No. 16-16605
Consolidated with No. 16-16586

In the United States Court of Appeals
for the Ninth Circuit

PROTECTING ARIZONA'S RESOURCES AND CHILDREN, ET AL.,

Plaintiffs – Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.

Defendants – Appellees.

GILA RIVER INDIAN COMMUNITY,

Plaintiff – Appellant,

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Arizona Cause Nos. 2:15-CV-00893-DJH
and 2:15-CV-01219-DJH

APPELLANT GILA RIVER INDIAN COMMUNITY'S OPENING BRIEF

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INTRODUCTION*

The defendant transportation agencies, in their enthusiasm to complete a long-ago-devised freeway cutting through a mountain sacred to an Indian Tribe, gave lip service to their statutory obligations to study fully and protect the tribe's natural and cultural resources. The statutes require more than a rubber-stamping of a decades-old regional plan, especially when that plan would desecrate the land and ancestral treasures sacred to the sovereign nation that lived there for centuries.

The Gila River Indian Community (the "Community") is a federally recognized Indian Tribe located south of the Phoenix metropolitan area. In 2015, the Federal Highway Administration ("FHWA") and the Arizona Department of Transportation ("ADOT" and, collectively with FHWA, the "Agencies") authorized the construction of the South Mountain Freeway (the "Freeway"), which would form part of State Route 202 and run directly adjacent to the Community's borders. Besides permanently altering the natural environment within and near the Community, the Freeway would require the destruction of portions of South Mountain, a vital core of the Community's spiritual beliefs and a sacred resource central to its culture and religious practices.

* For the Court's convenience, the cases and statutes cited in this brief include hyperlinks to Westlaw, and the record cites include hyperlinks to the ECF filing in the district court.

The record reveals that the process of evaluating and selecting the Freeway was flawed from the start. Rather than follow federal statutes and regulations and properly evaluate the impacts of potential alternatives, the Agencies took steps to validate a decision that had been made more than 30 years earlier. This prejudgment approach violated the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department of Transportation Act ("Section 4(f)"), and applicable regulations.

To predetermine the outcome, the Agencies began the NEPA and Section 4(f) process by defining the statement of "purpose and need" so narrowly that it could only encompass the desired highway: a "major transportation facility" within a narrowly restricted study area. With these parameters drawn tightly, the Agencies then screened out numerous viable alternatives because they fell outside the parameters, i.e. they were inconsistent with the "purpose and need." This bypassed a thorough study of options that would have avoided harm to the Community and the surrounding environment. The Agencies also refused to analyze impacts of the project on the Community and its members. Although the Freeway would abut the Community for nearly its entire length, the Agencies studied its impacts only on the other side of the highway corridor, ignoring the cultural and environmental harms to the Tribe.

The Agencies concede that throughout the process, they never deviated from their selection of the Freeway as the chosen alternative. They concede that they ignored the advice and recommendations of the Environmental Protection Agency ("EPA"). They concede that in evaluating the no-build option, they relied on data that assumed the construction of the very highway at issue. And they concede not only that the project would cause environmental harm along the highway corridor, but that the Freeway would have minimal benefits for the region as a whole in the coming decades.

Yet the district court granted summary judgment in favor of the Agencies and against the Community and plaintiffs in a consolidated action. The Court erred, among other reasons, because:

- The Agencies unlawfully limited their stated purpose and need;
- The Agencies improperly substituted decades-old local planning for a proper and thorough application of the requirements under NEPA and Section 4(f), in violation of federal regulations that constrict when prior analyses may be used;
- By using an unreasonably narrow statement of purpose and need, the Agencies improperly eliminated from consideration numerous viable alternatives;

- The Agencies failed to determine and evaluate the extent of harm to the Community and its members;
- The Agencies approved a route that, absent additional design and analysis, was not feasible because it would result in the illegal taking of wells held in trust by the United States for the benefit of the Community.

In its Order, the district court misapplied governing law and abused its discretion by disregarding undisputed facts throughout the administrative record. The Court of Appeals should reverse the district court's Order and enter judgment in favor of the Community and against the Agencies. In the alternative, the Court should remand with instructions to apply the appropriate legal standards to a proper reading of the facts.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. section 1331 because the case arose under federal law, under 5 U.S.C. section 702 because it called for review of agency action, and under 28 U.S.C. section 1362 because a tribe brought the action and the matter arose under federal law. The Court issued its final order on August 19, 2016. (ER1-006; ECF-132.) The Community filed a timely Notice of Appeal on September 9, 2016. (ER2-006; ECF-139.) This Court has jurisdiction pursuant to 28 U.S.C. section 1291.

ISSUES

1. Did the district court err in holding that NEPA and Section 4(f) allowed the Agencies to define the project's purpose and need so narrowly that it excluded any outcome besides a highway in the predetermined study area, and permitted the Agencies to exclude alternatives from their evaluation based on their narrow statement of purpose and need?

2. Did the district court err by allowing the Agencies to substitute prior regional-planning decisions for a thorough, independent NEPA and Section 4(f) analysis?

3. Did the district court err in sustaining the Agencies' determination that no reasonable and prudent alternatives to the Freeway existed?

4. Did the district court err in holding that the Agencies could comply with their obligations under NEPA and Section 4(f) without analyzing the impacts of the project on the Community's members and land?

5. Did the district court err in concluding that the Agencies' use of incomplete and deficient data did not violate NEPA and Section 4(f) and that the Agencies could overlook the related concerns of the EPA?

6. Did the district court err in determining that NEPA and Section 4(f) allowed the Agencies to approve an alternative that impermissibly interferes with land held in trust for the benefit of the Community?

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, the pertinent statutes are included in an addendum to this brief.

STATEMENT OF THE CASE AND FACTS

I. The Proposed Freeway.

On March 5, 2015, FHWA and ADOT issued a Record of Decision, approving the alignment for the Freeway and allowing the design, planning, and construction of the Freeway to proceed. (ER2-013; ECF-98-1 at FAR00000003.) Also known as the South Mountain Freeway, the Freeway would become a part of State Route 202L ("Loop 202") and a piece of a regional transportation system first contemplated in 1985. (ER2-021; ER3-144; ECF-98-1 at FAR00000011; ECF-98-5 at FAR00006461.) Extending twenty-two miles with eight traffic lanes, the Freeway would run from the Interstate 10/Loop 202 interchange in the east, travel just north of and adjacent to Community land along Pecos Road, and veer north near 59th Avenue before connecting again with Interstate 10 on the western side of Maricopa County. (ER2-045-46; ECF-98-2 at FAR00000035-36.)

The Freeway would destroy parts of three separate ridges of South Mountain. ER2-045; ECF-98-2 at FAR00000035.) Two of those ridges are within the Phoenix South Mountain Park/Preserve ("South Mountain Park" or "SMPP"), which is one of the largest municipally-operated parks in the world and eligible for

protection under Section 4(f) of the Department of Transportation Act as a publicly owned recreation area, historic property, and traditional cultural property ("TCP"). (*Id.*; ER2-055-56; ECF-98-2 at FAR00000045-46.) The proposed freeway would take approximately 31.3 acres of South Mountain Park, but impact much more. (ER2-055- 56; ECF-98-2 at FAR00000045-46.)

The Agencies have acknowledged the historic and cultural significance of South Mountain to various tribes in the area and to the city of Phoenix as a whole, stating:

> The South Mountains are highly valued by area residents for various reasons, including the following:
>
> - SMPP is one of the largest city parks in the United States and is considered a centerpiece of the Phoenix Mountain Preserve system.
>
> - As a property eligible for listing in the National Register of Historic Places (NRHP), SMPP's origins are rooted in President Franklin D. Roosevelt's New Deal programs . . . . SMPP is a symbol of Phoenix's parks program origins.
>
> - As a TCP and a resource directly associated with other TCPs, the mountains are considered sacred – playing a role in tribal cultures, identities, histories, and oral traditions – and appear in many creation stories. The South Mountains continue to play a role in cultural and community identity.

(ER2-056; ECF-98-2 at FAR00000046.)

II. The Impact of the Freeway on the Community.

The Community is a federally recognized Indian Tribe located south of the

Phoenix metropolitan area, comprised of members of the Akimel O'odham and Pee Posh tribes. (ER6-152; ECF-100-1 at ¶¶ 6-7.) The Community has roughly 21,000 enrolled members, and its reservation lands encompass approximately 372,000 acres. (ER6-152; ECF-100-1 at ¶ 8.) The proposed freeway runs adjacent to the Community's border along much of the approved route. (ER2-045-46; ECF-98-2 at FAR00000035-36.)

The Community's religion, traditions, and ceremonial activities and practices all are tied to the natural environment. (ER6-152; ECF-100-1 at ¶ 9.) South Mountain – the traditional name for which is Muhadagi Doag – is one of the Community's most significant and sacred natural resources and a cultural property that figures prominently in the Community's traditions. (ER6-152; ECF-100-1 at ¶ 10.) South Mountain not only is a significant feature within the landscape of the Community's reservation, but it holds a central place in the Community's view of the surrounding natural resources and the Community's worldview. (ER6-152; ECF-100-1 at ¶ 11.)

The Community and its members recognize an intimate relationship with South Mountain and the natural environment and believe that this relationship is essential to the continuing survival of the Community's culture. (ER6-152; ECF-100-1 at ¶ 12.) Community elders have long reaffirmed the importance of South Mountain and the surrounding areas through oral tradition, which reiterates and

renews the Community's ties with the land through stories and songs over the years. (ER6-152; ECF-100-1 at ¶ 13.) Community members continue to conduct private and traditional religious activities around and on their sacred mountain. (ER6-153; ECF-100-1 at ¶ 14.)

The Freeway is a direct affront to these cultural and religious values and activities. The Agencies approved an alignment that would forever alter the landscape and views of South Mountain as they are experienced and relied upon by members of the Community. (ER6-153; ECF-100-1 at ¶ 15.) The Freeway would also affect various sites on or around South Mountain that contribute to South Mountain's historical and cultural significance to the Community, serve as important spiritual locations for its members, and constitute protected TCPs. (ER6-153; ECF-100-1 at ¶ 16.) The Freeway would destroy or interfere with trails, shrines, and archaeological sites, all important cultural resources for the Community's members. (ER6-153; ECF-100-1 at ¶ 17.) In addition, it would decrease access for Community members to South Mountain and other natural resources that have spiritual significance to them, diminishing the members' traditional ways of life. (ER6-153; ECF-100-1 at ¶ 18.)

In April 2007, the Community's Council, its elected governing body, explained in a resolution that "the South Mountain Range in its entirety is a sacred place/traditional cultural property [that] must be kept inviolate" and that it

"strongly opposes any alteration of the South Mountain Range for any purpose [because such alteration] would be a violation of the cultural and religious beliefs of the Gila River Indian Community and would have a negative cumulative effect on the continuing lifeways of the people of the Gila River Indian Community." (ER5-127; ECF-99-4 at FAR00007222.) In February 2012, the Community's members passed a referendum rejecting a freeway, in large part due to the negative cultural impacts of the proposed project. (ER3-048; ECF-98-4 at FAR00002598.)

The Agencies agree, as they must, that South Mountain holds cultural significance to the Community:

> The South Mountains appear in the creation stories of the Akimel O'odham and Pee Posh tribes and, as such, are regarded as sacred. From the perspective of the Akimel O'odham and Pee Posh, the South Mountains are part of a continuum of life and not an individual entity that can be isolated and analyzed. . . . The South Mountains continue to be a focus for tribal tradition and ceremony and contain petroglyph sites, shrines, trails, named places in traditional stories, and traditional resources. The South Mountains also remain as a resource area for upland plants and animals used by Native Americans.

(ER5-014; ECF-98-4 at FAR00006734.) They also agree that, despite the best mitigation efforts, the Freeway would harm these cultural and religious resources that are important to the Community and its members:

> [T]he proposed action would be a physical barrier on the landscape, altering traditional access to sacred sites, disrupting traditional cultural practices, and degrading the overall integrity of the cultural tradition and identity. *Even with mitigation*, implementation of the proposed action would alter the direct physical connection Community members have between their homeland and the South

> Mountains and would restrict the ability to visit or use these locations in a traditional cultural manner. . . . The proposed freeway would be located in an area used frequently by members of the Community, one that provides direct access to the South Mountains. Thus, the proposed action would adversely affect physical access to the TCP and adversely affect another TCP within the South Mountains TCP. Perhaps more important to members of the Community, the proposed action might be perceived as severing the Community's spiritual connection to the mountains. (emphasis added.)

(ER5-092-93; ECF-99-4 at FAR00006812-13.)

III. The Agencies' Decision-Making Process.

1. Decisions Made Long Before NEPA Work Began.

Since the mid-1980s, ADOT and the Maricopa Association of Governments ("MAG") have planned the construction of a Regional Freeway and Highway System (the "Highway System"). (ER2-021-22; ECF-98-1 at FAR00000011-12.) Initially, the announced purpose of the Highway System was to address evolving transportation needs throughout Maricopa County. Over the past 30 years, as funds became available, ADOT and MAG have designed and constructed various segments of the Highway System. (ER2-022; ECF-98-1 at FAR00000012.)

Since 1985, ADOT and MAG have contemplated building the South Mountain Freeway, to be located in the southwestern part of Maricopa County, forming a segment of the Highway System and constituting part of Loop 202. (ER3-144; ECF-98-5 at FAR00006461.) As the Agencies have acknowledged, the general location for the Freeway has remained unchanged for the past 30 years.

(ER3-189; ECF-98-5 at FAR00006506.) Thus, well before the Agencies began the statutory process for the analysis and approval of the project, they had already picked the preferred location. (ER2-022; ER3-181; ECF-98-1 at FAR00000012; ECF-98-5 at FAR00006498.) That never changed.

For the past three decades, ADOT and MAG have assumed the very same freeway location and have incorporated that assumption into their transportation planning. For example, ADOT and MAG have explained that versions of the Freeway have been included in updates to MAG's regional transportation-planning documents. (ER2-022; ER3-144; ECF-98-1 at FAR00000012; ECF-98-5 at FAR00006461.) They also have considered the Freeway "integral to the region's adopted multimodal transportation plan" and a key element of what they predetermined would be a "freeway system component." (ER2-022; ECF-98-1 at FAR00000012.) In fact, the Agencies have explained that a factor in their evaluation of the project was the "historical need for a major transportation facility," which would "implement the facility recognized in over 25 years of planning." (ER2-024; ER3-205; ECF-98-1 at FAR00000014; ECF-98-6 at FAR00006522.) Underscoring that their decision confirmed a longstanding intent, the Agencies repeatedly have referred to the Freeway as a "missing" segment of their desired Highway System. (ER3-193; ER3-145; ECF-98-6 at FAR00006510; ECF-98-5 at FAR00006542.)

The Freeway's location was so settled – even before the required review process began – that the Agencies used it to plan and design other transportation facilities in the region. (ER3-144-45; ECF-98-5 at FAR00006461-62.) For example, the traffic interchange between the I-10 highway and what would become the eastern portion of the proposed route "was constructed between 2000 and 2002 to accommodate the western leg" of the proposed freeway. (ER2-046; ECF-98-2 at FAR00000036.) ADOT also built, before approving this project, a direct connection for high-occupancy vehicles between the I-10 highway and Loop 202. (*Id.*) In the Agencies' words, "[u]pon its inclusion in the Regional Freeway and Highway System in the mid-1980s, the South Mountain Freeway also became an element of long-range planning efforts of local jurisdictions throughout the Study Area." (ER2-022; ECF-98-1 at FAR00000012.)

2. Draft Environmental Impact Statement.

On April 16, 2013, the Agencies issued a Draft Environmental Impact Statement ("DEIS"), recommending the construction of the South Mountain Freeway in the same location that had been chosen nearly 25 years earlier. (ER3-133; ECF-98-4 at FAR00006450.) At that time, the Agencies described the purpose and need of the project, and thus the focus of the required evaluation process. Yet they defined the purpose and need to guarantee the outcome, explaining that the Agencies were examining the propriety of a "major

transportation facility" – i.e., a highway – within a predetermined "Study Area." (ER3-146; ECF-98-5 at FAR00006463.) The "Study Area" was "the southwestern portion of the Phoenix metropolitan area," the geographic area in which the Agencies already had chosen the freeway path. (ER3-141; ECF-98-4 at FAR00006458.)

