the studies necessary for permitting to be done as part of and simultaneously with the National Environmental policy Act (NEPA) studies for transportation projects. If the appropriate Federal and State environmental resource agency staff participate as part of the NEPA process, then their issues and concerns can be raised early in the process, when there is time to ensure that the issues can be studied and understood in detail. Too often what happens today is that these issues are not raised until after decisions have been made and there is less flexibility or time to deal with the issues.

The key to environmental streamlining is that all environmental resource agencies are involved early, raise issues and concerns early, and that these issues and concerns are dealt with and resolved when there is time to ensure they can be dealt with effectively. Too often today, because there are not requirements for early participation and early identification and resolution of issues, environmental resource agencies wait until the subsequent permitting processes to raise issues or concerns, and the effect is to delay the process and increase the likelihood of conflict. The effect can be that there is less environmental protection in the end than there would have been with earlier participation.

In those states where environmental streamlining agreements have been implemented and resource agencies have agreed to early participation and early identification and resolution of issues, the environmental mandates required by Congress have been more thoroughly analyzed and more thoroughly understood before transportation decisions have been made. Environmental resource agencies have also been more involved in the actual transportation decision making process. The net effect in these cases has been that environmental streamlining has worked to increase environmental protection, rather than compromising it.

In the enclosed publication AASHTO has documented examples of successful environmental streamlining practices. These case studies are from states that were identified in a national competition organized and sponsored by AASHTO to recognize excellence in environmental streamlining practices. These case studies demonstrate that environmental streamlining can be successful without compromising Congressional mandates.

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STATEMENT OF TIM STOWE, VICE PRESIDENT, TRANSPORTATION AND PLANNING,  
ANDERSON & ASSOCIATES, INC.

Good afternoon Mr. Chairman and members of the committee, my name is Tim Stowe, I am representing the American Consulting Engineers Council and we are here to ask for changes to the proposed regulations.

I am Vice President of Transportation and Planning for Anderson and Associates, a consulting firm in Blacksburg, VA. I presently serve as chair of the Transportation Committee for the American Consulting Engineers Council. I am pleased to have the opportunity to address you on behalf of ACEC, the largest and oldest organization representing engineering firms. The American Consulting Engineers Council (ACEC) is the largest national organization of engineers engaged in the independent practice of consulting engineering. ACEC has more than 5,700 member firms, employing nearly 250,000 engineers, land surveyors, scientists and technicians. Together they design over \$250 billion in construction projects annually. More than 75 percent of these firms are small businesses, employing fewer than 30 people each.

ACEC's involvement in the areas covered by the proposed regulations is not new. ACEC played an important role in the enactment of TEA-21 where our Transportation Committee was a major participant in the formulation of provisions in the legislation relating to simplification of planning requirements, and the streamlining of the NEPA process as well as environmental permitting. Working as professionals on behalf of our clients, our member firms experience first hand the compelling need to reduce, and hopefully eliminate duplicative efforts, overly complicated and cumbersome processes, and inordinate delays that have become obstacles to the timely

delivery of transportation projects. ACEC has frequently testified on these matters before the appropriate congressional subcommittees of both the Senate and the House.

The ACEC Transportation Committee has reviewed and analyzed the proposed regulations, and in particular, evaluated them in light of what Congress had intended. Regrettably, we can only conclude that these regulations are a missed opportunity.

TEA-21 provided a unique opportunity to accelerate the existing planning process, streamline environmental approvals, and ensure the continued high quality of America's transportation system all the while fulfilling the intent of Congress that protection of the environment not be diminished or compromised in any way. Regrettably, and much to our dismay, the proposed regulations, unless drastically revised, squander the unique opportunity of TEA-21 to streamline and simplify the planning and environmental processes. The proposed regulations fail, in our view, to follow the clear direction set forth by Congress and in fact, steer the process away from streamlining and simplifying.

The proposed regulations not only miss the opportunity to address the general intent of environmental streamlining, they also fail to address very specific provisions in TEA-21 relating to time limitations, concurrent reviews, and dispute resolution. While the narrative accompanying the regulations discusses environmental streamlining, the regulations themselves are virtually silent on this issue. It is difficult to understand how the proposed regulation could fail to support and amplify the intent of, and the specific provisions of Section 1309, and instead move further away from achieving the goal of streamlining the environmental review process.

The attempt to establish a relevant linkage between the planning process and the NEPA environmental review and project development process, while laudable, falls way short in many respects. The application of a mandatory MIS-type effort in metropolitan areas is completely contrary to TEA-21. Furthermore, the failure to provide any assurance that if project level environmental work (such as the MIS-type study and the preliminary purpose and need statement) is carried out in the planning phase that it will carry any weight and avoid re-visiting in the NEPA process is glaring.

Mr. Chairman, ACEC has been and continues to be, willing to work with your committee and with Federal Highway Administration officials in developing the kind of regulations envisioned in TEA-21 and desired by the citizens of this country. Regulations that will allow needed transportation projects, vital to our economy's continued growth, to move forward expeditiously and economically.

Mr. Chairman, I think it is important that I make one other point before ending. ACEC is asking for changes to the proposed regulations because, we feel that it is the right thing for the country. By promoting concurrent environmental approvals, we have chosen to emphasize broad societal interest over individual corporate gain.

ACEC supports the efforts of both the Federal Highways Administration and this Committee to promote environmental streamlining, but we do not feel that these regulations, as written, will accomplish the goals set out in TEA-21. We urge the Agency to stop the rule making process and to amend their proposal so that the goals of TEA-21 achieved. We stand ready to work with Committee staff and all interested stakeholders to make sure that happens.

At the appropriate time, I would be happy to answer any questions you may have.

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STATEMENT OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL ASSOCIATION OF DEVELOPMENT ORGANIZATIONS ON HIGHWAY PLANNING REGULATIONS

This statement is being submitted on behalf of the National Association of Counties (NACo) and the National Association of Development Organizations (NADO) in support of the proposed rulemaking issued by the Federal Highway Administration that implements changes in the surface transportation law allowing local officials in non-metropolitan or rural areas greater authority in the statewide planning. The proposed rule reflects accurately the change in the law included in TEA-21 and Congressional intent to provide more authority and enhanced consultation for non-metropolitan local officials to participate in the formulation of the Statewide Transportation Improvement Program (STIP). The proposed rule also closes the gap between urban and rural local officials in regard to participation in the planning process.

Two years ago when Congress passed the TEA-21 legislation, a key change in the law was a provision allowing local officials in non-metropolitan or rural areas to be given more authority in deciding how TEA-21 highway funds were spent. Our associations, along with other local government groups, worked very hard to include this

change in the law. We believe that members of the Environment and Public Works Committee understand our concerns. In fact, the rural planning provision included in the TEA-21 bill passed by the Senate was substantially stronger than what was agreed to in conference.

The impetus for this change was a feeling expressed by rural local officials that some states, specifically the state departments of transportation/highways, were ignoring them or not providing adequate avenues for input in the planning process that determined how federal highway funds were distributed within a state. State bureaucracies that shutout local officials, particularly elected officials, were not getting the full picture of the transportation needs in a state. A second reason was that urban local officials had been granted substantial authority in the planning process in ISTEA and that the gap needed to be closed between rural and urban officials. There is no rationale, for instance, why rural elected local officials should have less of a say over how federal funds should be spend or programmed than their urban counterparts.

We believe that requiring a documented process for consultation as required by the statute is essential and support the language in this rulemaking. It is particularly vital in the development of the STIP. Without opportunities for input, local nonmetropolitan officials are totally at the mercy of state transportation officials in regard to the selection of projects for inclusion in the STIP. Requiring that the process be developed cooperatively is key. Local officials are very interested in participating with the state in identifying and implementing a process that will work for both parties. A process developed only by the state is not likely to meet the requirements of TEA-21 nor will it meet the needs of local governments. By requiring cooperation a level playing field is created during the decision making process. The likelihood of successful outcomes increases through consultation.

Both NACo and NADO are pleased that the proposed rulemaking retains state flexibility. While it does require each state to have a documented process for consultation with local officials that is to be developed cooperatively with local officials, there is no one process identified that each state must adopt. Local officials have always been clear that they do not want a "one-size-fits-all" solution. They recognize that a process that works well in one state may not work in another. Finally, while the rulemaking does not allow the FHWA or the FTA to review or approve the process in each state, we fully agree that local official participation must be considered when certifying the STIP. If any state fails to follow the law regarding participation by nonmetropolitan local officials, local officials must have the ability to raise this issue with the FHWA or the FTA and ask that the STIP not be approved.

Thank you for the allowing NACo and NADO to submit this statement.

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#### STATEMENT OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS

Mr. Chairman and Members of the Committee: The American Society of Civil Engineers (ASCE) is pleased to offer this statement for the record on the notice of proposed rulemaking by the Department of Transportation (DOT) regarding changes in the National Environmental Policy Act (NEPA) procedures as mandated by the Transportation Equity Act for the 21st Century (TEA-21).<sup>1</sup>

##### I. ASCE INTEREST AND CONCLUSIONS

ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 125,000 civil engineers 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 Service rules.

ASCE opposes the NEPA regulations as they were proposed. We believe the proposed regulations are faulty because (1) they fail, at a minimum, to establish firm deadlines for the completion of the federal portion of the transportation streamlining process and (2) they open the door for pilot projects in contravention of the intent of Congress. We urge the Committee to conduct a vigorous oversight of the Department's NEPA streamlining process and we will ask the Department to revise the proposed regulations accordingly.

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<sup>1</sup>NEPA and Related Procedures for Transportation Decisionmaking, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites, 65 Fed. Reg. 33,960 (May 25, 2000) (to be codified at 23 C.F.R. parts 771, 1420 and 1430 and 49 C.F.R. parts 622-623).

## II. STATUTORY BACKGROUND

Congress enacted the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, June 9, 1998, 112 Stat. 107, to authorize funds for federal-aid highways, highway safety programs, and transit programs. The legislation provides \$218 billion for highway construction and maintenance and other surface transportation projects through fiscal year 2003. The bulk of the funding goes for highway projects (\$162 billion) and transit projects (\$36 billion).

Concerned about the frequently lengthy project-delivery process for federal-aid highways, Congress added section 1309 to the Act.<sup>2</sup> Section 1309 was necessary to remove the bottlenecks in the environmental review process. As a Senate supporter explained the problem:

Mr. President, another way to describe this amendment, which deals with the transportation and environmental review process that is central to getting these projects on line and dealing with our transportation issues, is the "do-it-right-once" amendment. What we have in this country today is essentially a disjointed process for doing transportation and environmental reviews. In effect, you have one track going down the road trying to address the various requirements essential to OK'ing a project from the transportation side. You then have a separate effort going forward to deal with environmental reviews. Instead of the two efforts being combined at every step of the process, time and money is wasted as these separate undertakings go forward. So what you have is an extraordinary amount of duplication. You have duplication as it relates to the environmental side and as it relates to the transportation side, and you waste an extraordinary amount of time as it relates to getting these projects actually constructed.

144 CONG. REC. S1391 (daily ed. Mar. 5, 1998) (statement of Sen. Wyden).

The amendment created new requirements for the Department of Transportation (DOT) to implement "environmental streamlining" in order to accelerate the planning, design and construction process for federal-aid highways by means of a "coordinated environmental review process." Pub. L. 105-178, 112 Stat. at 232 (codified at 23 U.S.C.A. 109 note (West 2000)).

A key provision of section 1309 called for the DOT to work with federal, state and local agencies in unison to establish clear schedules for completing the environmental review process. The section states that "[t]he coordinated environmental review process for each project shall ensure that, whenever practicable (as specified in this section), all environmental reviews, analyses, opinions, and any permits, licenses, or approvals that must be issued or made by any Federal agency for the project concerned shall be conducted concurrently and completed within a cooperatively determined time period. *Id.* (emphasis added).