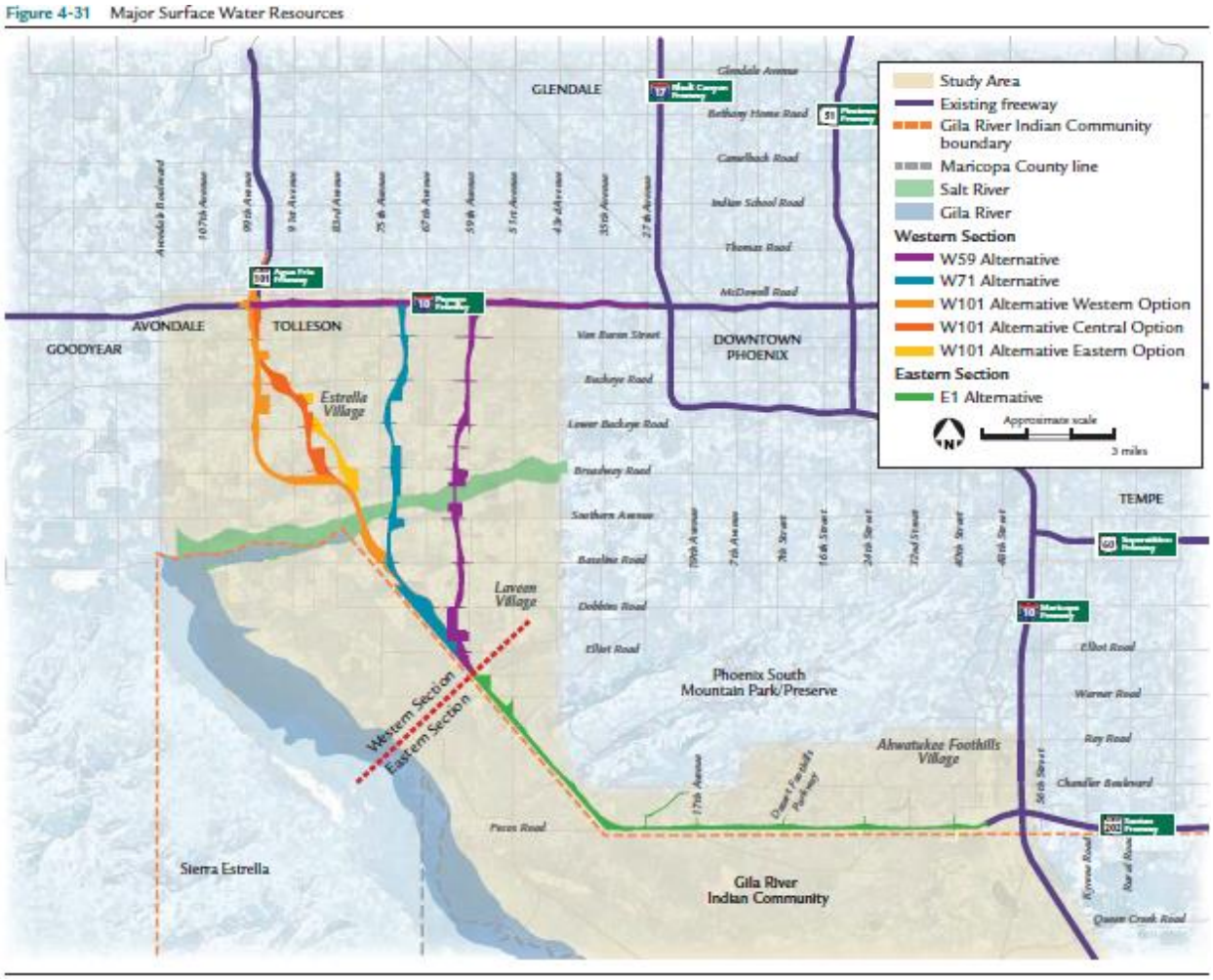
The Agencies explained that a factor in their decision was the existence of the "freeway system component" of the region's long-term "adopted multimodal transportation plan." (*Id.*) The Agencies rested their narrow scope on prior, pre-NEPA determinations, explaining that a "major transportation facility (the South Mountain Freeway) has been included in the region's adopted transportation planning documents since 1985." (ER3-145; ECF-98-5 at FAR00006462.) According to the Agencies, "[t]he freeway mode would bring added benefit to the transportation system linkage by completing the Regional Freeway and Highway System as planned since the mid-1980s . . . ." (ER3-148; ECF-98-5 at FAR00006465.) The Agencies also deferred to predeterminations by others, outside the NEPA process: "The City of Phoenix has made land use planning decisions (i.e., general plan designations and zoning) in the context of the proposed freeway's general alignment," and "[c]hanges to the alignment could adversely affect resultant private investments." (ER3-181; ECF-98-5 at FAR00006498.) Rather than allowing a broader statement of purpose and need to determine the

scope of available alternatives, the Agencies conceded that ADOT's consideration, development, and study of alternatives and determination of the purpose and need for the project had already begun by 2002. (ER3-219; ECF-98-6 at FAR00006536.)

With this predetermined agenda, the Agencies considered in the DEIS only a single alignment for the eastern portion of the freeway, designated as the "E1 Alignment." (ER3-178; ECF-98-5 at FARF00006495.) The E1 Alignment would connect at its eastern terminus with the existing traffic interchange between the I-10 (Maricopa Freeway) and Loop 202 (Santan Freeway). It would travel west on Pecos Road, directly north of and adjacent to Community land, for approximately eight miles. It then would veer northwest for approximately five miles to a point near the intersection of 59th Avenue and Elliot Road, blasting through portions of South Mountain in the process. (ER4-022-24; ECF-98-8 at FAR00006583-85.) With no other eastern alignments under consideration, the Agencies recommended the eight-mile E1 Alignment. (ER3-229; ECF-98-7 at FAR00006546.)

In the western portion of the Study Area, the Agencies considered three similar alignments, each connected to the eight-mile E1 Alignment at a single intersection. (ER3-147; ECF-98-5 at FAR00006464.) Of those alignments, the Agencies recommended the one designated as the "W59 Alignment." (ER3-175; ECF-98-5 at FAR00006492.) The W59 Alignment would connect with the E1

Alignment, head north for approximately nine miles, cross the Salt River, and connect at its western terminus with a new traffic interchange with the I-10 (Papago Freeway) near 59th Avenue. (ER4-014; ECF-98-8 at FAR00006575.) A map showing the options considered is below.



The Agencies concluded that the single eastern alternative, and the three similar western alternatives to which it would connect, along with the no-action alternative, constituted "an adequate range of reasonable alternatives for detailed study in the DEIS." (ER3-148; ECF-98-5 at FAR00006465.) They made this

finding while acknowledging that the E1 Alignment was old fare, noting that it "would closely follow the published alignment first adopted in the 1980s." (ER3-229; ECF-98-7 at FAR00006546.) The Agencies also admitted that their decision not to consider other eastern alternatives limited their required study of impacts in that area. In their own words, "[i]n the DEIS, comparison of action alternatives necessarily focuses on differences in impacts in the Western Section of the Study Area, because only one action alternative is located in the Eastern Section." (ER3-150; ECF-98-5 at FAR00006467.)

The Agencies justified their failure to consider eastern alternatives by asserting that any other alternatives would not serve the project's narrow purpose and need; other potential options, they claimed, "were eliminated from detailed study primarily because of their failure to meet purpose and need criteria – or to meet them well – and/or because of the severity of social and parkland impacts they would have generated . . . ." (ER3-178; ECF-98-5 at FARF00006495.)

Relying in part on their limited statement of purpose and need, the Agencies rejected without further analysis all action alternatives north of South Mountain that would have spared the destruction of the ridges. (ER3-179-80; ECF-98-5 at FAR00006496-97.) With the same justification, the Agencies likewise rejected without further analysis all action alternatives south of Community land. (ER3-180; ECF-98-5 at FAR00006497.) They also rejected other proposed alternatives,

including those known as the US 60 Extension alternative, the Riggs Road alternative, and the SR 85/I-8 alternative, as inconsistent with the project's purpose and need and thus not prudent under Section 4(f). (ER5-083; ECF-99-4 at FAR00006803.)

The same circular proof allowed the Agencies to reject the no-action alternative: the no-action alternative, they asserted, "would not satisfy the purpose and need of the proposed action." (ER4-014; ECF-98-8 at FAR00006575.) Based on that finding, they in turn determined that the no-action alternative was not prudent under Section 4(f) of the Department of Transportation Act. (ER5-083; ECF-99-4 at FAR00006803.) The Agencies further justified the rejection of the no-action alternative as "inconsistent with MAG's and local jurisdictions' land use and transportation plans." (ER3-150; ECF-98-5 at FAR00006467.) The Agencies' reliance on a narrow purpose and need also permitted them to dismiss summarily other non-freeway action alternatives, such as rail options, bus routes, and arterial-street improvements. (ER3-221-22; ECF-98-6 at FAR0000006538-39.)

In response to the DEIS, the Community and others expressed concerns over the Agencies' process and decisions. (ER3-009; ECF-98-4 at FAR00002558.) The Community objected to the Agencies' failure adequately to consider the no-action alternative, other action alternatives that would avoid South Mountain, and more than a single option in the eastern section of the project. (ER3-048-55; ECF-

98-4 at FAR00002598-2605.) The Community also noted the failure of the Agencies to address and analyze the harmful environmental effects of the project specifically on the Community and its members. (ER3-055-69; ECF-98-4 at FAR00002605-19.) Among other omissions identified:

- The Agencies refused to address air-quality impacts on Community land, or even along the project corridor, relying instead on alleged air-quality improvement in the Phoenix metropolitan area as a whole. ER3-055-63; ECF-98-4 at FAR00002605-13.)
- The Agencies justified their choice of the E1 Alternative by stating that it "would do the most to avoid, reduce, or otherwise mitigate impacts on neighborhoods immediately north of Pecos Road" – as opposed to impacts south of Pecos Road, where the Community is located. (ER3-229; ECF-98-7 at FAR00006546.)
- Even after promising to provide data on vehicle miles traveled per day and total annual tonnages for criteria pollutants, hazardous air pollutants, mobile source air toxics, and diesel particulate matter, the Agencies never supplied that information or explained the precise impact on the Community and its members. (ER3-056-57; ECF-98-4 at FAR00002606-07.)
- While the DEIS included modeling of estimated concentrations of air pollutants at arterials on the west side of Phoenix and the east side of the

project in Chandler, it did not include this modeling along the stretch of freeway bordering the Community. (ER3-058; ECF-98-4 at FAR00002608.)

- While the Agencies discussed the transport of hazardous materials, they did not fully address the particular risk to the Community and its members stemming from this transport during the construction and operation phases of the proposed freeway. ER3-065-66; ECF-98-4 at FAR00002615-16.)
- The Agencies conceded that, despite the lack of information regarding Community-specific harm, the Community has "allowed the study of impacts on Community land from alternatives located off Community land." (ER2-196; ER3-216; ECF-98-3 at FAR00001247; ECF-98-6 at FAR00006533.)

The EPA also expressed concern over the DEIS, giving it the agency's lowest rating of 3, signifying "Inadequate Information." Specifically, the EPA concluded that the DEIS lacked analysis of the project's impacts on air quality and recommended that the Agencies provide information on "[e]missions analyses that present the emissions of the South Mountain Freeway corridor separate from those of I-10, along with updated traffic forecasting for the No Action alternative" and a "robust air toxics risk assessment that addresses potential health effects from the proposed new freeway." (ER3-017; ECF-98-4 at FAR00002566.)

The EPA also found that the Agencies failed to adequately and independently address the project's impacts not just on the freeway corridor, but within the Community. (ER3-024-27; ECF-98-4 at FAR00002573-76.) It recommended that the Agencies "[c]oordinate with [the Community] to disclose potential health impacts from the new freeway corridor so that information will be available to [the Community] to assist with land-use and zoning decisions along [Community] lands that are adjacent to the new corridor." (ER3-027; ECF-98-4 at FAR00002576.) The EPA explained that "there are many resources regarding the potential health impacts of locating sensitive receptors adjacent to freeways as well as the benefits of smart growth and location efficient housing. ADOT and FHWA should disclose these potential near-roadway health impacts and ensure [the Community] has access to the most current information available regarding optimizing land use decisions and safeguarding health in the face of a potential new freeway directly adjacent to [Community] land." (ER3-035; ECF-98-4 at FAR00002584.)

Of particular concern to the EPA, the Agencies had studied the environmental impact of the Freeway only using models that assumed the construction of the Freeway, rather than analyzing the impacts that would exist as a result of the no-action alternative or other possible action alternatives. (ER3-024-25; ECF-98-4 at FAR00002573-74.) Expert analysis also found problems with the

Agencies' data and methodologies. For example, an expert for Protecting Arizona's Resources and Children ("PARC") found that the Agencies had relied on outdated data in their analyses, utilizing 2005 census data although 2010 data was available and showed a decrease in projected population-growth rates. (ER3-071; ECF-98-4 at FAR00002872.)

3. Final Environmental Impact Statement.

On September 18, 2014, the Agencies issued the Final Environmental Impact Statement ("FEIS"), recommending the same Freeway alignment chosen in the DEIS. (ER2-127; ECF-98-2 at FAR00001156.) They restated their decision that a "major transportation facility" was needed. (ER2-137; ECF-98-2 at FAR00001166.) The Agencies also reiterated their determination that the three similar alternatives in the western section of the Study Area and one alternative in the eastern section, along with the no-action alternative, "represented a range of reasonable alternatives that were the subject of detailed study in the DEIS and subsequent FEIS." (*Id.*) The Agencies noted that "[t]he new socioeconomic and traffic projections, while generally lower than what was previously predicted, validated the overall conclusions of the DEIS in terms of purpose and need . . . ." (*Id.*) The Agencies also defended their refusal to use the more current 2010 Census data, stating that "[w]hile new projections based on the 2010 Census showed a lower anticipated population and vehicle miles traveled in 2035 than the

previous projections, the conclusions reached in the Draft Environmental Impact Statement were validated in the Final Environmental Impact Statement . . . ." (ER3-083; ECF-98-4 at FAR00002928.)

In response to the Community's comments to the DEIS, the Agencies rejected the points raised, concluded that prior analyses and discussions were sufficient to address them, and would not agree to additional evaluation or supplementation. (ER3-048-69; ECF-98-4 at FAR00002598-2619.) The Agencies also continued to deny any requirement to study emissions along the project corridor alone and defended their decision based on reduced exposure to emissions in the region as a whole. (ER3-024-25, 92; ECF-98-4 at FAR00002573-74, 2957.)

Having been rebuffed completely, the Community reiterated its concerns in comments to the FEIS, objecting to ADOT's failure to consider adequately the no-action alternative and other action alternatives, conduct surveys and studies necessary to evaluate the project, and analyze the impacts of the project on the Community and its members, among other deficiencies. (ER2-110-20; ECF-98-2 at FAR00000108-18.) The Community also explained the obvious – that its own decision to reject an on-Reservation alternative (also offensive to Community interests) could not justify the Agencies' arbitrary decision to limit review only to the E1 Alignment. (ER2-110; ECF-98-2 at FAR00000108.)

The EPA reiterated many of its concerns in response to the FEIS: "We have

continuing concerns regarding the analysis and discussions provided in the Final EIS regarding possible near-roadway health impacts along the proposed new freeway corridor, including impacts to children and sensitive receptors. Additionally, we have continuing concerns with the analysis of the No Action Alternative, as well as impacts to both aquatic resources and wildlife connectivity." (ER2-093-94; ECF-98-2 at FAR00000090-91.) The EPA also remained troubled that the Agencies had not studied particular impacts near the Freeway and continued to explain that because the data and analyses of the Agencies improperly assumed the construction of the project, there was not a thorough comparison of alternatives. (ER2-095-98; ECF-98-2 at FAR00000092-95.)

Expert commentary offered by PARC also noted that "the only difference between the DEIS and the FEIS is that the reduced figures . . . have now been 'plugged in' to Figure 1-7 and the text on page 1-11. The fact that a nearly 20% decrease in projected 2035 values has no bearing on conclusions regarding the proposed action suggests that decisions regarding the proposed action were made irrespective of population and employment projections to begin with." (ER2-122; ECF-98-2 at FAR00000297.)

4. Record of Decision.

On March 5, 2015, the Agencies issued the Record of Decision ("ROD"), approving the analyses and conclusions set forth in both the DEIS and the FEIS.