Although the Act itself does not establish deadlines to complete the NEPA review process, TEA-21 does require the Department to establish a mandatory schedule for completing the federal portion of the environmental review and strongly encourages state and local agencies to establish some sort of mutually agreeable timetable for each federal-aid project subject to the provisions of section 1309.

The Act requires the DOT to "identify all potential Federal agencies that \* \* \* have jurisdiction by law over environmental-related issues that may be affected by the project and the analysis of which would be part of any environmental document required by the National Environmental Policy Act of 1969 \* \* \*." *Id.*

At the same time, the DOT and the relevant federal agencies must "jointly develop and establish time periods for review for \* \* \* all Federal agency comments with respect to any environmental review documents required by" NEPA as well as every other federal agency environmental analysis, review, opinion, and decision on any permits, licenses, and approvals required for the project. It is essential that "each such Federal agency[] review shall be undertaken and completed within [the] established time periods for review." *Id.* at 233.

The state and local agencies also may play a role in the streamlining of the projects, albeit their participation is entirely voluntary. Regarding the states, the language of the Act is permissive:

Participation of State Agencies.—For any project eligible for assistance under chapter 1 of title 23, United States Code, a State by operation of State law, may require that all State agencies that have jurisdiction by State or Federal law

<sup>2</sup>The environmental review process involves as many as 30 federal, state and local highway and environmental agencies and requires 2 to 8 years to complete on average. U.S. General Accounting Office, HIGHWAY PLANNING: AGENCIES ARE ATTEMPTING TO EXPEDITE ENVIRONMENTAL REVIEWS BUT BARRIERS REMAIN (1994 WL 836265).

over environmental-related issues that may be affected by the project, or that are required to issue any environmental-related reviews, analyses, opinions, or determinations on issuing any permits, licenses, or approvals for the project, be subject to the coordinated environmental review process established under this section unless the Secretary determines that a State's participation would not be in the public interest. For a State to require State agencies to participate in the review process, all affected agencies of the State shall be subject to the review process.

*Id.* At 234 (emphases added).

Thus the statute contemplates a mandatory federal system of coordinated environmental reviews coupled with compulsory deadlines for completing the NEPA process among the federal agencies involved in highway and transit project approvals.

Finally, the House initially considered a provision in TEA-21 that would have required the DOT to establish a state environmental review pilot demonstration program. Under the original bill language, the DOT would have been required to delegate to at least eight states "all of the responsibilities for conducting the federal environmental review process required by the National Environmental Policy Act of 1969 in the manner required if the projects were undertaken by" the Department. See 144 CONG. REC. H1976 (daily ed. Apr. 1, 1998).

This language was removed from the final legislation. See 144 CONG. REC. H10, 502 (daily ed. Oct. 10, 1998) (statement of Rep. Shuster). Since there is no discussion in the legislative record on the reasons for the change, all we know for sure is that TEA-21 contains no provisions requiring or authorizing pilot projects at the state or federal level for the streamlining of the NEPA process.

### III. THE PROPOSED REGULATION

On May 25, 2000, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) jointly proposed regulations to implement, among other things, the provisions of section 1309, 65 Fed. Reg. 33, 960 (2000) (NEPA and Related Procedures for transportation Decisionmaking, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites).

If adopted, the regulation would add new section 1420.203 to title 23 of the Code of Federal Regulations to fulfill the environmental streamlining provisions of TEA-21. In largely hortatory language, the key provision of the proposed new section states:

Sec. 1420.203 Environmental streamlining.

(a) For highway and mass transit projects requiring an environmental impact statement, an environmental assessment, or an environmental reviews analysis, opinion, or environmental permit, license, or approval by operation of Federal law, as lead Federal agency, the DOT agency, in cooperation with the applicant, shall perform the following:

(1) Consult with the applicant regarding the issues involved, the likely Federal involvement, and project timing.

(2) Early in the NEPA process, contact Federal agencies likely to be involved in the proposed action to verify the nature of their involvement and to discuss issues, methodologies, information requirements, time frames and constraints associated with their involvement.

(3) Identify and use the appropriate means listed in 40 CFR 1500. 4and 1500. 5 for reducing paperwork and reducing delay.

(4) Document the results of such consultation and distribute to the appropriate Federal agencies for their concurrence, identifying at a minimum the following:

(i) Federal reviews and approvals needed for the action,

(ii) Those issues to be addressed in the NEPA process and those that need no further evaluation,

(iii) Methodologies to be employed in the conduct of the NEPA process,

(iv) Proposed agency and public involvement processes, and

(v) A process schedule.

(5) Identify, during the course of completing the NEPA process, points of interagency disagreement causing delay and immediately take informal measures to resolve or reduce delay. If these measures are not successful in a reasonable time, the DOT agency shall initiate a dispute resolution process pursuant to section 1309 of the TEA-21.

(b) A State may request that all State agencies with environmental review or approval responsibilities be included in the coordinated environmental review process and, with the consent of the DOT agency, establish an appropriate

means to assure that Federal and State environmental reviews and approvals are fully coordinated.

(c) At the request of the applicant, the coordinated environmental review process need not be applied to an action not requiring an environmental impact statement.

(d) In accordance with the CEQ regulations on reducing paperwork (40 CFR 1500.4), NEPA documents prepared by DOT agencies need not devote paper to impact areas and issues that are not implicated in the proposed action and need not make explicit findings on such issues.

*Id.* at 33, 980.

Although the proposed regulation describes a seemingly straightforward approach, the preamble to the proposal clouds the picture.

We are proposing to implement the environmental streamlining requirements largely outside of the regulatory process through \* \* \* memoranda of understanding with Federal or State agencies \* \* \* dispute resolution processes \* \* \* streamlining pilot efforts \* \* \* authorization of the DOT to approve State DOT or transit agency requests to reimburse Federal agencies for expenses associated with meeting expedited time frames and \* \* \* performance measures to evaluate and measure [the] success [of] \* \* \* environmental streamlining.

*Id.* At 33, 967–33, 968 (emphases added).

#### IV. SUGGESTED REVISIONS

##### A. *The Regulations Must Establish Firm Deadlines for the Completion of the Environmental Review Process by Federal Agencies*

The proposed regulation eschews any directive for deadlines. It is cast in permissive language. It speaks in terms of coordinated federal efforts at “consulting,” “identifying,” “contacting,” and “documenting” federal activities during the NEPA review process. To be sure, section 1420.203(a)(4)(v) requires the FHWA and the FTA to “distribute \* \* \* a process schedule” following consultations, but such a schedule would be required on a case-by-case basis and would not definitively address the long-term problem of lengthy and duplicative environmental reviews.

The three classes of actions described in the proposed regulation suggest the obvious solution to the scheduling problem. Class I projects (those requiring a full environmental impact statement), should have a 270-day deadline, with one or two 90-day extensions, thus ensuring that every major project’s NEPA process could be completed in nine to fifteen months.

Class II projects (those allowing for a categorical exclusion from the NEPA process because they do not involve a significant environmental impact) should have a 30- or 60-day deadline, with no extensions. Class III projects (those requiring a limited environmental assessment) might qualify for a 180-day deadline, with a single 90-day extension possible in unusual cases. A waiver process should be included in the regulation for unusual or extremely difficult Class I and Class III projects.

We are concerned that the Department and the other agencies—having received DOT’s blessing in advance to go “outside of the regulatory process”—could well cripple the statutory deadline requirement under the unofficial memorandum of understanding (MOU) signed by the DOT, the Department of Interior, the Department of Commerce, the Department of Agriculture, the Army Corps of Engineers, the Environmental Protection Agency and the Advisory Council for Historic Preservation last year. It is to be the “framework for \* \* \* streamlining the environmental process \* \* \*” 65 Fed. Reg. at 33, 967.

The MOU seeks a coordinated environmental review process to expedite federal highway and transit projects. The seven agencies have agreed to seek solutions to the delays inherent in the current project planning process, including efforts to “[s]upport and encourage [agency] field offices to explore flexible streamlining opportunities on their own and with state transportation and environmental partners \* \* \*.” DOT, Environmental Streamlining National Memorandum of Understanding 1, <<http://www/fhwa.dot.gov/environment/nmou4.htm>> (accessed 6/20/00) >. One of the “opportunities” to be encouraged is a series of mini-MOUs to establish “concurrent review within cooperatively determined time frames.” *Id.*

The national MOU does not require project review deadlines for individual highway or transit projects or explain how the federal signatories are to achieve the TEA–21 requirement to “jointly develop and establish time periods for review.” More importantly, the MOU is not in any sense law that limits the discretion of the DOT or other agencies.

By and large, we are concerned that the DOT and the other agencies may revert to the softer, non-binding language of the national MOU in the absence of a firm

regulatory regime for the setting of deadlines. We believe that the DOT must revise the proposed regulations to allow a system of fixed deadlines for the completion of environmental reviews by the federal agencies involved in highway and transit project planning. The DOT must set flexible environmental review deadlines in the regulation for each class of project toward which federal agencies must aim.

Of course our idea is not to lock the DOT or the other agencies into prescriptive deadlines in every instance. We grant that they certainly need to remain somewhat flexible during the NEPA process to allow for unforeseen circumstances. But government agencies, being run by human beings, can lose focus without fixed goals, and we predict further delays during NEPA if the government does not place itself on some sort of predictable regulatory timetable.

If doubt remains on the need for firm deadlines, the history of section 1309 makes it clear that Congress wanted and expected the Department to establish explicit schedules in order to expedite the necessary federal environmental reviews under NEPA.<sup>3</sup>

The fundamental goals of the environmental streamlining provisions are to establish an integrated review and permitting process that identifies key decision points and potential conflicts as early as possible; integrates the NEPA process as early as possible; encourages full and early participation by all relevant agencies that must review a highway construction project or issue a permit, license, approval or opinion relating to the project; and establishes coordinated time schedules for agencies to act on a project.

H.R. CONF. REP. NO. 105-550, printed in 144 CONG. REC. H3910-3911 (daily ed. May 22, 1998) (emphasis added).

The DOT ought to comply with this clear statutory directive and ensure that fair, flexible and rational deadlines are contained in the final Department regulation.

#### *B. The DOT Should Avoid Any Use of Streamlining Pilot Projects*

The proposed regulation appears to reopen the question of pilot projects. See 65 Fed. Reg. 33, 967-33, 968, *supra* (preamble contemplating streamlining pilot efforts). Nevertheless, the DOT cautions that:

[W]e are not proposing to establish a formal process for pilots at this time, through regulation or any other means. Instead, we will participate in pilot efforts on a case-by-case basis. These pilot efforts might be focused on a single project or on improving a particular process, but would not include the delegation of Federal NEPA responsibilities to States that was considered but not enacted in the TEA-21.

*Id.* at 33, 968 (emphasis added).

As Congress has foreclosed the delegation of federal NEPA review pilot projects to the states, we presume from the preamble discussion that the FHWA and the FTA intend to use Federal pilot projects in the streamlining of federal NEPA reviews. We encourage the Committee to ensure that the Department not carry out any pilot projects at all.

ASCE believes that pilot projects would unduly burden the implementation of section 1309's mandate to complete the federal NEPA review process for TEA-21 projects in a timely manner. Additionally, they simply are not authorized by TEA-21.

Pilot projects on ways to expedite federal NEPA reviews are pointless. The NEPA process itself, which is "essentially procedural," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* 435 U.S. 519, 558 (1978), should be well known to FHWA and FTA after more than 30 years. Experience ought to suggest numerous ways to reduce the time and effort required to complete a NEPA review. Indeed, the Department already has concluded on the basis of its experience that it may safely eliminate from the environmental impact statement documentation of impacts that are unlikely to occur.