(ER2-013; ECF-98-1 at FAR00000003.) While acknowledging that the population and traffic projections used initially to support their decision had decreased, the Agencies refused to alter their conclusions: "The new socioeconomic and traffic projections were generally lower than what was previously predicted; nevertheless, FHWA and ADOT concluded that the data still supported the overall study conclusions related to evaluation of lane and alignment changes, responsiveness of the proposed freeway to purpose and need, and traffic conditions with the action and No-Action alternatives." (ER2-028; ECF-98-1 at FAR00000018.) The Agencies also repeated their conclusion that one alternative in the eastern section of the Study Area and three similar alternatives in the western section of the Study Area, along with the no-action alternative, "represented a range of reasonable alternatives for further study in the FEIS." (*Id.*)

The Agencies continued to reject the no-action alternative, finding that it would not meet the project's purpose and need and that it would be inconsistent with long-range planning and policies. (ER2-036, 70-71; ECF-98-2 at FAR00000026, 60-61.) They also continued to reject all action alternatives north of South Mountain and south of Community land, in part because those options would not meet the narrowly defined purpose and need of the project. (ER2-056-57; ECF-98-2 at FAR00000046-47.) In response to comments regarding their data and methodologies, the Agencies admitted that their data and analyses assumed the

construction of the project itself, but asserted that their methods nevertheless were "appropriate." (ER2-097; ECF-98-2 at FAR00000094.)

The Agencies also admitted that although vehicle emissions would increase along the project corridor adjacent to the Community, they did not conduct a full analysis of specific impacts along the Corridor or within the Community and justified their decision based on impacts in the Study Area as a whole. (ER2-070; ECF-98-2 at FAR00000060.) When addressing the Community's specific concerns about air-quality impacts on its land, the Agencies asserted that the DEIS and FEIS had "analyzed all potential significant environmental impacts" and that the Agencies "do not believe additional analysis would change the proposed action." (ER2-116; ECF-98-2 at FAR00000114.)

Even if the project were completed, significant unmet demand would remain. For example, the Agencies have calculated that even by 2035, the South Mountain Freeway would result in 20 percent of traffic demand remaining unmet, compared to 31 percent of demand being unmet without the project. (ER6-072; ECF-99-8 at FAR00009385.) In the Agencies' own view, all of the cultural and environmental harm this project will bring results in just an 11-percent reduction in unmet traffic demand nearly 20 years from now.

IV. District Court's Order.

In granting summary judgment against the Community and in favor of the

Agencies, the district court overlooked significant undisputed portions of the record and improperly applied this Circuit's established precedent. Among its errors:

- The district court incorrectly held that the Agencies' narrow purpose and need statement – one requiring a "major transportation facility" within a confined study area – sufficed under NEPA and Section 4(f) despite contrary precedent and the predicable effect on the Agencies' subsequent decisions. (ER-1-011-13; ECF-132 at 6-8.)
- While acknowledging the regulations' guidance addressing when prior studies can replace independent NEPA and Section 4(f) analyses, the district court, like the Agencies, failed properly to apply the guidance. (ER1-012-13; ECF-132 at 7-8)
- In concluding that the Agencies properly rejected alternatives as imprudent, the district court ignored both the Agencies' inability to justify their decision on grounds other than their narrow statement of purpose and need and data that showed the minimal benefit of the selected project. (ER1-013-16, 33-35; ECF-132 at 8-11, 28-30.)
- The district court allowed the Agencies to approve the project without specific analysis of harm to the Community and its members, despite distinctions in the land, population, and sovereignty of the areas on the two

sides of the highway. (ER1-019-21; ECF-98-1 at 14-16.)

- The district court improperly expanded this Court's case law to permit the Agencies to analyze the impacts of the no-build option using data that assumed the construction of the Freeway. (ER1-017-18; ECF-98-1 at 12-13.)
- Despite acknowledging the potential need for a supplemental environmental impact statement should the project impact wells held in trust for the benefit of the Community, the district court improperly permitted the Agencies to adopt the project based on plans that show improper interference with those wells. (ER1-038-40; ECF-98-1 at 33-35.)

As explained further below, the district court's order illustrates both the Agencies' failure to comply with the applicable authorities and its own misapplication of Ninth Circuit law.

STANDARD OF REVIEW

Judicial review of the Agencies' actions under NEPA and Section 4(f) is governed by the Administrative Procedure Act ("APA"). See *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (9th Cir. 2010); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984). The APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

Despite the deference sometimes granted to agencies, reviewing courts must under NEPA and Section 4(f) conduct a "thorough, probing, in-depth review" of agency action. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Courts bear the concomitant obligation to overturn any decisions that lack full record support. *See Stop H-3 Ass'n*, 740 F.2d at 1450 (The "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). Therefore, if the Court determines that the record "does not demonstrate that the stringent requirements of section 4(f) . . . have been satisfied," the Court's inquiry is at an end and it must declare the process deficient. *Id.* at 1455.

ARGUMENT SUMMARY

The Court should reverse for six reasons, all related. First, the district court erred by approving the Agencies' use of an unreasonably narrow statement of purpose and need. That statement called for a "major transportation facility" in a predefined "Study Area," which all but assured the Agencies would approve the

very same highway that had been planned for decades. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013) ("A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained."); *N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (EIS "will not be used to rationalize or justify decisions already made"). The district court further erred by allowing the Agencies to reject the no-action alternative and numerous action alternatives on the basis of the faulty statement of purpose and need, in violation of both NEPA and Section 4(f).

Second, the district court improperly allowed the Agencies to substitute decades of prior regional planning for a proper and thorough NEPA process. *See* 40 C.F.R. § 1501.2 (when relying on prior planning, agencies must "integrate the NEPA process with other planning at the earliest possible time"). The governing regulations provide guidelines explaining when the use of prior studies and analysis is appropriate, but neither the Agencies nor the district court attempted to apply those guidelines, which examine factors such as how much time has passed and whether the assumptions on which the prior planning was based remain valid. *See* 23 C.F.R. § 450.318(b); 23 C.F.R. pt. 450, App. A.

Third, the district court erred by ignoring the Agencies' rejection of numerous action alternatives without a finding of sufficiently "unusual or

extraordinary" implications from their adoption. *See Stop H-3 Ass'n*, 740 F.2d at 1456. Besides relying on unsupported, conclusory assertions to justify their decisions, the agencies never explained how the rejected alternatives were not prudent given the acknowledged limitations of the proposed highway and its inability to satisfy transportation needs.

Fourth, although NEPA requires the disclosure of "all foreseeable direct and indirect impacts" of a project, the Agencies failed to evaluate the effects of the project specifically on the Community's members and land. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002). The Agencies acknowledge that they did not even evaluate impacts along the project corridor, let alone within the Community's boundaries. Despite conceding that the Community allowed them to study impacts on its land, the Agencies did not analyze issues relating to air quality, the transportation of hazardous materials, and other harm to individuals or the natural environment within the Community.

Fifth, in evaluating the no-build alternative, the Agencies used data that assumed construction of the Freeway, precluding a proper analysis. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008) (environmental impact statement lacked true "no-action" alternative because it assumed, "as the baseline," "the existence of the very plan being proposed"); 40 C.F.R. § 1502.14(d) ("[C]ourts not infrequently find NEPA violations when an

agency miscalculates the 'no build' baseline or when the baseline assumes the existence of a proposed project." (citations and internal quotation marks omitted). The EPA raised the same concerns, which the Agencies, and the district court, disregarded. *See* *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002) ("[T]he apparently unanswered concern of a sister agency that [an issue] was not adequately addressed weighs as a factor pointing toward the inadequacy of the EIS.").

Sixth, the Agencies chose a route that cannot be used – one that illegally interferes with three wells held in trust by the United States for the benefit of the Community and their related easements. Although the Agencies promise that any construction will avoid the wells, they never considered during the NEPA and Section 4(f) process the reasonableness and feasibility of alternatives that would avoid the wells and easements, ignoring their obligations and violating the statutes.

ARGUMENT

I. Overview of NEPA and Section 4(f) Planning Requirements.

A. National Environmental Policy Act.

The National Environmental Policy Act and its implementing regulations dictate the procedures that the Agencies were required to follow in analyzing and approving the Freeway. *See* 42 U.S.C. §§ 4321-70h; 40 C.F.R. §§ 1500.1-1508.28; 23 C.F.R. §§ 771.101-139. As the regulations explain, "NEPA procedures must

insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

Among other responsibilities, an agency must "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment" and "[u]se all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." *Id.* § 1500.2(e), (f). The regulations also explain the purpose of and requirements for environmental impact statements: "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Id*. § 1502.1.

Under NEPA, "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2(g).

B. Section 4(f) of the Department of Transportation Act.

While NEPA imposes procedural requirements, Section 4(f) of the Department of Transportation Act creates substantive obligations. It disallows actions that will use protected natural resources (no matter how good the "procedures" were) unless there are no reasonable and prudent alternatives. The original Section 4(f), now codified in two other statutory provisions, applies to any agency action that uses publicly owned land or historic sites for transportation purposes. It allows a transportation project that uses these sites "*only if*" two requirements are met: "(1) there is no prudent and feasible alternative to using that land" *and* "(2) the program or project includes all possible planning to minimize harm" to the site resulting from the use. 49 U.S.C. § 303(c) (emphasis added); *see also* 23 U.S.C. § 138.

Under the implementing regulations, if FHWA determines that no feasible and prudent avoidance alternative exists, it may approve only the alternative that "[c]auses the least overall harm in light of the statute's preservation purpose." 23 C.F.R. § 774.3(c)(1). A Section 4(f) evaluation must "include sufficient supporting documentation to demonstrate why there is no feasible and prudent

avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property." *Id.* § 774.7(a). The regulations explain that "[a] feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute." *Id.* § 774.17.

As the Supreme Court has noted, "[t]his language is a plain and explicit bar to the use of federal funds for construction of highways through parks – only the most unusual situations are exempted." *Citizens to Pres. Overton Park*, 401 U.S. at 411 (abrogated and superseded on other grounds). The statute thus imposes an absolute prohibition on using protected land absent a clear and supported finding that no feasible and prudent alternative exists:

> But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Id. at 412-13 (footnote omitted).

II. The Agencies Violated Applicable Law by Improperly Limiting the Purpose and Need and Excluding Reasonable Alternatives from Their Evaluation Process.

By limiting the stated purpose and need to include only a "major transportation facility" within the defined "Study Area" – "the southwestern portion of the Phoenix metropolitan area" – the Agencies finished before they started, preordaining their desired outcome. NEPA prohibits this. The regulations address precisely this problem by requiring that agencies "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2. They also provide that an environmental impact statement "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

This Court agrees that NEPA's prohibition against predefining the outcome has teeth. It has frequently held that agencies violated the applicable statutes by crafting the purpose and need in a way that allows them to sidestep their obligations, limit the range of alternatives to consider, and justify decisions already made. As it explained in *Alaska Survival*, 705 F.3d at 1084, "[a] purpose and need statement will fail if it unreasonably narrows the agency's consideration of

alternatives so that the outcome is preordained." Similarly, in *National Parks and Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1072 (9th Cir. 2010), this Court struck down a BLM decision because the agency "adopted Kaiser's interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange." Having picked an "unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives." *Id.*; *accord* *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) ("[T]he comprehensive 'hard look' mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made."); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms.").

Other circuits agree that NEPA prohibits preordained outcomes achieved through narrow statements of purpose and need. *See* *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 667 (7th Cir. 1997) ("We conclude that the U.S. Army Corps of Engineers defined an impermissibly narrow purpose for the contemplated project. The Corps therefore failed to examine the full range of reasonable

alternatives and vitiated the EIS. We reverse."); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.").

Understanding the arbitrary constraints set by their narrow statement of purpose and need, the Agencies argued in the district court that their actual purpose was broader, and sought *general* transportation solutions in the *entire* region. The record revealed otherwise, and the district court properly ignored the Agencies' attempts to recharacterize the purpose and need. Where the district court erred was in concluding, nonetheless, that the Agencies complied with NEPA and Section 4(f) despite defining the purpose and need as a "major transportation facility" in a limited, predefined study area.

By relying on their artificially narrow purpose and need, the Agencies compounded the problem, rejecting a host of alternatives on the asserted ground that each alternative failed to meet the project's purpose and need. They summarily rejected all action alternatives north of South Mountain – despite urging by the EPA and the Community that the Agencies explore this alternative – all action alternatives south of Community land, the US 60 Extension alternative, the

Riggs Road alternative, and the SR 85/I-8 alternative. The Agencies likewise supported their rejection of all non-freeway action alternatives, including rail options, bus routes, and arterial-street improvement, by reference to their predetermined and artificially narrow purpose and need. These options were all eliminated without the detailed, independent study NEPA requires.

The only alternative that would avoid harming the sacred mountain that the Agencies studied in detail was the no-action alternative, but that too was rejected because it "would not satisfy the purpose and need of the proposed action." Using that finding, they in turn determined that the no-action alternative was not prudent under Section 4(f) of the Department of Transportation Act, avoiding the statute's stringent requirements.

This Court has found that limiting consideration of alternatives based on a narrowly stated purpose and need is improper under NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) ("However, in the course of evaluating the options that would best achieve the stated purpose of the proposed action, the Forest Service failed to consider an adequate range of alternatives. The EIS considered only a no action alternative along with two virtually identical alternatives."). The Seventh Circuit explained well how this frustrates the statute's purpose:

> One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E). . . . If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives. In this case, the officials of the Army Corps of Engineers executed an end-run around NEPA's core requirement. By focusing on the single-source idea, the Corps never looked at an entire category of reasonable alternatives and thereby ruined its environmental impact statement.

Simmons, 120 F.3d at 666, 670.

The district court ignored these concerns, allowing the Agencies to rely on their inappropriate statement of purpose and need to avoid a thorough evaluation of alternatives and summarily justify the chosen route. On these grounds alone, summary judgment for the Community was appropriate and the district court should have ordered the Agencies to conduct a proper evaluation under NEPA. *See* 40 C.F.R. § 1502.14(a), (b) (in their environmental impact statements, agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated" and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits").

III. The Agencies Improperly Allowed Decades-Old Decisions to Substitute for a Thorough Evaluation Under NEPA and Section 4(f).

Although the Agencies have argued that they simply referenced prior ADOT pronouncements about the South Mountain Freeway to provide historical context and inform their decision, the record shows that ADOT predetermined the result it wanted. Among other examples:

- The Agencies admit that since 1985 ADOT and MAG have contemplated the construction of the Freeway in the same location chosen in the ROD. (ER3-144; ECF-98-5 at FAR00006461.)
- The Agencies have stated that "[a] major transportation facility in the Study Area would implement the facility recognized in over 25 years of planning." (ER3-205; ECF-98-6 at FAR00006522.)
- One factor the Agencies considered is the "historical need for a major transportation facility." (ER2-024; ECF-98-1 at FAR00000014.)
- In the Agencies' view, with the construction of the Freeway, a "missing" segment of the regional plan, more than 25 years in the making, will be complete. (ER3-193; ECF-98-6 at FAR00006510.)
- In reliance on the future construction of the Freeway, the system traffic interchange between the I-10 highway and what would become the eastern portion of the proposed route was constructed between 2000 and 2002, as

was a direct high-occupancy-vehicle connection between the I-10 highway and Loop 202. (ER2-046; ECF-98-2 at FAR00000036.)

- The Agencies have admitted that "[t]he City of Phoenix has made land use planning decisions (i.e., general plan designations and zoning) in the context of the proposed freeway's general alignment. Changes to the alignment could adversely affect resultant private investments." (ER3-181; ECF-98-5 at FAR00006498.)

Not only had ADOT set in motion its plan for the eventual approval of the Freeway decades earlier, but it took steps to restrict the purpose and need on which it would rely and thereby limit its alternatives. The Agencies even admit that ADOT's consideration, development, and study of alternatives and determination of the purpose and need for the project had begun by 2002. (ER3-219; ECF-98-6 at FAR00006536.)

Reliance on these prior decisions, however, violates governing law. Although applicable regulations provide that a state's transportation planning "may be used as part of the overall project development process consistent with [NEPA]," they do not eliminate agencies' obligations to conduct the required "hard look" under NEPA or ensure that no feasible and prudent alternatives exist. 23 C.F.R. § 450.318. Even where agencies rely on prior planning, they must "integrate the NEPA process with other planning at the earliest possible time" to

ensure that they comply with all environmental requirements. 40 C.F.R. § 1501.2. For the same reason, an environmental impact statement "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

In fact, the regulations make clear that agencies can incorporate materials from prior planning processes only under certain conditions, which the Agencies failed to discuss below. The regulations provide that incorporation from prior planning is permitted only if the Agencies agree that the incorporation "will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts" and if the study was conducted with "(i) Involvement of interested State, local, Tribal, and Federal agencies; (ii) Public review; (iii) Reasonable opportunity to comment during the metropolitan transportation planning process . . . ; (iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and (v) The review of the FHWA and the FTA, as appropriate." 23 C.F.R. § 450.318(b). Moreover, the appendix to this regulation lists an additional set of guidelines for determining whether a prior study should be accepted during the NEPA process. Among the

key factors are: (i) how much time has passed since the planning studies and corresponding decisions were made; (ii) were the policy assumptions used in the planning process consistent with those used in the NEPA process; (iii) is the information still relevant and valid; (iv) what changes have occurred in the area since the study was completed; (v) are the prior analyses based on data, analytical methods, and modeling techniques that are reliable; (vi) were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions; and (vii) during NEPA scoping, was a clear connection between the decisions made in planning and those to be made during project development explained to the public and others. *See* 23 C.F.R. pt. 450, App. A.