Nor does the Department explain what help the data from pilot projects will be in the streamlining of TEA-21 projects. It may be that the DOT is concerned that, absent information gained from pilot studies, the federal government cannot be sure that an expedited NEPA process would provide the requisite protection to the environment. But that assessment seems to be contradicted by rule's proposed section 1420.35, which specifically authorizes the use of supplemental environmental impact statements.

<sup>3</sup> As we have noted, TEA-21 does not impose NEPA review deadline requirements on the state or local agencies.

Of course the Department would be protected from an incomplete EIS in any case. The NEPA process is not discrete; it allows for the gathering of data even after the environmental impact statement is written.

Supplemental environmental impact statements are not expressly addressed in NEPA, but such a duty is supported by NEPA's approach to environmental protection and its manifest concern with preventing uninformed action as well as by regulations of the Council on Environmental Quality and the Army Corps of Engineers, both of which make plain that, times, supplemental data are required. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

In conclusion, ASCE believes the Department must revise the streamlining regulation to include fixed deadlines for all classes of highway and transit projects and to preclude the use of Federal pilot projects to study the NEPA streamlining process.

Mr. Chairman, that concludes our statement. Thank you for your attention to our concerns. If you or Members of the Committee have any questions, please contact Michael Charles of our Washington Office at (202) 789-2200 or by e-mail at [mcharles@asce.org](mailto:mcharles@asce.org)

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#### ASSOCIATION OF METROPOLITAN PLANNING ORGANIZATIONS (AMPO)

##### OVERALL COMMENTS

- AMPO fully supports the intentions behind the NPRM's on planning and environment, but believes the NPRM's should not be implemented without extensive re-writing.
- AMPO believes that implementation of the NPRM's without amendments aimed at providing more specific guidance will:
  - Cause confusion, delay, extra expense and potential for litigation on project and plan development
  - Lead to inconsistent application of regulations across different US DOT regions
  - Significantly increase MPO costs
  - Undermine achievement of some of the objectives of the NPRM's
- AMPO is also concerned that in two areas, cooperative revenue forecasting and the creation of annual listings of obligated projects, MPO's are given responsibilities without necessarily having the information required to carry out these responsibilities. The NPRM on planning needs to be modified to provide mechanisms that ensure that MPO's get the information they need to carry out their responsibilities in these areas.

##### ENVIRONMENTAL JUSTICE

- AMPO supports the proposal to clarify and strengthen requirements for compliance with the President's Executive Order on Environmental Justice and Title VI of the Civil Rights Act.
- The NPRM's do not give guidance about how environmental justice requirements may be met, nor do they set performance criteria or provide best practice case studies. This is particularly problematic since MPO actions could be subject to legal challenge under Title VI, notwithstanding the wording of the NPRM's.
- AMPO would welcome specific environmental justice requirements with regard to data collection and analysis, and public outreach. Without any limit on how much data and research is enough to satisfy compliance, research and analysis could be endless.
- AMPO believes the content of long range plans, as opposed to the process of creating such plans, should be explicitly exempt from legal challenges on environmental justice grounds, because the demography of areas will change dramatically over the life of the plans.
- The Executive Order on Environmental Justice, Title VI of the Civil Rights Act, and ADA each provide different types of protection and rights to different groups. The NPRM's, by intertwining these three rules and combining compliance requirements for all three, will create confusion for agencies trying to comply. Each of these three sets of issues needs to be separately addressed in the NPRM's.
- The NPRM makes use of terms, such as "reduction in benefits", that are not used in Title VI or the Executive Order, and could give rise to new rights not afforded by statute. This new terminology may be subject to differing interpretations,

and could increase agencies' exposure to litigation. The NPRM should adhere to existing language.

#### MERGING OF MIS AND NEPA PROCESSES

- In eliminating the requirement for separate Major Investment Studies (MIS), the NPRM's provide no specifications of the requirements for planning studies to be recognized in the NEPA process.
- Without amendment, the NPRM's are likely to promote two kinds of outcomes:
  - duplication of effort and delay, where projects go through a thorough planning process, which then has to be duplicated because it does not meet unknown and unspecified NEPA requirements, and,
  - limited public participation and consideration of alternatives, because planning activities are curtailed in order to minimize exposure to duplication of effort at the NEPA stage.
- The NPRM could be interpreted as requiring MIS-type analyses on nearly all projects in metropolitan areas; mandatory MIS-type analyses should only be required for specified categories of project, which can be defined by cost, length, physical characteristics, and social or environmental impact.
- The planning stage is typically where multi-modal options and the most creative alternatives are developed, and where the public can be most easily engaged in the process; by the NEPA stage, there is typically significant commitment to a narrow range of options. But the NPRM's will tend to discourage expenditures on planning, because there is no way of knowing whether money and time spent on planning will have to be duplicated at the NEPA stage. The NPRM's should include incentives that will encourage MPO's and project sponsors to undertake the type of planning studies called for in the NPRM.
- The NPRM should clarify the role of MPO's in the NEPA process: there is no reference to MPO's as agencies that can enter an agreement regarding the NEPA stage of a project.

#### COOPERATIVE REVENUE FORECASTING

- Because funding available in future years is a key component of MPO's' financially constrained long range plans, TEA-21 requires State DOT's, transit agencies and MPO's to "cooperatively develop estimates of funds that are reasonably expected to be available". The NPRM's weaken this requirement by requiring the parties to agree only on the procedures to be used to develop revenue estimates.
- A survey of 56 MPO's in July 2000 indicated that:
  - 40 percent did not have cooperatively developed revenue forecasts
  - 70 percent did not have a document that explained how their share of future federal funding was calculated
  - nearly 40 percent did not have enough information about future federal funding figures used in long range plans to explain them to the public
  - 30 percent said future federal funding had been a significant issue in public discussion of long range plans
- Under these circumstances, it is important for the integrity of the planning process, and for high public confidence in the credibility of long range plans, that the NPRM on planning be strengthened by adding processes to ensure that all MPO's have cooperatively developed revenue forecasts that are documented and can be readily explained to the public.

#### ANNUAL LISTING OF OBLIGATED PROJECTS

- AMPO strongly supports the TEA-21 requirement that MPO's, as an important part of their feedback to the public, produce annual listings of projects for which federal funds have been obligated in the previous year.
  - MPO's typically do not have the project status information necessary to provide the listings. State DOT's and transit agencies, the agencies that have access to the information, often do not provide it to MPO's.
  - A provision should be added to the NPRM to ensure that MPO's get the information they need to fulfill their responsibilities in this area.
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U.S. NUCLEAR REGULATORY COMMISSION,  
Washington, DC, March 2, 2000.

Hon. ROBERT SMITH, *Chairman,*  
*Committee on Environment and Public Works,*  
*Washington, DC.*

DEAR MR. CHAIRMAN: The following comments are submitted for the record, for Senate Committee on Environment and Public Works Full committee hearing. DOT regulations on Environmental Streamlining, September 12, 2000.

Defenders of Wildlife is a national nonprofit conservation organization with over 400,000 members, committed to preserving the integrity and diversity of natural ecosystems, preventing the decline of native species and restoration of threatened habitats and wildlife populations. Recently, Defenders launched a new campaign to address the conflicts between transportation and wildlife. Our objective is to reduce the impact of surface transportation on wildlife and habitat, and to incorporate conservation into transportation planning to avoid or minimize the effects on wildlife and habitat.

We are submitting the following views for the hearing record because neither conservation groups or Federal resource agencies testified at the hearings, and we believe it is important that this perspective be articulated in this context. If additional hearings are held on this matter, we would welcome the opportunity to testify.

1. The NEPA review process for transportation projects has sometimes been subject to delays, elevated costs and litigation. At the same time, NEPA is the foundation for environmental protection in this country, and is largely credited for the level of environmental quality we enjoy today. The rule in question attempts to codify measures to reduce unnecessary costs and delays without diluting the strength of NEPA. We fully concur with the intent of the rule, to the extent that project times can be reduced without jeopardizing the health of our environment.

2. We understand the concerns of other stakeholders and agree that the NPRM does lack a certain degree of clarity. However, we believe this was in response to constituents' demand for flexibility and aversion for "one-size-fits-all" regulations. Such ambiguity can and should be removed via the public comment and response procedure, as well as individual State customization of the rules.

3. We trust that the DOT will heed our comments and those of other interested parties as they revisit the NPRM, following the close of the comment period on September 23. Finally, we ask that you let the system of public participation take its course before you consider intervention.

As written, we support three general, but key elements of environmental streamlining:

#### 1. EARLY INVOLVEMENT

*§ 1420.203(2) "Early in the NEPA process, contact Federal agencies likely to be involved in the proposed action to verify the nature of their involvement and to discuss issues, methodologies, information requirements, timeframes and constraints associated with their involvement."*

*§ 1420.203(5) "Identify, during the course of completing the NEPA process, points of interagency disagreement causing delay and immediately take informal measures to resolve or reduce delay."*

Defenders supports the facilitation and reimbursement of agency representation at the early stages of NEPA engagement. The additional cost is a wise investment—pennies on the dollar—if said involvement prevents delays and/or litigation further along in the project.

#### 2. INTEGRATE PLANNING AND NEPA

*§ 1420.201(b) Applicants preparing documents under this part shall, to the maximum extent useful and practicable, incorporate and utilize analyses, studies, documents, and other sources of information developed during the transportation planning processes . . . in satisfying the requirements of the NEPA process."*

Defenders supports the integration of NEPA procedures into the planning stages of transportation projects. As Chairman Smith so eloquently stated, "The ideal vision for transportation planning is one that meets the needs of all stakeholders, and takes environmental concerns into consideration early, with no hidden agendas in the process and no duplication of effort." We believe that projects that are planned in mind and in the spirit of NEPA's goals are more likely to meet the needs of the American people and less likely to pose a threat to wildlife habitat. Many of the questions posed during NEPA review are especially valid during planning, specifi-

cally the articulation of the project's purpose and need. Finally, documentation produced during planning should be applicable during NEPA review, provided it meets the standards of validity, public participation, coordination and endorsement.

### 3. COLLABORATIVE PROCESS

*§ 1420.107 (5) Collaboration. Transportation decisions are made through a collaborative partnership involving Federal, State, local, and tribal agencies, communities, interest groups, private businesses, and interested individuals.*

Defenders supports an inclusive and collaborative planning and development process. Transportation decisions are necessarily complex and multidisciplinary endeavors. They include economic, social, ethical, historic, technical, cultural and environmental factors. Transportation projects have pervasive and permanent effects at many levels, from personal to regional and national. To that end, we contend that the best decisions are those that are informed by all stakeholders.

There is no question that America's transportation infrastructure is imperative to our mobility, productivity and success. However, we cannot deny that it has also had significant impacts on our environment. Four million miles of roadways cover no less than 1 percent of our total land area, approximately the size of the State of South Carolina. Unfortunately, not all of those roads were planned wisely, leaving a destructive—and permanent—footprint on our landscapes and wildlife habitat. That is why it is imperative that transportation decisions are not made in haste, but after careful consideration of not only the immediate need and purpose, but also the long term and cumulative effects.

In closing, we urge you to allow the public participation process take its course, and allow DOT the chance to respond to these and other concerns. Defenders of Wildlife looks forward to reviewing the revised rule, and working with the DOT on implementing environmental streamlining in the future. We would like to meet with you and your staff to discuss the above and any questions you may have on our position.

Sincerely,

PATRICIA A. WHITE,  
*Transportation Associate.*

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GEORGIA DEPARTMENT OF TRANSPORTATION,  
*Washington, DC, March 2, 2000.*

Hon. ROBERT C. SMITH, *Chairman,*  
*Committee on Environment and Public Works,*  
*U.S. Senate,*  
*Washington, DC.*

DEAR CHAIRMAN SMITH. Please accept the enclosed testimony regarding the Georgia Department of Transportation's position on new regulations issued by the Department of Transportation. We join other States in expressing the concern that the new regulations supplant and distort the congressional language and intent of the Transportation Equity Act for the Twenty-first Century (TEA-21).