The Agencies have never explained how the "regional transportation plan for the Phoenix metropolitan area" qualifies as a "study" under the regulations, let alone attempted to show that any study held the technical and analytical features needed to meet the regulation's standards. Rather, the Agencies appear to assert that a regional plan adopted decades ago, merely because it was a plan adopted under various other federal laws, *see generally* 23 U.S.C. § 134, somehow creates a safe-harbor from NEPA's requirements. It does not. *See* 23 C.F.R. pt. 450, App. A ("The degree to which studies . . . from the transportation planning process can be incorporated into the . . . NEPA process[] will depend upon how well they meet

certain standards established by NEPA regulations and guidance."). While regional plans themselves are exempt from NEPA, individual projects based on those plans are not. *See id.* Despite acknowledging the applicable factors, the district court also overlooked them. Instead, it concluded, contrary to the record, that the prior decades had merely "informed" the Agencies' NEPA analysis. (ER1-013; ECF-132 at 8.)

The record is clear that the Agencies improperly relied on prior decisions to define an overly narrow purpose and need, predetermine their desired outcome, and sidestep the requirements of the governing law.

IV. The Agencies Violated Applicable Law by Improperly Rejecting Reasonable and Prudent Alternatives to the Proposed Highway.

The Agencies not only failed properly to define the project's purpose and need and conduct a thorough NEPA evaluation, they also failed to demonstrate that no feasible and prudent alternative existed to the proposed highway. "Consideration of alternatives is the heart of the [EIS], and agencies should [r]igorously explore and objectively evaluate all reasonable alternatives that relate to the purposes of the project and briefly discuss the reasons for eliminating any alternatives from detailed study." *Alaska Survival*, 705 F.3d at 1087 (citation and internal quotation marks omitted).

This is particularly important under Section 4(f) of the Department of Transportation Act. It imposes substantive requirements that are "stringent," and

the implementing regulations "specifically require the 4(f) statement to analyze alternatives to the use of the parkland to determine whether the alternatives are feasible and prudent." *Stop H-3 Ass'n*, 740 F.2d at 1447.

Even a single, viable alternative that was not properly considered by the Agencies renders the process deficient. *See NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) ("Because the range of alternatives considered by the EIS omits the viable alternative of allocating less unspoiled area to development [land use designations], we hold that the EIS is inadequate, in violation of NEPA."); *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998) ("The existence of reasonable but unexamined alternatives renders an EIS inadequate."); *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate."); *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 784-85 (9th Cir. 1980) ("As we have said before, the existence of an unexamined but viable alternative to the adopted plan can have a dual significance; it can render the environmental impact statement inadequate and provide a basis for overturning the Secretary of Transportation's decision that parkland could be used for highway purposes under § 4(f) of the Department of Transportation Act.").

In *Stop H-3 Association*, this Court determined that agency decisions to reject a no-build option and a specific action alternative were improper and an abuse of discretion. 740 F.2d at 1455, 1458. The Court held that it must strike down agency action under Section 4(f) where it was not "wholly convinced that the record clearly demonstrates that the increased congestion or commuter delays projected for the year 2000 would be so unusual or extraordinary that the No Build alternative must be rendered imprudent." *Id.* at 1456. It further stated that asserted safety considerations and increased transportation costs did not justify rejection of the no-build option. *See id.* at 1455-57. With respect to a previously rejected action alternative, the Court also held that "[t]he record before us simply does not demonstrate that the stringent requirements of section 4(f), as defined in *Overton Park* and its progeny, have been satisfied. Until those requirements are satisfied, we cannot allow our Nation's sacred parklands to be taken or used." *Id.* at 1455.

Compliance with Section 4(f) requires far more than a finding that a project satisfies the stated purpose and need. As this Court has explained, "[t]he mere fact that a 'need' for a highway has been 'established' does not prove that not to build the highway would be 'imprudent' under *Overton Park*. To the contrary, it must be shown that the implications of not building the highway pose an 'unusual situation,' are 'truly unusual factors,' or represent cost or community disruption reaching 'extraordinary magnitudes.'" *See id.* at 1455 n.21 (citation omitted).

The Agencies failed adequately to consider numerous alternatives and failed properly to conclude that sufficiently unusual or extraordinary implications would result from their adoption of the alternatives. Those alternatives include: (i) the no-action alternative; (ii) all action alternatives north of South Mountain; (iii) all action alternatives south of Community land; (iv) the US 60 Extension alternative; (v) the Riggs Road alternative; (vi) the SR 85/I-8 alternative; and (vii) non-freeway alternatives such as rail options, bus routes, and arterial-street improvement. The Agencies not only relied largely on the stated purpose and need to avoid detailed consideration of such options, but their decisions rest on conclusory findings that ignore the Section 4(f) standard. The Agencies also fail to explain how the rejected alternatives are not prudent in light of the acknowledged deficiencies in the expected project benefits – a benefit that, at best, would improve unmet traffic demand by 11 percent.

Case law makes clear that while agencies' analyses of alternatives need not be exhaustive, conclusory and general statements violate both NEPA and Section 4(f). *See* *Muckleshoot Indian Tribe*, 177 F.3d at 811 (finding inadequate analyses that "merely provide very broad and general statements devoid of specific, reasoned conclusions"); *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002) ("Cumulative options, however, were not given adequate study. Alternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion

that it was unreasonable to consider them as viable alternatives in the EA. As a result, only two alternatives were studied in detail: the no build alternative, and the preferred alternative. FHWA acted arbitrarily and capriciously in approving an EA/4(f) that does not provide an adequate discussion of Project alternatives.") (abrogated on other grounds).

Failure to explain adequately a rejection of even one of the alternatives supported summary judgment in favor of the Community. Here, several of the alternatives were improperly rejected or inadequately considered. With those deficiencies, this Court must overturn the decision and it cannot look for alternative support in the record. *See Stop H-3 Ass'n*, 740 F.2d at 1450 (The "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

V. The Agencies Failed Adequately to Analyze Impacts on the Community and Its Members.

NEPA requires that agencies disclose "all foreseeable direct and indirect impacts" of a project. *Idaho Sporting Cong.*, 305 F.3d at 963. As part of their evaluation, they "must adequately consider the project's potential impacts and the consideration given must amount to a 'hard look' at the environmental effects." *Id.* (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)). Yet despite this mandate, the Agencies failed to evaluate, analyze, and disclose the

environmental impacts specifically affecting the Community and its members.

Although the Freeway borders Community land for most of its length, and would destroy one of the Community's most sacred resources, the Agencies overlooked the harm to the Community and brushed aside its concerns in approving the project. The Agencies' defended their shortchanging of Community interests with flawed arguments:

- The Agencies reviewed Community impacts based only on "data available to the general public and on field observation as appropriate," rather than seeking Community input and data on potential impacts. (ER7-077-79; ECF-105 at 26-28.)
- The Agencies believed focusing only on areas north of Pecos Road – not south where the Community is located – satisfied their legal responsibilities despite acknowledging that the Community allowed the study of impacts on its land. (*Id.*)
- While the Agencies argue that they held a public forum on Community land, they offered no measures to address the comments made by Community members. (*Id.*)
- In arguing that they addressed Community-specific "social conditions," the Agencies point to discussions that hardly reference the Community or its members. The Agencies rested an argument that the Community would

actually benefit from the Freeway on unsupported speculation that businesses on Community land would grow from increased access and visibility. (*Id.*)

- In arguing that they addressed "environmental justice" concerns, they point to studies regarding all minority populations. (*Id.*)
- In stating that they considered noise impacts, they cite a single page in the record noting that one out of 42 noise receivers was on Community land. (*Id.*)
- Concluding that they only discussed "those areas where impacts would occur," the Agencies acknowledge that they disregarded other Community harm. (*Id.*)
- The Agencies do not dispute that pollutants will increase along the Freeway corridor, noting instead that the Community should recognize that other populations could experience health benefits. (ER7-103; ECF-105 at 52.)
- The Agencies do not dispute that they did not follow the EPA's recommendations to "[c]oordinate with GRIC to disclose potential health impacts from the new freeway corridor so that information will be available to GRIC to assist with land-use and zoning decisions along GRIC lands that are adjacent to the new corridor" and to "disclose these potential near-roadway health impacts and ensure GRIC has access to the most current

information available regarding optimizing land use decisions and safeguarding health in the face of a potential new freeway directly adjacent to GRIC land." (ER7-091-93; ECF-105 at 40-42.)

- In response to the Community's concerns regarding air quality, the Agencies admit that they concluded that the DEIS and FEIS had "analyzed all potential significant environmental impacts" and that they did "not believe additional analysis would change the proposed action." (ER7-110; ECF-105 at 59.)

Evaluating the environmental impacts on the Study Area "as a whole" cannot substitute for the required thorough analysis of the project's impacts on the Community. Yet the district court made the same error as did the Agencies, allowing the Agencies to neglect Community-specific interests.

Two examples that illustrate this mistake and its consequences relate to the transport of hazardous materials and air-quality impacts. Responding to the Community's concerns about the effect of hazardous materials transported along the proposed Freeway, the Agencies said not only that impacts were not reasonably foreseeable, but that ADOT would take care of any problems and that "planning for emergency situations will be initiated as the project moves into design." (ER7-090-91; ECF-105 at 39-40.) But consideration of the impacts of hazardous materials on the Community, a sovereign tribal nation, should not be dependent on

the discretion of a state agency, which has limited jurisdiction on Community land. *See, e.g.*, *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973) (explaining State's limited ability to regulate on reservations); *Wauneka v. Campbell*, 526 P.2d 1085 (Ariz. Ct. App. 1974) (state cannot regulate on reservation without tribe's consent). And when most of the project borders the Community, there is no justification for delaying an assessment of these issues until "the project moves into design."

Air quality is another example. The NEPA analysis never explained the impact on air quality within the Community. (ER3-055-69; ECF-98-4 at FAR00002605-19.) The Agencies merely noted that some model receptors were placed on Community land along the proposed freeway path. (ER7-089; ECF-105 at 38.) Yet the Agencies provided no analysis of the project's impact on air quality *within* the Community. Moreover, the impact of the Freeway on the suburban neighborhoods north of Pecos was analyzed, but the potential impact on the primarily agricultural areas on the Community's land south of Pecos was not. (ER3-229; ECF-98-7 at FAR00006546.) The Agencies also conducted no health-risk assessment concerning the Freeway's impact. (ER3-017; ECF-98-4 at FAR00002566.)

The district court rejected these concerns, saying that it is the Community's burden to demonstrate why the Agencies' analysis "does not equally apply to the

Community and its members." (ER1-019; ECF-132 at 14.) Respectfully, this is backward. It is the Agencies' responsibility to prepare a comprehensive analysis of the impact of their project. *E.g.*, 40 C.F.R. § 1502.1 (requiring a "full and fair discussion" of environmental impacts). With that analysis in hand, the public, including the Community, can review and comment. That is the process NEPA requires. The Agencies needed to address impacts within the Community, but they did not. Their study was deficient and violated NEPA.

The district court ignored governing law in concluding that the Agencies' refusal to analyze and disclose the impacts uniquely affecting the Community was acceptable, further compelling reversal.

VI. The Agencies' Improperly Relied on Incomplete and Deficient Data and Ignored the Concerns of the EPA.

Besides failing adequately to consider all impacts of the proposed project and evaluate all reasonable alternatives, the Agencies relied on faulty data and methodologies to support their conclusions, providing another, independent basis to overturn their decision. The governing regulations emphasize the importance of sound scientific analysis: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24. In this case, however, the

Agencies did not rely upon data in reaching a decision; rather, the data was used to justify a forgone conclusion.

As the EPA noted, one of the most fundamental errors in the Agencies' analysis was their failure to use non-build data when evaluating the no-build alternative. Defying logic and science, the Agencies assumed that the same employment and population growth projections for the Study Area would apply if the Freeway was not built. As a result, the Agencies could not and did not create a valid or proper comparison of the adverse environmental impacts that would flow from a no-build decision.

Courts have addressed precisely this flaw, and held that it violates NEPA. For example, in *Friends of Yosemite Valley*, 520 F.3d at 1037, this Court found that the environmental impact statement lacked a true "no-action" alternative because it assumed, "as the baseline," "the existence of the very plan being proposed." In *N. Carolina Wildlife Fed'n*, 677 F.3d 602-03, the Fourth Circuit explained how this kind of faulty methodology infects the process and precludes the required analysis: "[T]he Agencies acknowledged that MUMPO's data assumed the existence of the Monroe Connector. . . . This mischaracterization related to a critical aspect of the NEPA process – the accuracy of the 'no build' baseline. NEPA requires that an agency's alternatives analysis include a 'no build' alternative. 40 C.F.R. § 1502.14(d). Without [accurate baseline] data, an agency

cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision. *Id.* (citations and internal quotation marks omitted).

Contrary to the district court's order, this Court's opinion in *Laguna Greenbelt, Inc. v. United States Department of Transportation*, 42 F.3d 517 (9th Cir. 1994), does not support the Agencies' actions. In *Laguna*, the Court was careful not to validate assumptions unsupported by data. *See id.* at 525. Instead, the Court found that the agencies were correct that the project would not affect the amount and pattern of growth because the record showed that the area already had experienced substantial growth and that 98.5 percent of all land in the area was committed to other uses. *See id.* By selectively choosing language from the opinion, the Agencies have asserted that those same two factors – current growth and saturation of available land – supported this Court's separate finding that reliance on the flawed data did not violate NEPA.

Although they did not cite those factors in the record as support for their own deficient data, the Agencies have argued that they properly relied on the data because they had discussed current growth and because land use in the Study Area is already highly developed. Like the district court, the Agencies read *Laguna* as making the exception swallow the rule. *Laguna*, however, merely adopted a logical and common sense rule: where reliable data is used to determine a

project's growth-inducing impacts, use of that data complies with NEPA. In *Laguna*, the record "support[ed] the EIS's conclusion that the tollroad will not affect the amount and pattern of growth in Orange County." *Id.* at 525. This is not Orange County. The Freeway passes through large areas of undeveloped land. Indeed, the Agencies have admitted that, unlike the 98.5-percent saturation discussed in *Laguna*, at most 88 percent of the entire Study Area is *zoned* for development. (ER7-35; ECF-103 at 7.) And according to the FEIS, only 57 percent of the Study Area is actually developed. (ER2-198; ECF-114-7 at 53 (FAR000001332).) The Freeway, if built, will impact growth dramatically.

Thus, the Agencies are unable to refute that they relied on faulty data and failed to address all of the EPA's concerns. "[T]he apparently unanswered concern of a sister agency that [an issue] was not adequately addressed weighs as a factor pointing toward the inadequacy of the EIS." *League of Wilderness Defenders*, 309 F.3d at 1192; *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1031 (2d Cir. 1983) ("Further, the court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise."); *Suffolk Cnty. v. Sec'y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977) ("Where evidence presented to the preparing agency is ignored or otherwise inadequately dealt with, serious questions may arise about the adequacy of the

authors' efforts to compile a complete statement."); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) ("[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response.").

For these reasons as well, the district court should have granted summary judgment in favor of the Community.

VII. The Agencies Violated Applicable Law by Selecting a Preferred Alternative That Unconstitutionally Takes Land Held in Trust for the Benefit of the Community.

The Community owns three wells, held in trust by the United States, located in the direct path of the alternative that the Agencies selected for construction. (ER6-108-12; ECF-99-8 at FAR00078126-30.) The law is clear – and FHWA and ADOT fully acknowledge – that these wells (and associated easements, rights of way, ditches, and air rights) cannot be taken or infringed upon by the construction of the Freeway. *See, e.g.*, *Chase v. McMasters*, 573 F.2d 1011, 1017-18 (8th Cir. 1978). In short, the Freeway cannot be built as planned.

Despite this undeniable impediment, throughout the NEPA and Section 4(f) evaluation process, all reports, documentation, and comments by the Agencies reveal that they were completely unaware that they lacked power to acquire the

Community wells in the Freeway's path. Although the record shows extensive discussion of wells and related mitigation for other wells in the right of way, it contains no mention of the need to avoid wells owned by the Community and held in trust. (ER2-114, 198-203; ER3-006-08; ER4-137-45; ECF-98-2 at FAR00000112; ECF-98-3 at FAR00001420-25; ECF-98-4 at FAR00001426-28; ECF-99-2 at FAR0000 6698-706.)

In fact, only after the FEIS was released did ADOT notify the Community that its wells could be impacted by the project. (ER6-156; ECF-100-1 at ¶¶ 3-4.) When the Community expressed concerns, the Agencies made the vague statement that the wells were included in the impacts analysis and that mitigation measures would follow during the later phases of the project. (ER2-114; ECF-98-2 at FAR00000112.) Even more telling, the initial freeway designs included with the NEPA documents show the Freeway running directly over all three Community wells and severing the easements connecting the wells to the reservation. (ER6-143-46; ECF-99-9 at FAR00078563-66.)

The Agencies failed to consider and evaluate the impacts of the Community wells until shortly before the Record of Decision was issued, and even then, the Agencies apparently failed to recognize that the wells could not be condemned and acquired. Because the Agencies' failed to address their inability to acquire the Community's wells, they never gave consideration during the NEPA and Section

4(f) process to the reasonableness and feasibility of alternatives that would avoid the wells and easements. For this reason alone, the Court should vacate the final decision and require the Agencies to comply fully with NEPA and Section 4(f).

Equally troubling, however, the Agencies appear to be moving forward with construction of a Freeway that will in fact take the Community's wells. Once the ROD was issued, ADOT contacted the Community in an attempt to acquire the wells, but the Community refused to sell its rights. (ER6-156; ECF-100-1 at ¶¶ 3-4.) Undeterred, rather than reevaluating the preferred alternative with this new information as required by NEPA and Section 4(f), the Agencies simply provided the Community with assurances that they understood their lack of authority to take the wells and promised that the wells would be avoided in the final design plans. (ER6-156; ECF-100-1 at ¶ 5.)

In their Request for Proposals, issued to select a developer for the project, the Agencies discussed the need to avoid the Community wells, easements, air rights, ditches, and access: "Developer recognizes and acknowledges ADOT has no power to condemn property rights and interests owned by or on behalf of the GRIC for or in connection with water wells, including fee title and air rights respecting land parcels on which such wells are located, and easements for pipes and ditches serving such water wells or for access (collectively the "GRIC well properties"). Accordingly . . . Developer's design shall avoid and preserve the

GRIC well properties, GRIC's legal access to GRIC well properties, and the water wells, pipes and ditches located therein." (ER6-125-26; ECF-99-9 at FAR00078193-94.)

It was not until the administrative record was provided to Plaintiffs at the end of November 2015 that the Agencies first provided drawings purporting to show the redesign of the Freeway. Contrary to ADOT's assurances and the promises made to the Community, the drawings show that the Agencies still plan to construct the proposed freeway directly over the Community's wells:

- Parcel 7-11714 is a well site at 59th Avenue and Elliot Road with an access road running due south along 59th Avenue from the well site to the Community boundary. As originally designed, the well site was located between the proposed freeway and a drainage channel, rendering the well entirely inaccessible and placing the path of the Freeway directly over the easement, access road, and ditch. The redesign routed the drainage channel around the ditch, but did not cure the fundamental problem that the Freeway (and now the drainage channel as well) runs directly over the Community's easement, access road, and irrigation ditch, which connect the well to the Community boundary. (ER6-107; ECF-99-8 at FAR00078121.)
- Parcel 7-11920 is a well site at 51st Avenue and Estrella, with an easement and right of way for a ditch running south along 51st Avenue to the

Community boundary. As originally designed, the well site would be located directly underneath a newly constructed road connection from 51st Avenue to the T-intersection allowing access to and from the Freeway, and the Freeway itself and accompanying drainage channel would run directly over the Community's easement, right of way, and ditch and separate the well site from the Community boundary. According to the Agencies' redesign of the Freeway, the proposed road has been shifted slightly, but still crosses over a portion of the Community's well site. In addition, the entire Freeway still runs directly over the Community's easement, right of way, and ditch. (ER6-106; ECF-99-8 at FAR00078120.)

- Parcel 7-11921 is a well site located at the intersection of 51st Avenue and the Community boundary. It is located directly south of Parcel 7-11920 and includes an irrigation ditch and easement, connecting the well site to the Community. As originally planned, the Freeway was to be constructed directly over the well site. The Agencies' revised designs have the Freeway shifted slightly, so that it appears to run directly adjacent to the well site, but the level of design is not detailed enough to make a determination whether a portion of the Freeway will still run directly over the well site. (ER6-105; ECF-99-8 at FAR00078119.)

As it stands, the Agencies have selected an alternative that they cannot build – an alternative that runs directly over at least one well and severs easements, rights of way, ditches, and access roads for all three wells. This fact, combined with the failure to consider the issue in their NEPA and Section 4(f) evaluation, renders the Agencies' decision arbitrary, capricious, and an abuse of discretion.

CONCLUSION

The district court erred in granting summary judgment against the Community and in favor of the Agencies, despite the Agencies' abuse of their discretion and violation of established law in approving the South Mountain Freeway. The Court should reverse the district court's order and remand with instructions to enter judgment in favor of the Community.

RESPECTFULLY SUBMITTED this 18th day of January, 2017.

OSBORN MALEDON, P.A.

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STATEMENT OF RELATED CASES

Appellant Gila River Indian Community is aware of one related case pending in this Court: Case No. 16-16586. These appeals have been consolidated by this Court's January 13, 2017 Order.

CERTIFICATE OF COMPLIANCE

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is 13,630 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Dated this 18th day of January, 2017.

s/ Jeffrey B. Molinar
Attorneys for Appellant Gila River Indian Community

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellant's Opening Brief and Excerpts of Record (Volumes 1 – 7) with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on January 18, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jeffrey B. Molinar
Attorneys for Appellant Gila River Indian Community

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Addendum to Appellant's Opening Brief

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 1. Federal-Aid Highways (Refs & Annos)

23 U.S.C.A. § 134

§ 134. Metropolitan transportation planning

Currentness

(a) Policy.--It is in the national interest--

(1) to encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight, foster economic growth and development within and between States and urbanized areas, and take into consideration resiliency needs while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and

(2) to encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 135(d).

(b) Definitions.--In this section and section 135, the following definitions apply:

(1) Metropolitan planning area.--The term "metropolitan planning area" means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).

(2) Metropolitan planning organization.--The term "metropolitan planning organization" means the policy board of an organization established as a result of the designation process under subsection (d).

(3) Nonmetropolitan area.--The term "nonmetropolitan area" means a geographic area outside designated metropolitan planning areas.

(4) Nonmetropolitan local official.--The term "nonmetropolitan local official" means elected and appointed

officials of general purpose local government in a nonmetropolitan area with responsibility for transportation.

(5) Regional transportation planning organization.--The term "regional transportation planning organization" means a policy board of an organization established as the result of a designation under section 135(m).

(6) TIP.--The term "TIP" means a transportation improvement program developed by a metropolitan planning organization under subsection (j).

(7) Urbanized area.--The term "urbanized area" means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census.

(c) General requirements.--

(1) Development of long-range plans and TIPs.--To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State.

(2) Contents.--The plans and TIPs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) that will function as an intermodal transportation system for the metropolitan planning area and as an integral part of an intermodal transportation system for the State and the United States.

(3) Process of development.--The process for developing the plans and TIPs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(d) Designation of metropolitan planning organizations.--

(1) In general.--To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals--

(A) by agreement between the Governor and units of general purpose local government that together represent at

least 75 percent of the affected population (including the largest incorporated city (based on population) as determined by the Bureau of the Census); or

(B) in accordance with procedures established by applicable State or local law.

(2) Structure.--Not later than 2 years after the date of enactment of MAP-21, each metropolitan planning organization that serves an area designated as a transportation management area shall consist of--

(A) local elected officials;

(B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and

(C) appropriate State officials.

(3) Representation.--

(A) In general.--Designation or selection of officials or representatives under paragraph (2) shall be determined by the metropolitan planning organization according to the bylaws or enabling statute of the organization.

(B) Public transportation representative.--Subject to the bylaws or enabling statute of the metropolitan planning organization, a representative of a provider of public transportation may also serve as a representative of a local municipality.

(C) Powers of certain officials.--An official described in paragraph (2)(B) shall have responsibilities, actions, duties, voting rights, and any other authority commensurate with other officials described in paragraph (2).

(4) Limitation on statutory construction.--Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities--

(A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and

(B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

(5) Continuing designation.--A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (6).

(6) Redesignation procedures.--

(A) In general.--A metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as determined by the Bureau of the Census) as appropriate to carry out this section.

(B) Restructuring.--A metropolitan planning organization may be restructured to meet the requirements of paragraph (2) without undertaking a redesignation.

(7) Designation of more than 1 metropolitan planning organization.--More than 1 metropolitan planning organization may be designated within an existing metropolitan planning area only if the Governor and the existing metropolitan planning organization determine that the size and complexity of the existing metropolitan planning area make designation of more than 1 metropolitan planning organization for the area appropriate.

(e) Metropolitan planning area boundaries.--

(1) In general.--For the purposes of this section, the boundaries of a metropolitan planning area shall be determined by agreement between the metropolitan planning organization and the Governor.

(2) Included area.--Each metropolitan planning area--

(A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and

(B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by

the Bureau of the Census.

(3) Identification of new urbanized areas within existing planning area boundaries.--The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.

(4) Existing metropolitan planning areas in nonattainment.--

(A) In general.--Notwithstanding paragraph (2), except as provided in subparagraph (B), in the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) as of the date of enactment of the SAFETEA-LU, the boundaries of the metropolitan planning area in existence as of such date of enactment shall be retained.

(B) Exception.--The boundaries described in subparagraph (A) may be adjusted by agreement of the Governor and affected metropolitan planning organizations in the manner described in subsection (d)(6).

(5) New metropolitan planning areas in nonattainment.--In the case of an urbanized area designated after the date of enactment of the SAFETEA-LU, as a nonattainment area for ozone or carbon monoxide, the boundaries of the metropolitan planning area--

(A) shall be established in the manner described in subsection (d)(1);

(B) shall encompass the areas described in paragraph (2)(A);

(C) may encompass the areas described in paragraph (2)(B); and

(D) may address any nonattainment area identified under the Clean Air Act (42 U.S.C. 7401 et seq.) for ozone or carbon monoxide.

(f) Coordination in multistate areas.--

(1) In general.--The Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation

planning for the entire metropolitan area.

(2) Interstate compacts.--The consent of Congress is granted to any 2 or more States--

(A) to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(B) to establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(3) Reservation of rights.--The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(g) MPO consultation in plan and TIP coordination.--

(1) Nonattainment areas.--If more than 1 metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.

(2) Transportation improvements located in multiple MPOs.--If a transportation improvement, funded from the Highway Trust Fund or authorized under chapter 53 of title 49, is located within the boundaries of more than 1 metropolitan planning area, the metropolitan planning organizations shall coordinate plans and TIPs regarding the transportation improvement.

(3) Relationship with other planning officials.--

(A) In general.--The Secretary shall encourage each metropolitan planning organization to consult with officials responsible for other types of planning activities that are affected by transportation in the area (including State and local planned growth, economic development, tourism, natural disaster risk reduction, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities.

(B) Requirements.--Under the metropolitan planning process, transportation plans and TIPs shall be developed with

due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the metropolitan area that are provided by--

(i) recipients of assistance under chapter 53 of title 49;

(ii) governmental agencies and nonprofit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the Department of Transportation to provide nonemergency transportation services; and

(iii) recipients of assistance under section 204.

(h) Scope of planning process.--

(1) In general.--The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will--

(A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and for freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(G) promote efficient system management and operation;

(H) emphasize the preservation of the existing transportation system;

(I) improve the resiliency and reliability of the transportation system and reduce or mitigate stormwater impacts of surface transportation; and

(J) enhance travel and tourism.

(2) Performance-based approach.--

(A) In general.--The metropolitan transportation planning process shall provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of this title and the general purposes described in section 5301 of title 49.

(B) Performance targets.--

(i) Surface transportation performance targets.--

(I) In general.--Each metropolitan planning organization shall establish performance targets that address the performance measures described in section 150(c), where applicable, to use in tracking progress towards attainment of critical outcomes for the region of the metropolitan planning organization.

(II) Coordination.--Selection of performance targets by a metropolitan planning organization shall be coordinated with the relevant State to ensure consistency, to the maximum extent practicable.

(ii) Public transportation performance targets.--Selection of performance targets by a metropolitan planning organization shall be coordinated, to the maximum extent practicable, with providers of public transportation to ensure consistency with sections 5326(c) and 5329(d) of title 49.

(C) Timing.--Each metropolitan planning organization shall establish the performance targets under subparagraph (B) not later than 180 days after the date on which the relevant State or provider of public transportation establishes the performance targets.

(D) Integration of other performance-based plans.--A metropolitan planning organization shall integrate in the metropolitan transportation planning process, directly or by reference, the goals, objectives, performance measures, and targets described in other State transportation plans and transportation processes, as well as any plans developed under chapter 53 of title 49 by providers of public transportation, required as part of a performance-based program.

(3) Failure to consider factors.--The failure to consider any factor specified in paragraphs (1) and (2) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process.

(i) Development of transportation plan.--

(1) Requirements.--

(A) In general.--Each metropolitan planning organization shall prepare and update a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection.

(B) Frequency.--

(i) In general.--The metropolitan planning organization shall prepare and update such plan every 4 years (or more frequently, if the metropolitan planning organization elects to update more frequently) in the case of each of the following:

(I) Any area designated as nonattainment, as defined in section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(II) Any area that was nonattainment and subsequently designated to attainment in accordance with section 107(d)(3) of that Act (42 U.S.C. 7407(d)(3)) and that is subject to a maintenance plan under section 175A of that Act (42 U.S.C. 7505a).

(ii) Other areas.--In the case of any other area required to have a transportation plan in accordance with the requirements of this subsection, the metropolitan planning organization shall prepare and update such plan every 5 years unless the metropolitan planning organization elects to update more frequently.

(2) Transportation plan.--A transportation plan under this section shall be in a form that the Secretary determines to be appropriate and shall contain, at a minimum, the following:

(A) Identification of transportation facilities.--

(i) In general.--An identification of transportation facilities (including major roadways, public transportation facilities, intercity bus facilities, multimodal and intermodal facilities, nonmotorized transportation facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions.

(ii) Factors.--In formulating the transportation plan, the metropolitan planning organization shall consider factors described in subsection (h) as the factors relate to a 20-year forecast period.

(B) Performance measures and targets.--A description of the performance measures and performance targets used in assessing the performance of the transportation system in accordance with subsection (h)(2).

(C) System performance report.--A system performance report and subsequent updates evaluating the condition and performance of the transportation system with respect to the performance targets described in subsection (h)(2), including--

(i) progress achieved by the metropolitan planning organization in meeting the performance targets in comparison with system performance recorded in previous reports; and

(ii) for metropolitan planning organizations that voluntarily elect to develop multiple scenarios, an analysis of how the preferred scenario has improved the conditions and performance of the transportation system and how changes in local policies and investments have impacted the costs necessary to achieve the identified performance targets.

(D) Mitigation activities.--

(i) In general.--A long-range transportation plan shall include a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(ii) Consultation.--The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(E) Financial plan.--

(i) In general.--A financial plan that--

(I) demonstrates how the adopted transportation plan can be implemented;

(II) indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan; and

(III) recommends any additional financing strategies for needed projects and programs.

(ii) Inclusions.--The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(iii) Cooperative development.--For the purpose of developing the transportation plan, the metropolitan planning organization, transit operator, and State shall cooperatively develop estimates of funds that will be available to support plan implementation.

(F) Operational and management strategies.--Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods.

(G) Capital investment and other strategies.--Capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure, provide for multimodal capacity increases based on regional priorities and needs, and reduce the vulnerability of the existing transportation infrastructure to natural disasters.

(H) Transportation and transit enhancement activities.--Proposed transportation and transit enhancement activities including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated.

(3) Coordination with Clean Air Act agencies.--In metropolitan areas that are in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), the metropolitan planning organization shall coordinate the development of a transportation plan with the process for development of the transportation control measures of the State implementation plan required by that Act.

(4) Optional scenario development.--

(A) In general.--A metropolitan planning organization may, while fitting the needs and complexity of its community, voluntarily elect to develop multiple scenarios for consideration as part of the development of the metropolitan transportation plan, in accordance with subparagraph (B).