In summary our position includes the following major points:

- Required consultation with local officials has expanded to include a variety of officials well beyond the law to the point where the process is unwieldy.
- The consultation process must be approved by the Federal agencies, a direct contradiction with TEA-21.
- TEA-21 eliminated the need for Major Investment Studies (MIS) for urban transportation projects. The proposed regulations, at a tremendous cost, reinstate the requirement for MIS-type studies on all projects for no apparent reason and will create additional time and cost burdens.
- The proposed regulations implement vague Environmental Justice considerations based only on Executive Order 12898 without congressional consent and judicial review.
- Intelligent Transportation System (ITS) regulations are proposed without clarity and definition of terms leaving States somewhat in the dark about how to comply.

Georgia's testimony is designed to help improve the process of providing needed transportation services to the traveling public. We are compelled to be heavily involved in the process and vow to follow through with every means available to continue to complete our mission.

On behalf of the Georgia Transportation Board and the Department of Transportation, thank you very much for your attention and any consideration. Please con-

tact me if you have any questions or concerns as you contemplate the proposed regulations.

Sincerely,

TOM COLEMAN, JR.,  
*Commissioner.*

STATEMENT OF J. TOM COLEMAN, JR., COMMISSIONER, GEORGIA DEPARTMENT  
OF TRANSPORTATION

With the passage of the Transportation Equity Act for the 21st Century on June 9, 1998, Congress sent a strong message to the States that it wanted to improve the way our Nation's transportation system develops. Unfortunately, the draft regulations issued on May 23d of this year compromise the intention of the legislation and of this body. As written, these regulations if adopted will cause the planning and construction process to face drastic cost increases and serious time delays.

Regulations are important; they represent the rules of engagement for how the Federal Government proposes to implement legislative requirements and deem how we get our work done.

The proposed regulations cover four elements: planning, environment, intelligent transportation (ITS), and environmental justice. Today, I would like to highlight the impacts those new regulations will have on Georgia's transportation program. Since their release by the United States Department of Transportation, we have worked closely with the American Association of State Highway and Transportation Officials (AASHTO) in examining the proposed regulations. My comments on possible shortcomings and potential pitfalls reflect the concerns of the Georgia Department of Transportation and to a large extent those of other AASHTO member States.

The regulations take liberty with TEA-21. It is astonishing that the drafters of these rules would change definition of terms, changes not reflected in the statutory language of TEA-21.

We take a great deal of pride in the extent of coordination we have with locally-elected officials. As part of the statewide transportation planning process, ISTEA required consultation, cooperation and coordination with locally-elected officials. We meet annually with representatives from all 159 Counties and more than 540 cities in the State of Georgia to review projects, consult on needs and address concerns.

TEA-21 did not change this requirement—BUT, the regulations do propose to change the participants. The new regulations require that we consult, cooperate and coordinate with locally-elected officials, just as before. This is not cause for concern. What is troubling is that the regulations have expanded the requirements to embrace local land use planning agencies, non-elected special transportation agencies, economic development agencies and many more. This means that FTA/FHWA can take the 'self' out of 'self certification' by withholding approval of a State Transportation Improvement Program (STIP) based on their review of a State's process.

Congress wrote into TEA-21 the condition that USDOT "shall not review or approve" the State's consultation processes with non-metropolitan local officials. The proposed regulations propose the exact opposite by requiring review during annual planning certification assessments.

If these regulations are adopted, the consultation process must be "documented and cooperatively developed" in consultation with non-metropolitan officials, (again language not included in legislation)—all of them, transit authorities, regional development centers, economic development authorities, and more. Obviously the drafter of the regulations never worked outside the beltway—nor do they understand the time, energy, money and effort that is part of any good consultation process. Georgia has a documented process in place with elected officials that works. The new regulations will do nothing more than needlessly aggrandize the process.

Another Concern—Section 1308 of TEA-21 called for the elimination of major investment studies. The legislation said that the analysis should be part of the transportation planning and project development processes, as appropriate.

The proposed regulations miss the opportunity to streamline the process—they extend the MIS-type study requirements to all projects in MPO areas, regardless of size or cost. This means that all projects could require an MIS type study similar to the Northern Arc project in Metropolitan Atlanta, which required 3 years and several million dollars to complete. This will increase the cost and time of implementation of capital projects. Another concern is that the proposed regulations require that States "shall consider . . . other factors and issues in the planning process." ISTEA required consideration of 23 planning factors. TEA-21 streamlined the process by reducing the 23 into 7 factors. Instead of streamlining the process, the proposed regulations open the door to any issues any participants may suggest. As I mentioned earlier, the regulations give "planning process participants" discretion

to introduce additional planning factors, although they do not have fiscal involvement or program accountability.

Taken altogether, the change in definition of local officials; the requirement for MIS-type studies and the role given to the “planning process partners” all add up to increased time and resources required for planning approval of needed projects. And the question for all of us as stewards of the public trust is—does it add value? I will answer that for Georgia, NO it does not.

Project development from idea to letting is currently 5 to 6 years, if the project is not controversial. Add 2 or more years for construction and you have 7 to 8 years from idea to fruition. If the proposed regulations are approved, additional delay will result.

Next I would like to address Environmental Justice; I want to begin by saying that Georgia supports concern for and protection of the human environment. In fact, we have for years felt that the Federal resource agencies have ignored impacts to human beings quality of life in favor of marginally valuable natural and historic resources. We support a balanced approach that weighs all of the issues equally rather than taking a “thou shalt not” approach to certain sacred icons of singly focused resource agencies.

As a preface to discussing the Environmental Justice regulations, let me review what we do for Title VI. As you know, DOT’s currently comply with Title VI, the Americans with Disabilities Act and other anti-discrimination laws adopted by Congress—as well as with State laws that complement and further define equal opportunity and equal treatment. Those requirements are well understood and have been tested over time—there is guidance in regulations and in case law that we follow. In addition, measures for compliance have been defined for Title VI and ADA compliance. FHWA’s annual review follows a structured process documenting compliance in employment, transportation projects, purchasing, contracting, and more.

The Environmental Justice regulations state a broad goal, but lack clarity of objectives and lack definition of what are measures of compliance. Environmental justice is based on Executive Order 12898, which, because it is an order from the President to his Department Heads, applies to Federal agencies. Executive orders are not established in statute and therefore not subject to judicial review. The absence of judicial review may be fine for the President when he deals with his Departments, but it doesn’t work for States that have to prove compliance.

The goal of the Executive Order is to address “human environmental effects.” The EJ regulation adds new protected groups—“low income” and “traditionally underserved”. These are not part of the Title VI or any other legislatively protected group. Complying with the EJ requirements will be a condition of Federal approval of the STIP. FHWA and FTA will ask us to document that we have met Environmental Justice goals—but what those goals are is not clear. The lack of regulatory definition of what are environmental effects, burdens and benefits and how to measure compliance will very likely be challenged in practice and in the courts. When is a burden or benefit disproportionate? When measured at the State, county, municipality or project level? Does that mean if a single project places some burden on a protected community because it runs through that community that it is automatically disproportionate? What are burdens and benefits? How are they defined? Again, this lack of definition can be cause for delay as we wrestle with ill defined terms, and more importantly, legal fodder for any opponent of any project who can take issue with what these terms mean.

The proposed Intelligent Transportation System regulations are hazy about many points and will cause potentially costly interpretation during enforcement. The proposed regulations require the use of a “system engineering process” and an “interoperability test.” They also require that “ITS projects funded from the highway trust fund conform to the National ITS Architecture, applicable or provisional standards, and protocols.” The problem—“System Engineering Processes,” “interoperability test,” “Conformity” and “provisional standards” are not defined or existing nor has anyone been assigned to define them.

The proposed regulations lack a clear definition of what is an ITS “project.” Are all ITS investments considered “projects” for purposes of planning, programming and conformity determination? For instance, will every traffic signal project be subject to the proposed regulation even if it is simply replacement or maintenance of existing equipment? Again, the regulations lack definition.

AASHTO has drafted a resolution which requests that work be suspended on the proposed regulations and that USDOT comprehensively revise the regulations. AASHTO also requests that any final rules streamline, not complicate or delay the transportation process. Georgia supports the AASHTO resolution.

In summary, the proposed regulations have many shortcomings: they will cause more delay, expend more resources, and create more opportunities to challenge the

transportation process. The proposed regulations will not serve the transportation program in Georgia nor does it serve the congressional intent of TEA-21. Please consider suspending this work. Please inject reason into this process. Please exercise congressional authority and order USDOT to work with the States to develop regulations that will achieve the national purpose and provide transportation mobility.

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TEXAS TRANSPORTATION COMMISSION,  
Washington, DC, September 12, 2000.

Hon. ROBERT C. SMITH, *Chairman,*  
*Committee on Environment and Public Works*

DEAR CHAIRMAN SMITH: The Texas Department of Transportation (TxDOT) is delighted that the Committee on Environment and Public Works will hold a hearing this month on proposed regulatory changes issued on May 25 by the Department of Transportation (USDOT). The proposed changes affect regulations governing the development of metropolitan and statewide transportation plans and improvement programs and regulations implementing the National Environmental Policy Act of 1969 (NEPA) and related statutes with respect to projects funded or approved by the Federal Highway Administration and the Federal Transit Administration. We have some apprehensions about those proposed regulatory changes. TxDOT will file detailed comments with USDOT expressing our concern with the regulations as presently drafted, but as commissioner of transportation for Texas. I want to summarize my concerns for you prior to your hearings.

TxDOT strongly supports sound, participative planning and full compliance with the letter and spirit of the environmental laws. We have made great progress in recent years toward balancing the many competing demands on transportation planners—from expanding public involvement, to improving traffic modeling techniques, to addressing increasingly complex air quality requirements. Current planning and environmental review processes for transportation projects include ample opportunities for public participation and careful review if the issues raised by those projects and their effects on the areas they serve. We may need to listen more carefully to one another; that will be achieved, however, through the continued commitment of all parties involved, not through regulation.

It is TxDOT's commitment to making the transportation process more inclusive, and more effective, and more efficient that gives rise to our deep concerns about USDOT's proposed regulations. Instead of providing a catalyst for innovation, they significantly increase the regulatory burden on TxDOT and on those responsible for planning transportation improvements for metropolitan areas in Texas, while reducing their authority to make transportation decisions. The significant changes these proposed regulations make would disrupt the planning and project development processes and make them more bureaucratic, more document-driven, and less responsive to demands of organized special-interest groups. However well intentioned, they would impede State efforts to improve transportation planning and significantly increase both the time and expense of delivering improvements for the safety and efficiency of our transportation system.

When it enacted the Transportation Equity Act for the 21st Century (TEA-21), Congress clearly indicated its intention to reduce the delay experienced by transportation solutions through extended and duplicative environmental reviews that add no real value. These proposed regulations would complicate that review process significantly, consuming even more time but still with no insurance of added value. Even under current procedures, the resources available to Federal agencies involved in environmental reviews of transportation projects seem insufficient to support timely reviews, postponing much needed transportation improvements. The added complexity of the processes in these proposed regulations can only extend, not reduce, the delay in project delivery.

I request that this letter be included in the record of comments received at your hearing. The TxDOT and I recommend that USDOT be directed to suspend its current rulemaking effort and to work cooperatively with State DOT's and metropolitan planning organizations to develop alternative procedures. We stand ready to work with you and all Members of Congress and with USDOT to deliver important transportation projects and services in an environmentally sound manner, in full and open communication with local officials and interested citizens.

Sincerely,

JOHN W. JOHNSON,  
*Commissioner of Transportation.*