(B) Recommended components.--A metropolitan planning organization that chooses to develop multiple scenarios under subparagraph (A) shall be encouraged to consider--

(i) potential regional investment strategies for the planning horizon;

(ii) assumed distribution of population and employment;

(iii) a scenario that, to the maximum extent practicable, maintains baseline conditions for the performance measures identified in subsection (h)(2);

(iv) a scenario that improves the baseline conditions for as many of the performance measures identified in subsection (h)(2) as possible;

(v) revenue constrained scenarios based on the total revenues expected to be available over the forecast period of the plan; and

(vi) estimated costs and potential revenues available to support each scenario.

(C) Metrics.--In addition to the performance measures identified in section 150(c), metropolitan planning organizations may evaluate scenarios developed under this paragraph using locally-developed measures.

(5) Consultation.--

(A) In general.--In each metropolitan area, the metropolitan planning organization shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan.

(B) Issues.--The consultation shall involve, as appropriate--

(i) comparison of transportation plans with State conservation plans or maps, if available; or

(ii) comparison of transportation plans to inventories of natural or historic resources, if available.

(6) Participation by interested parties.--

(A) In general.--Each metropolitan planning organization shall provide citizens, affected public agencies, representatives of public transportation employees, public ports, freight shippers, providers of freight transportation services, private providers of transportation (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan.

(B) Contents of participation plan.--A participation plan--

(i) shall be developed in consultation with all interested parties; and

(ii) shall provide that all interested parties have reasonable opportunities to comment on the contents of the transportation plan.

(C) Methods.--In carrying out subparagraph (A), the metropolitan planning organization shall, to the maximum extent practicable--

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(7) Publication.--A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, approved by the metropolitan planning organization and submitted for information purposes to the Governor at such times and in such manner as the Secretary shall establish.

(8) Selection of projects from illustrative list.--Notwithstanding paragraph (2)(E), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(E).

(j) Metropolitan TIP.--

(1) Development.--

(A) In general.--In cooperation with the State and any affected public transportation operator, the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the metropolitan planning area that--

(i) contains projects consistent with the current metropolitan transportation plan;

(ii) reflects the investment priorities established in the current metropolitan transportation plan; and

(iii) once implemented, is designed to make progress toward achieving the performance targets established under subsection (h)(2).

(B) Opportunity for comment.--In developing the TIP, the metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(C) Funding estimates.--For the purpose of developing the TIP, the metropolitan planning organization, public transportation agency, and State shall cooperatively develop estimates of funds that are reasonably expected to be available to support program implementation.

(D) Updating and approval.--The TIP shall be--

(i) updated at least once every 4 years; and

(ii) approved by the metropolitan planning organization and the Governor.

(2) Contents.--

(A) Priority list.--The TIP shall include a priority list of proposed Federally supported projects and strategies to be carried out within each 4-year period after the initial adoption of the TIP.

(B) Financial plan.--The TIP shall include a financial plan that--

(i) demonstrates how the TIP can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be available to carry out the program;

(iii) identifies innovative financing techniques to finance projects, programs, and strategies; and

(iv) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.

(C) Descriptions.--Each project in the TIP shall include sufficient descriptive material (such as type of work, termini, length, and other similar factors) to identify the project or phase of the project.

(D) Performance target achievement.--The transportation improvement program shall include, to the maximum extent practicable, a description of the anticipated effect of the transportation improvement program toward achieving the performance targets established in the metropolitan transportation plan, linking investment priorities to those performance targets.

(3) Included projects.--

(A) Projects under this title and chapter 53 of title 49.--A TIP developed under this subsection for a metropolitan area shall include the projects within the area that are proposed for funding under chapter 1 of this title and chapter 53 of title 49.

(B) Projects under chapter 2.--

(i) Regionally significant projects.--Regionally significant projects proposed for funding under chapter 2 shall be identified individually in the transportation improvement program.

(ii) Other projects.--Projects proposed for funding under chapter 2 that are not determined to be regionally significant shall be grouped in 1 line item or identified individually in the transportation improvement program.

(C) Consistency with long-range transportation plan.--Each project shall be consistent with the long-range transportation plan developed under subsection (i) for the area.

(D) Requirement of anticipated full funding.--The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project or the identified phase within the time period contemplated for completion of the project or the identified phase.

(4) Notice and comment.--Before approving a TIP, a metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(5) Selection of projects.--

(A) In general.--Except as otherwise provided in subsection (k)(4) and in addition to the TIP development required

under paragraph (1), the selection of Federally funded projects in metropolitan areas shall be carried out, from the approved TIP--

(i) by--

(I) in the case of projects under this title, the State; and

(II) in the case of projects under chapter 53 of title 49, the designated recipients of public transportation funding; and

(ii) in cooperation with the metropolitan planning organization.

(B) Modifications to project priority.--Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved TIP in place of another project in the program.

(6) Selection of projects from illustrative list.--

(A) No required selection.--Notwithstanding paragraph (2)(B)(iv), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv).

(B) Required action by the Secretary.--Action by the Secretary shall be required for a State or metropolitan planning organization to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv) for inclusion in an approved TIP.

(7) Publication.--

(A) Publication of TIPs.--A TIP involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review.

(B) Publication of annual listings of projects.--

(i) In general.--An annual listing of projects, including investments in pedestrian walkways and bicycle transportation facilities, for which Federal funds have been obligated in the preceding year shall be published or otherwise made available by the cooperative effort of the State, transit operator, and metropolitan planning organization for public review.

(ii) Requirement.--The listing shall be consistent with the categories identified in the TIP.

(k) Transportation management areas.--

(1) Identification and designation.--

(A) Required identification.--The Secretary shall identify as a transportation management area each urbanized area (as defined by the Bureau of the Census) with a population of over 200,000 individuals.

(B) Designations on request.--The Secretary shall designate any additional area as a transportation management area on the request of the Governor and the metropolitan planning organization designated for the area.

(2) Transportation plans.--In a transportation management area, transportation plans shall be based on a continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and public transportation operators.

(3) Congestion management process.--

(A) In general.--Within a metropolitan planning area serving a transportation management area, the transportation planning process under this section shall address congestion management through a process that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under this title and chapter 53 of title 49 through the use of travel demand reduction (including intercity bus operators, employer-based commuting programs such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), job access projects, and operational management strategies.

(B) Schedule.--The Secretary shall establish an appropriate phase-in schedule for compliance with the requirements of this section but no sooner than 1 year after the identification of a transportation management area.

(C) Congestion management plan.--A metropolitan planning organization serving a transportation management

area may develop a plan that includes projects and strategies that will be considered in the TIP of such metropolitan planning organization. Such plan shall--

(i) develop regional goals to reduce vehicle miles traveled during peak commuting hours and improve transportation connections between areas with high job concentration and areas with high concentrations of low-income households;

(ii) identify existing public transportation services, employer-based commuter programs, and other existing transportation services that support access to jobs in the region; and

(iii) identify proposed projects and programs to reduce congestion and increase job access opportunities.

(D) Participation.--In developing the plan under subparagraph (C), a metropolitan planning organization shall consult with employers, private and nonprofit providers of public transportation, transportation management organizations, and organizations that provide job access reverse commute projects or job-related services to low-income individuals.

(4) Selection of projects.--

(A) In general.--All Federally funded projects carried out within the boundaries of a metropolitan planning area serving a transportation management area under this title (excluding projects carried out on the National Highway System) or under chapter 53 of title 49 shall be selected for implementation from the approved TIP by the metropolitan planning organization designated for the area in consultation with the State and any affected public transportation operator.

(B) National Highway System projects.--Projects carried out within the boundaries of a metropolitan planning area serving a transportation management area on the National Highway System shall be selected for implementation from the approved TIP by the State in cooperation with the metropolitan planning organization designated for the area.

(5) Certification.--

(A) In general.--The Secretary shall--

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation

management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) Requirements for certification.--The Secretary may make the certification under subparagraph (A) if--

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) Effect of failure to certify.--

(i) Withholding of project funds.--If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this title and chapter 53 of title 49.

(ii) Restoration of withheld funds.--The withheld funds shall be restored to the metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) Review of certification.--In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

(l) Report on performance-based planning processes.--

(1) In general.--The Secretary shall submit to Congress a report on the effectiveness of the performance-based planning processes of metropolitan planning organizations under this section, taking into consideration the requirements of this subsection.

(2) Report.--Not later than 5 years after the date of enactment of the MAP-21, the Secretary shall submit to

Congress a report evaluating--

(A) the overall effectiveness of performance-based planning as a tool for guiding transportation investments;

(B) the effectiveness of the performance-based planning process of each metropolitan planning organization under this section;

(C) the extent to which metropolitan planning organizations have achieved, or are currently making substantial progress toward achieving, the performance targets specified under this section and whether metropolitan planning organizations are developing meaningful performance targets; and

(D) the technical capacity of metropolitan planning organizations that operate within a metropolitan planning area with a population of 200,000 or less and their ability to carry out the requirements of this section.

(3) Publication.--The report under paragraph (2) shall be published or otherwise made available in electronically accessible formats and means, including on the Internet.

(m) Abbreviated plans for certain areas.--

(1) In general.--Subject to paragraph (2), in the case of a metropolitan area not designated as a transportation management area under this section, the Secretary may provide for the development of an abbreviated transportation plan and TIP for the metropolitan planning area that the Secretary determines is appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems in the area.

(2) Nonattainment areas.--The Secretary may not permit abbreviated plans or TIPs for a metropolitan area that is in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.).

(n) Additional requirements for certain nonattainment areas.--

(1) In general.--Notwithstanding any other provisions of this title or chapter 53 of title 49, for transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), Federal funds may not be advanced in such area for any highway project that will result in a significant increase in the carrying capacity for single-occupant vehicles unless the project is addressed through a congestion management process.

(2) Applicability.--This subsection applies to a nonattainment area within the metropolitan planning area boundaries determined under subsection (e).

(o) Limitation on statutory construction.--Nothing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this title or chapter 53 of title 49.

(p) Funding.--Funds apportioned under paragraphs (5)(D) and (6) of section 104(b) of this title or section 5305(g) of title 49 shall be available to carry out this section.

(q) Continuation of current review practice.--Since plans and TIPs described in this section are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and TIPs described in this section have not been reviewed under that Act as of January 1, 1997, any decision by the Secretary concerning a plan or TIP described in this section shall not be considered to be a Federal action subject to review under that Act.

(r) Bi-State metropolitan planning organization.--

(1) Definition of Bi-State MPO Region.--In this subsection, the term "Bi-State MPO Region" has the meaning given the term "region" in subsection (a) of Article II of the Lake Tahoe Regional Planning Compact (Public Law 96-551; 94 Stat. 3234).

(2) Treatment.--For the purpose of this title, the Bi-State MPO Region shall be treated as--

(A) a metropolitan planning organization;

(B) a transportation management area under subsection (k); and

(C) an urbanized area, which is comprised of a population of 145,000 in the State of California and a population of 65,000 in the State of Nevada.

(3) Suballocated funding.--

(A) Planning.--In determining the amounts under subparagraph (A) of section 133(d)(1) that shall be obligated for a fiscal year in the States of California and Nevada under clauses (i), (ii), and (iii) of that subparagraph, the Secretary shall, for each of those States--

(i) calculate the population under each of those clauses;

(ii) decrease the amount under section 133(d)(1)(A)(iii) by the population specified in paragraph (2) of this subsection for the Bi-State MPO Region in that State; and

(iii) increase the amount under section 133(d)(1)(A)(i) by the population specified in paragraph (2) of this subsection for the Bi-State MPO Region in that State.

(B) STBGP set aside.--In determining the amounts under paragraph (2) of section 133(h) that shall be obligated for a fiscal year in the States of California and Nevada, the Secretary shall, for the purpose of that subsection, calculate the populations for each of those States in a manner consistent with subparagraph (A).

CREDIT(S)

(Added Pub.L. 87-866, § 9(a), Oct. 23, 1962, 76 Stat. 1148; amended Pub.L. 91-605, Title I, § 143, Dec. 31, 1970, 84 Stat. 1737; Pub.L. 95-599, Title I, § 169, Nov. 6, 1978, 92 Stat. 2723; Pub.L. 102-240, Title I, § 1024(a), Dec. 18, 1991, 105 Stat. 1955; Pub.L. 102-388, Title V, § 502(b), Oct. 6, 1992, 106 Stat. 1566; Pub.L. 103-429, § 3(5), Oct. 31, 1994, 108 Stat. 4377; Pub.L. 104-59, Title III, § 317, Nov. 28, 1995, 109 Stat. 588; Pub.L. 105-178, Title I, § 1203(a) to (m), (o), June 9, 1998, 112 Stat. 170 to 179; Pub.L. 105-206, Title IX, § 9003(c), July 22, 1998, 112 Stat. 839; Pub.L. 109-59, Title VI, § 6001(a), Aug. 10, 2005, 119 Stat. 1839; Pub.L. 110-244, Title I, § 101(n), June 6, 2008, 122 Stat. 1576; Pub.L. 112-141, Div. A, Title I, § 1201(a), July 6, 2012, 126 Stat. 500; Pub.L. 114-94, Div. A, Title I, § 1201, Dec. 4, 2015, 129 Stat. 1371.)

Notes of Decisions (24)

23 U.S.C.A. § 134, 23 USCA § 134
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260, 114-264, 114-265, 114-269, and 114-271 to 114-277.

2

23 U.S.C.A. § 138

§ 138. Preservation of parklands

Currentness

(a) Declaration of policy.--It is declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a Federal lands transportation facility) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

(b) De minimis impacts.--

(1) Requirements.--

(A) Requirements for historic sites.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.--The requirements of subsection (a)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (a)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites.--With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, that--

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.--With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(c) Satisfaction of requirements for certain historic sites.--

(1) In general.--The Secretary shall--

(A) align, to the maximum extent practicable, with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 306108 of title 54, including implementing regulations; and

(B) not later than 90 days after the date of enactment of this subsection, coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the "Council" to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) Avoidance alternative analysis.--

(A) In general.--If, in an analysis required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may--

(i) include the determination of the Secretary in the analysis required under that Act;

(ii) provide a notice of the determination to--

(I) each applicable State historic preservation officer and tribal historic preservation officer;

(II) the Council, if the Council is participating in the consultation process under section 306108 of title 54; and

(III) the Secretary of the Interior; and

(iii) request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (a)(1).

(B) Concurrence.--If the applicable preservation officer, the Council, and the Secretary of the Interior each

provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (a)(1) shall be required.

(C) Publication.--A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall--

(i) be included in the record of decision or finding of no significant impact of the Secretary; and

(ii) be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) Aligning historical reviews.--

(A) In general.--If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (a)(2) through the consultation requirements of section 306108 of title 54.

(B) Satisfaction of conditions.--To satisfy subsection (a)(2), each individual described in paragraph (2)(A)(ii) shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54.

(d) References to past transportation environmental authorities.--

(1) Section 4(f) requirements.--The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89-670; 80 Stat. 934) as in effect before the repeal of that section).

(2) Section 106 requirements.--The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89-665; 80 Stat. 917) as in effect before the repeal of that section).

(e) Bridge exemption from consideration.--A common post-1945 concrete or steel bridge or culvert (as described in 77 Fed. Reg. 68790) that is exempt from individual review under section 306108 of title 54 shall be exempt from consideration under this section.

(f) Rail and transit.--

(1) In general.--Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (a), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) Exceptions.--

(A) In general.--Paragraph (1) shall not apply to--

(i) stations; or

(ii) bridges or tunnels located on--

(I) railroad lines that have been abandoned; or

(II) transit lines that are not in use.

(B) Clarification with respect to certain bridges and tunnels.--The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines--

(i) over which service has been discontinued; or

(ii) that have been railbanked or otherwise reserved for the transportation of goods or passengers.

CREDIT(S)

(Added Pub.L. 89-574, § 15(a), Sept. 13, 1966, 80 Stat. 771; amended Pub.L. 90-495, § 18(a), Aug. 23, 1968, 82 Stat. 823; Pub.L. 94-280, Title I, § 124, May 5, 1976, 90 Stat. 440; Pub.L. 100-17, Title I, § 133(b)(10), Apr. 2, 1987, 101 Stat. 171; Pub.L. 109-59, Title VI, § 6009(a)(1), Aug. 10, 2005, 119 Stat. 1874; Pub.L. 112-141, Div. A,

Title I, § 1119(c)(2), July 6, 2012, 126 Stat. 492; Pub.L. 113-287, § 5(f)(2), Dec. 19, 2014, 128 Stat. 3268; Pub.L. 114-94, Div. A, Title I, §§ 1301(a), 1302(a), 1303(a), Title XI, § 11502(a), Dec. 4, 2015, 129 Stat. 1375, 1377, 1378, 1690.)

Notes of Decisions (75)

23 U.S.C.A. § 138, 23 USCA § 138
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260, 114-264, 114-265, 114-269, and 114-271 to 114-277.

End of Document

3

49 U.S.C.A. § 303

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

Currentness

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of programs and projects.--Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if--

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.--

(1) Requirements.--

(A) Requirements for historic sites.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.--The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites.--With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code,[1] that--

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.--With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park,

recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) Satisfaction of requirements for certain historic sites.--

(1) In general.--The Secretary shall--

(A) align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 306108 of title 54, including implementing regulations; and

(B) not later than 90 days after the date of enactment of this subsection, coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the "Council") to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) Avoidance alternative analysis.--

(A) In general.--If, in an analysis required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may--

(i) include the determination of the Secretary in the analysis required under that Act;

(ii) provide a notice of the determination to--

(I) each applicable State historic preservation officer and tribal historic preservation officer;

(II) the Council, if the Council is participating in the consultation process under section 306108 of title 54; and

(III) the Secretary of the Interior; and

(iii) request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) Concurrence.--If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (c)(1) shall be required.

(C) Publication.--A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall--

(i) be included in the record of decision or finding of no significant impact of the Secretary; and

(ii) be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) Aligning historical reviews.--

(A) In general.--If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54.

(B) Satisfaction of conditions.--To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54.

(f) References to past transportation environmental authorities.--

(1) Section 4(f) requirements.--The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89-670; 80 Stat. 934) as in effect before the repeal of that section).

(2) Section 106 requirements.--The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89-665; 80 Stat. 917) as in effect before the repeal of that section).

(g) Bridge exemption from consideration.--A common post-1945 concrete or steel bridge or culvert (as described in 77 Fed. Reg. 68790) that is exempt from individual review under section 306108 of title 54 shall be exempt from consideration under this section.

(h) Rail and transit.--

(1) In general.--Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (c), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) Exceptions.--

(A) In general.--Paragraph (1) shall not apply to--

(i) stations; or

(ii) bridges or tunnels located on--

(I) railroad lines that have been abandoned; or

(II) transit lines that are not in use.

(B) Clarification with respect to certain bridges and tunnels.--The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines--

(i) over which service has been discontinued; or

(ii) that have been railbanked or otherwise reserved for the transportation of goods or passengers.

CREDIT(S)

(Added Pub.L. 97-449, § 1(b), Jan. 12, 1983, 96 Stat. 2419; amended Pub.L. 100-17, Title I, § 133(d), Apr. 2, 1987, 101 Stat. 173; Pub.L. 109-59, Title VI, § 6009(a)(2), Aug. 10, 2005, 119 Stat. 1875; Pub.L. 113-287, § 5(p), Dec. 19, 2014, 128 Stat. 3272; Pub.L. 114-94, Div. A, Title I, §§ 1301(b), 1302(b), 1303(b), Title XI, § 11502(b), Dec. 4, 2015, 129 Stat. 1376, 1378, 1690.)

Notes of Decisions (193)

Footnotes

1 So in original. The words ‘‘, United States Code’’ probably should not appear.

49 U.S.C.A. § 303, 49 USCA § 303
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260, 114-264, 114-265, 114-269, and 114-271 to 114-277.

End of Document

4

Code of Federal Regulations
Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter E. Planning and Research
Part 450. Planning Assistance and Standards (Refs & Annos)
Subpart C. Metropolitan Transportation Planning and Programming

23 C.F.R. § 450.318

§ 450.318 Transportation planning studies and project development.

Effective: June 27, 2016

Currentness

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA–21 (Pub.L. 105–178), an MPO(s), State(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the metropolitan transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), State(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500–1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with 40 CFR 1502.21, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in 40 CFR 1502.20), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement (EIS) or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate.

(d) Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part, including an explanation that it is non-binding guidance material. The guidance in Appendix A applies only to paragraphs (a)-(c) in this section.

(e) In addition to the process for incorporation directly or by reference outlined in paragraph (b) of this section, an additional authority for integrating planning products into the environmental review process exists in 23 U.S.C. 168. As provided in 23 U.S.C. 168(f):

(1) The statutory authority in 23 U.S.C. 168 shall not be construed to limit in any way the continued use of processes established under other parts of this section or under an authority established outside of this part, and

the use of one of the processes in this section does not preclude the subsequent use of another process in this section or an authority outside of this part.

(2) The statute does not restrict the initiation of the environmental review process during planning.

SOURCE: 81 FR 34135, May 27, 2016, unless otherwise noted.

AUTHORITY: 23 U.S.C. 134 and 135; 42 U.S.C. 7410 et seq.; 49 U.S.C. 5303 and 5304; 49 CFR 1.85 and 1.90.

Notes of Decisions (6)

Current through January 5, 2017; 82 FR 1591.

5

Code of Federal Regulations
Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter E. Planning and Research
Part 450. Planning Assistance and Standards (Refs & Annos)

23 C.F.R. Pt. 450, App. A

APPENDIX A TO PART 450—LINKING THE TRANSPORTATION PLANNING AND NEPA PROCESSES

Effective: June 27, 2016

Currentness

Background and Overview

This Appendix provides additional information to explain the linkage between the transportation planning and project development/National Environmental Policy Act (NEPA) processes. It is intended to be non-binding and should not be construed as a rule of general applicability.

For 40 years, the Congress has directed that federally funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to 23 U.S.C. 134–135 and 49 U.S.C. 5303–5306). Over the years, the Congress has refined and strengthened the transportation planning process as the foundation for project decisions, emphasizing public involvement, consideration of environmental and other factors, and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 (42 U.S.C. 4231 et seq.) have often been conducted de novo, disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), or planning-level corridor/subarea/feasibility studies. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements.

The purpose of this Appendix is to change this culture, by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions. This Appendix was crafted to recognize that transportation planning processes vary across the country. This document provides details on how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws, regardless of when the Notice of Intent has been published. This Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages.

The information below is intended for use by State departments of transportation (State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which

transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of this Appendix in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects.

This Appendix does not extend NEPA requirements to transportation plans and programs. The Transportation Efficiency Act for the 21st Century (TEA–21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) specifically exempted transportation plans and programs from NEPA review. Therefore, initiating the NEPA process as part of, or concurrently with, a transportation planning study does not subject transportation plans and programs to NEPA.

Implementation of this Appendix by States, MPOs, and public transportation operators is voluntary. The degree to which studies, analyses, or conclusions from the transportation planning process can be incorporated into the project development/NEPA processes will depend upon how well they meet certain standards established by NEPA regulations and guidance. While some transportation planning processes already meet these standards, others will need some modification.

The remainder of this Appendix document utilizes a "Question and Answer" format, organized into three primary categories ("Procedural Issues," "Substantive Issues," and "Administrative Issues").

I Procedural Issues

1 In what format should the transportation planning information be included?

To be included in the NEPA process, work from the transportation planning process must be documented in a form that can be appended to the NEPA document or incorporated by reference. Documents may be incorporated by reference if they are readily available so as to not impede agency or public review of the action. Any document incorporated by reference must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." Incorporated materials must be cited in the NEPA document and their contents briefly described, so that the reader understands why the document is cited and knows where to look for further information. To the extent possible, the documentation should be in a form such as official actions by the MPO, State DOT, or public transportation operator and/or correspondence within and among the organizations involved in the transportation planning process.

2 What is a reasonable level of detail for a planning product that is intended to be used in a NEPA document? How does this level of detail compare to what is considered a full NEPA analysis?

For purposes of transportation planning alone, a planning-level analysis does not need to rise to the level of detail required in the NEPA process. Rather, it needs to be accurate and up-to-date, and should adequately support recommended improvements in the statewide or metropolitan long-range transportation plan. The SAFETEA–LU requires transportation planning processes to focus on setting a context and following acceptable procedures. For example, the SAFETEA–LU requires a "discussion of the types of potential environmental mitigation activities" and potential areas for their implementation, rather than details on specific strategies. The SAFETEA–LU also emphasizes consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies.

However, the Environmental Assessment (EA) or Environmental Impact Statement (EIS) ultimately will be judged by the standards applicable under the NEPA regulations and guidance from the Council on Environmental Quality

(CEQ). To the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process. As an option, the NEPA analyses prepared for project development can be integrated with transportation planning studies (see the response to Question 9 for additional information).

3 What type and extent of involvement from Federal, Tribal, State, and local environmental, regulatory, and resource agencies is needed in the transportation planning process in order for planning-level decisions to be more readily accepted in the NEPA process?

Sections 3005, 3006, and 6001 of the SAFETEA–LU established formal consultation requirements for MPOs and State DOTs to employ with environmental, regulatory, and resource agencies in the development of long-range transportation plans. For example, metropolitan transportation plans now "shall include a discussion of the types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the [transportation] plan," and that these planning-level discussions "shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies." In addition, MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan," and that this consultation "shall involve, as appropriate, comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available." Similar SAFETEA–LU language addresses the development of the long-range statewide transportation plan, with the addition of Tribal conservation plans or maps to this planning-level "comparison."

In addition, section 6002 of the SAFETEA–LU established several mechanisms for increased efficiency in environmental reviews for project decision-making. For example, the term "lead agency" collectively means the U.S. Department of Transportation and a State or local governmental entity serving as a joint lead agency for the NEPA process. In addition, the lead agency is responsible for inviting and designating "participating agencies" (i.e., other Federal or non–Federal agencies that may have an interest in the proposed project). Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency:

(a) Has no jurisdiction or authority with respect to the project; (b) has no expertise or information relevant to the project; and (c) does not intend to submit comments on the project.

Past successful examples of using transportation planning products in NEPA analysis are based on early and continuous involvement of environmental, regulatory, and resource agencies. Without this early coordination, environmental, regulatory, and resource agencies are more likely to expect decisions made or analyses conducted in the transportation planning process to be revisited during the NEPA process. Early participation in transportation planning provides environmental, regulatory, and resource agencies better insight into the needs and objectives of the locality. Additionally, early participation provides an important opportunity for environmental, regulatory, and resource agency concerns to be identified and addressed early in the process, such as those related to permit applications. Moreover, Federal, Tribal, State, and local environmental, regulatory, and resource agencies are able to share data on particular resources, which can play a critical role in determining the feasibility of a transportation solution with respect to environmental impacts. The use of other agency planning outputs can result in a transportation project that could support multiple goals (transportation, environmental, and community). Further,

planning decisions by these other agencies may have impacts on long-range transportation plans and/or the STIP/TIP, thereby providing important input to the transportation planning process and advancing integrated decision-making.

4 What is the procedure for using decisions or analyses from the transportation planning process?

The lead agencies jointly decide, and must agree, on what processes and consultation techniques are used to determine the transportation planning products that will be incorporated into the NEPA process. At a minimum, a robust scoping/early coordination process (which explains to Federal and State environmental, regulatory, and resource agencies and the public the information and/or analyses utilized to develop the planning products, how the purpose and need was developed and refined, and how the design concept and scope were determined) should play a critical role in leading to informed decisions by the lead agencies on the suitability of the transportation planning information, analyses, documents, and decisions for use in the NEPA process. As part of a rigorous scoping/early coordination process, the FHWA and the FTA should ensure that the transportation planning results are appropriately documented, shared, and used.

5 To what extent can the FHWA/FTA provide up-front assurance that decisions and additional investments made in the transportation planning process will allow planning-level decisions and analyses to be used in the NEPA process?

There are no guarantees. However, the potential is greatly improved for transportation planning processes that address the "3–C" planning principles (comprehensive, cooperative, and continuous); incorporate the intent of NEPA through the consideration of natural, physical, and social effects; involve environmental, regulatory, and resource agencies; thoroughly document the transportation planning process information, analysis, and decision; and vet the planning results through the applicable public involvement processes.

6 What considerations will the FHWA/FTA take into account in their review of transportation planning products for acceptance in project development/NEPA?

The FHWA and the FTA will give deference to decisions resulting from the transportation planning process if the FHWA and FTA determine that the planning process is consistent with the "3–C" planning principles and when the planning study process, alternatives considered, and resulting decisions have a rational basis that is thoroughly documented and vetted through the applicable public involvement processes. Moreover, any applicable program-specific requirements (e.g., those of the Congestion Mitigation and Air Quality Improvement Program or the FTA's Capital Investment Grant program) also must be met.

The NEPA requires that the FHWA and the FTA be able to stand behind the overall soundness and credibility of analyses conducted and decisions made during the transportation planning process if they are incorporated into a NEPA document. For example, if systems-level or other broad objectives or choices from the transportation plan are incorporated into the purpose and need statement for a NEPA document, the FHWA and the FTA should not revisit whether these are the best objectives or choices among other options. Rather, the FHWA and the FTA review would include making sure that objectives or choices derived from the transportation plan were: Based on transportation planning factors established by Federal law; reflect a credible and articulated planning rationale; founded on reliable data; and developed through transportation planning processes meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the goals and choices must be documented and included in the NEPA document. The FHWA/FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable, scientifically acceptable, and consistent with goals, objectives, and policies set forth in long-range

transportation plans. This review would include determining whether: (a) Assumptions have a rational basis and are up-to-date and (b) data, analytical methods, and modeling techniques are reliable, defensible, reasonably current, and meet data quality requirements.

II Substantive Issues

General Issues To Be Considered

7 What should be considered in order to rely upon transportation planning studies in NEPA?

The following questions should be answered prior to accepting studies conducted during the transportation planning process for use in NEPA. While not a "checklist," these questions are intended to guide the practitioner's analysis of the planning products:

• How much time has passed since the planning studies and corresponding decisions were made?

• Were the future year policy assumptions used in the transportation planning process related to land use, economic development, transportation costs, and network expansion consistent with those to be used in the NEPA process?

• Is the information still relevant/valid?

• What changes have occurred in the area since the study was completed?

• Is the information in a format that can be appended to an environmental document or reformatted to do so?

• Are the analyses in a planning-level report or document based on data, analytical methods, and modeling techniques that are reliable, defensible, and consistent with those used in other regional transportation studies and project development activities?

• Were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions?

• Were the planning products available to other agencies and the public during NEPA scoping?

• During NEPA scoping, was a clear connection between the decisions made in planning and those to be made during the project development stage explained to the public and others? What was the response?

• Are natural resource and land use plans being informed by transportation planning products, and vice versa?

Purpose and Need

8 How can transportation planning be used to shape a project's purpose and need in the NEPA process?

A sound transportation planning process is the primary source of the project purpose and need. Through transportation planning, State and local governments, with involvement of stakeholders and the public, establish a vision for the region's future transportation system, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing these issues. The transportation planning process also provides a potential forum to define a project's purpose and need by framing the scope of the problem to be addressed by a proposed project. This scope may be further refined during the transportation planning process as more information about the transportation need is collected and consultation with the public and other stakeholders clarifies other issues and goals for the region.

23 U.S.C. 139(f), as amended by the SAFETEA–LU Section 6002, provides additional focus regarding the definition of the purpose and need and objectives. For example, the lead agency, as early as practicable during the environmental review process, shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project. The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include: (a) Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (b) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and (c) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

The transportation planning process can be utilized to develop the purpose and need in the following ways:

(a) Goals and objectives from the transportation planning process may be part of the project's purpose and need statement;

(b) A general travel corridor or general mode or modes (e.g., highway, transit, or a highway/transit combination) resulting from planning analyses may be part of the project's purpose and need statement;

(c) If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement; or

(d) The results of analyses from management systems (e.g., congestion, pavement, bridge, and/or safety) may shape the purpose and need statement.

The use of these planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document.

Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. However, the purpose and need statement should be specific enough to generate alternatives that may potentially yield real solutions to the problem at-hand. A purpose and need statement that yields only one alternative may indicate a purpose and need that is too narrowly defined.

Short of a fully integrated transportation decision-making process, many State DOTs develop information for their purpose and need statements when implementing interagency NEPA/Section 404 process merger agreements. These agreements may need to be expanded to include commitments to share and utilize transportation planning products when developing a project's purpose and need.

9 Under what conditions can the NEPA process be initiated in conjunction with transportation planning studies?

The NEPA process may be initiated in conjunction with transportation planning studies in a number of ways. A common method is the "tiered EIS," in which the first-tier EIS evaluates general travel corridors, modes, and/or packages of projects at a planning level of detail, leading to the refinement of purpose and need and, ideally, selection of the design concept and scope for a project or series of projects. Subsequently, second-tier NEPA review(s) of the resulting projects would be performed in the usual way. The first-tier EIS uses the NEPA process as a tool to involve environmental, regulatory, and resource agencies and the public in the planning decisions, as well as to ensure the appropriate consideration of environmental factors in these planning decisions.

Corridor or subarea analyses/studies are another option when the long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives. In such cases, the formal NEPA process could be initiated through publication of a NOI in conjunction with a corridor or subarea planning study.

Alternatives

10 in the context of this Appendix, what is the meaning of the term "alternatives"?

This Appendix uses the term "alternatives" as specified in the NEPA regulations (40 CFR 1502.14), where it is defined in its broadest sense to include everything from major modal alternatives and location alternatives to minor design changes that would mitigate adverse impacts. This Appendix does not use the term as it is used in many other contexts (e.g., "prudent and feasible alternatives" under Section 4(f) of the Department of Transportation Act or the "Least Environmentally Damaging Practicable Alternative" under the Clean Water Act.

11 Under what circumstances can alternatives be eliminated from detailed consideration during the NEPA process based on information and analysis from the transportation planning process?

There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start. Each approach requires careful attention, and is summarized below.

(a) Shaping the Purpose and Need for the Project: The transportation planning process should shape the purpose and need and, thereby, the range of reasonable alternatives. With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process. See the response to Question 8 for further discussion on how the planning process can shape the purpose and need used in the NEPA process.

For example, the purpose and need may be shaped by the transportation planning process in a manner that consequently narrows the range of alternatives that must be considered in detail in the NEPA document when:

(1) The transportation planning process has selected a general travel corridor as best addressing identified transportation problems and the rationale for the determination in the planning document is reflected in the purpose and need statement of the subsequent NEPA document;

(2) The transportation planning process has selected a general mode (e.g., highway, transit, or a highway/transit combination) that accomplishes its goals and objectives, and these documented determinations are reflected in the purpose and need statement of the subsequent NEPA document; or

(3) The transportation planning process determines that the project needs to be funded by tolls or other non-traditional funding sources in order for the long-range transportation plan to be fiscally constrained or identifies goals and objectives that can only be met by toll roads or other non-traditional funding sources, and that determination of those goals and objectives is reflected in the purpose and need statement of the subsequent NEPA document.

(b) Evaluating and Eliminating Alternatives During the Transportation Planning Process: The evaluation and elimination of alternatives during the transportation planning process can be incorporated by reference into a NEPA document under certain circumstances. In these cases, the planning study becomes part of the NEPA process and provides a basis for screening out alternatives. As with any part of the NEPA process, the analysis of alternatives to be incorporated from the process must have a rational basis that has been thoroughly documented (including documentation of the necessary and appropriate vetting through the applicable public involvement processes). This record should be made available for public review during the NEPA scoping process.

See responses to Questions 4, 5, 6, and 7 for additional elements to consider with respect to acceptance of planning products for NEPA documentation and the response to Question 12 on the information or analysis from the transportation planning process necessary for supporting the elimination of an alternative(s) from detailed consideration in the NEPA process.

Development of planning Alternatives Analysis studies, required prior to MAP–21 for projects seeking funds through FTA's Capital Investment Grant program, are now optional, but may still be used to narrow the alternatives prior to the NEPA review, just as other planning studies may be used. In fact, through planning studies, FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No–Build (No Action) alternative and the Locally Preferred Alternative. If the planning process has included the analysis and stakeholder involvement that would be undertaken in a first tier NEPA process, then the alternatives screening conducted in the transportation planning process may be incorporated by reference, described, and relied upon in the project-level NEPA document. At that point, the project-level NEPA analysis can focus on the remaining alternatives.

12 What information or analysis from the transportation planning process is needed in an EA or EIS to support the elimination of an alternative(s) from detailed consideration?

The section of the EA or EIS that discusses alternatives considered but eliminated from detailed consideration

should:

(a) Identify any alternatives eliminated during the transportation planning process (this could include broad categories of alternatives, as when a long-range transportation plan selects a general travel corridor based on a corridor study, thereby eliminating all alternatives along other alignments);

(b) Briefly summarize the reasons for eliminating the alternative; and

(c) Include a summary of the analysis process that supports the elimination of alternatives (the summary should reference the relevant sections or pages of the analysis or study) and incorporate it by reference or append it to the NEPA document.

Any analyses or studies used to eliminate alternatives from detailed consideration should be made available to the public and participating agencies during the NEPA scoping process and should be reasonably available during comment periods.

Alternatives passed over during the transportation planning process because they are infeasible or do not meet the NEPA "purpose and need" can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document. Alternatives that remain "reasonable" after the planning-level analysis must be addressed in the EIS, even when they are not the preferred alternative. When the proposed action evaluated in an EA involves unresolved conflicts concerning alternative uses of available resources, NEPA requires that appropriate alternatives be studied, developed, and described.

Affected Environment and Environmental Consequences

13 What types of planning products provide analysis of the affected environment and environmental consequences that are useful in a project-level NEPA analysis and document?

The following planning products are valuable inputs to the discussion of the affected environment and environmental consequences (both its current state and future state in the absence of the proposed action) in the project-level NEPA analysis and document:

• Regional development and growth analyses;

• Local land use, growth management, or development plans; and

• Population and employment projections.

The following are types of information, analysis, and other products from the transportation planning process that can be used in the discussion of the affected environment and environmental consequences in an EA or EIS:

(a) Geographic information system (GIS) overlays showing the past, current, or predicted future conditions of the natural and built environments;

(b) Environmental scans that identify environmental resources and environmentally sensitive areas;

(c) Descriptions of airsheds and watersheds;

(d) Demographic trends and forecasts;

(e) Projections of future land use, natural resource conservation areas, and development; and

(f) The outputs of natural resource planning efforts, such as wildlife conservation plans, watershed plans, special area management plans, and multiple species habitat conservation plans.

However, in most cases, the assessment of the affected environment and environmental consequences conducted during the transportation planning process will not be detailed or current enough to meet NEPA standards and, thus, the inventory and evaluation of affected resources and the analysis of consequences of the alternatives will need to be supplemented with more refined analysis and possibly site-specific details during the NEPA process.

14 What information from the transportation planning process is useful in describing a baseline for the NEPA analysis of indirect and cumulative impacts?

Because the nature of the transportation planning process is to look broadly at future land use, development, population increases, and other growth factors, the planning analysis can provide the basis for the assessment of indirect and cumulative impacts required under NEPA. The consideration in the transportation planning process of development, growth, and consistency with local land use, growth management, or development plans, as well as population and employment projections, provides an overview of the multitude of factors in an area that are creating pressures not only on the transportation system, but on the natural ecosystem and important environmental and community resources. An analysis of all reasonably foreseeable actions in the area also should be a part of the transportation planning process. This planning-level information should be captured and utilized in the analysis of indirect and cumulative impacts during the NEPA process.

To be used in the analysis of indirect and cumulative impacts, such information should:

(a) Be sufficiently detailed that differences in consequences of alternatives can be readily identified;

(b) Be based on current data (e.g., data from the most recent Census) or be updated by additional information;

(c) Be based on reasonable assumptions that are clearly stated; and/or

(d) Rely on analytical methods and modeling techniques that are reliable, defensible, and reasonably current.

Environmental Mitigation

15 How can planning-level efforts best support advance mitigation, mitigation banking, and priorities for environmental mitigation investments?

A lesson learned from efforts to establish mitigation banks and advance mitigation agreements and alternative mitigation options is the importance of beginning interagency discussions during the transportation planning process. Development pressures, habitat alteration, complicated real estate transactions, and competition for potential mitigation sites by public and private project proponents can encumber the already difficult task of mitigating for "like" value and function and reinforce the need to examine mitigation strategies as early as possible.

Robust use of remote sensing, GIS, and decision support systems for evaluating conservation strategies are all contributing to the advancement of natural resource and environmental planning. The outputs from environmental planning can now better inform transportation planning processes, including the development of mitigation strategies, so that transportation and conservation goals can be optimally met. For example, long-range transportation plans can be screened to assess the effect of general travel corridors or density, on the viability of sensitive plant and animal species or habitats. This type of screening provides a basis for early collaboration among transportation and environmental staffs, the public, and regulatory agencies to explore areas where impacts must be avoided and identify areas for mitigation investments. This can lead to mitigation strategies that are both more economical and more effective from an environmental stewardship perspective than traditional project-specific mitigation measures.

III Administrative Issues

16 Are Federal funds eligible to pay for these additional, or more in depth, environmental studies in transportation planning?

Yes. For example, the following FHWA and FTA funds may be utilized for conducting environmental studies and analyses within transportation planning:

• FHWA planning and research funds, as defined under 23 CFR part 420 (e.g., Metropolitan Planning (PL), Statewide Planning and Research (SPR), National Highway System (NHS), STP, and Equity Bonus); and

• FTA planning and research funds (49 U.S.C. 5303), urban formula funds (49 U.S.C. 5307), and (in limited circumstances) transit capital investment funds (49 U.S.C. 5309).

The eligible transportation planning-related uses of these funds may include: (a) Conducting feasibility or

subarea/corridor needs studies and (b) developing system-wide environmental information/inventories (e.g., wetland banking inventories or standards to identify historically significant sites). Particularly in the case of PL and SPR funds, the proposed expenditure must be closely related to the development of transportation plans and programs under 23 U.S.C. 134–135 and 49 U.S.C. 5303–5306.

For FHWA funding programs, once a general travel corridor or specific project has progressed to a point in the preliminary engineering/NEPA phase that clearly extends beyond transportation planning, additional in-depth environmental studies must be funded through the program category for which the ultimate project qualifies (e.g., NHS, STP, Interstate Maintenance, and/or Bridge), rather than PL or SPR funds.

Another source of funding is FHWA's Transportation Enhancement program, which may be used for activities such as: conducting archeological planning and research; developing inventories such as those for historic bridges and highways, and other surface transportation-related structures; conducting studies to determine the extent of water pollution due to highway runoff; and conducting studies to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

The FHWA and the FTA encourage State DOTs, MPOs, and public transportation operators to seek partners for some of these studies from environmental, regulatory, and resource agencies, non-government organizations, and other government and private sector entities with similar data needs, or environmental interests. In some cases, these partners may contribute data and expertise to the studies, as well as funding.

17 What staffing or organizational arrangements may be helpful in allowing planning products to be accepted in the NEPA process?

Certain organizational and staffing arrangements may support a more integrated approach to the planning/NEPA decision-making continuum. In many cases, planning organizations do not have environmental expertise on staff or readily accessible. Likewise, the review and regulatory responsibilities of many environmental, regulatory, and resource agencies make involvement in the transportation planning process a challenge for staff resources. These challenges may be partially met by improved use of the outputs of each agency's planning resources and by augmenting their capabilities through greater use of GIS and remote sensing technologies (see http://www.gis.fhwa.dot.gov/ for additional information on the use of GIS). Sharing databases and the planning products of local land use decision-makers and State and Federal environmental, regulatory, and resource agencies also provide efficiencies in acquiring and sharing the data and information needed for both transportation planning and NEPA work.

Additional opportunities such as shared staff, training across disciplines, and (in some cases) reorganizing to eliminate structural divisions between planning and NEPA practitioners may also need to be considered in order to better integrate NEPA considerations into transportation planning studies. The answers to the following two questions also contain useful information on training and staffing opportunities.

18 How have environmental, regulatory, and resource agency liaisons (Federally and State DOT funded positions) and partnership agreements been used to provide the expertise and interagency participation needed to enhance the consideration of environmental factors in the planning process?

For several years, States have utilized Federal and State transportation funds to support focused and accelerated project review by a variety of local, State, Tribal, and Federal agencies. While Section 1309(e) of the TEA–21 and

its successor in SAFETEA–LU section 6002 speak specifically to transportation project streamlining, there are other authorities that have been used to fund positions, such as the Intergovernmental Cooperation Act (31 U.S.C. 6505). In addition, long-term, on-call consultant contracts can provide backfill support for staff that are detailed to other parts of an agency for temporary assignments. At last count (as of 2015), over 200 positions were being funded. Additional information on interagency funding agreements is available at: http://environment.fhwa.dot.gov/strmlng/igdocs/index.htm.

Moreover, every State has advanced a variety of stewardship and streamlining initiatives that necessitate early involvement of environmental, regulatory, and resource agencies in the project development process. Such process improvements have: addressed the exchange of data to support avoidance and impact analysis; established formal and informal consultation and review schedules; advanced mitigation strategies; and resulted in a variety of programmatic reviews. Interagency agreements and work plans have evolved to describe performance objectives, as well as specific roles and responsibilities related to new streamlining initiatives. Some States have improved collaboration and efficiency by co-locating environmental, regulatory, and resource and transportation agency staff.

19 What training opportunities are available to MPOs, State DOTs, public transportation operators and environmental, regulatory, and resource agencies to assist in their understanding of the transportation planning and NEPA processes?

Both the FHWA and the FTA offer a variety of transportation planning, public involvement, and NEPA courses through the National Highway Institute and/or the National Transit Institute. Of particular note is the Linking Planning and NEPA Workshop, which provides a forum and facilitated group discussion among and between State DOT; MPO; Federal, Tribal, and State environmental, regulatory, and resource agencies; and FHWA/FTA representatives (at both the executive and program manager levels) to develop a State-specific action plan that will provide for strengthened linkages between the transportation planning and NEPA processes.

Moreover, the U.S. Fish and Wildlife Service offers Green Infrastructure Workshops that are focused on integrating planning for natural resources ("green infrastructure") with the development, economic, and other infrastructure needs of society ("gray infrastructure").

Robust planning and multi-issue environmental screening requires input from a wide variety of disciplines, including information technology; transportation planning; the NEPA process; and regulatory, permitting, and environmental specialty areas (e.g., noise, air quality, and biology). Senior managers at transportation and partner agencies can arrange a variety of individual training programs to support learning curves and skill development that contribute to a strengthened link of the transportation planning and NEPA processes. Formal and informal mentoring on an intra-agency basis can be arranged. Employee exchanges within and between agencies can be periodically scheduled, and persons involved with professional leadership programs can seek temporary assignments with partner agencies.

IV Additional Information on This Topic

Valuable sources of information are FHWA's environment Web site (http://www.fhwa.dot.gov/environment/index.htm) and FTA's environmental streamlining Web site (http://www.environment.fta.dot.gov). Another source of information and case studies is NCHRP Report 8–38 (Consideration of Environmental Factors in Transportation Systems Planning), which is available at http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+8–38. In addition, AASHTO's Center for Environmental Excellence Web site is continuously updated with news and links to information of interest to transportation and

environmental professionals (www.transportation.environment.org).

SOURCE: 81 FR 34135, May 27, 2016, unless otherwise noted.

AUTHORITY: 23 U.S.C. 134 and 135; 42 U.S.C. 7410 et seq.; 49 U.S.C. 5303 and 5304; 49 CFR 1.85 and 1.90.

Current through January 5, 2017; 82 FR 1591.

End of Document

6

Code of Federal Regulations
Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
Subchapter H. Right–of–Way and Environment
Part 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f)) (Refs & Annos)

23 C.F.R. § 774.3

§ 774.3 Section 4(f) approvals.

Effective: July 3, 2008

Currentness

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a de minimis impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives.[1] An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the Federal Register for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in § 774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§ 774.7 and 774.9, respectively.

Credits

[73 FR 31610, June 3, 2008]

SOURCE: 73 FR 13395, March 12, 2008, unless otherwise noted.

AUTHORITY: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub.L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

Notes of Decisions (7)

Current through January 5, 2017; 82 FR 1591.

Footnotes

1 FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal–Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally–Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally–Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

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23 C.F.R. § 774.7

§ 774.7 Documentation.

Effective: April 11, 2008

Currentness

(a) A Section 4(f) evaluation prepared under § 774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A de minimis impact determination under § 774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are de minimis as defined in § 774.17; and that the coordination required in § 774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under § 771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are de minimis or whether there are feasible and prudent avoidance alternatives. This preliminary approval shall include all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage may be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a de minimis impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§ 771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be presented in a separate document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

SOURCE: 73 FR 13395, March 12, 2008, unless otherwise noted.

AUTHORITY: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub.L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

Notes of Decisions (1)

Current through January 5, 2017; 82 FR 1591.

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23 C.F.R. § 774.17

§ 774.17 Definitions.

Effective: April 11, 2008

Currentness

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with § 771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f)

property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a de minimis impact determination under § 774.3(b).

(5) A de minimis impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a de minimis level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, de minimis impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a de minimis impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500–1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction

are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word "programmatic." A "programmatic Section 4(f) evaluation" is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

Use. Except as set forth in §§ 774.11 and 774.13, a "use" of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

SOURCE: 73 FR 13395, March 12, 2008, unless otherwise noted.

AUTHORITY: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub.L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

Notes of Decisions (12)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1500. Purpose, Policy, and Mandate (Refs & Annos)

40 C.F.R. § 1500.1

§ 1500.1 Purpose.

Currentness

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) 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. These regulations provide the direction to achieve this purpose.

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (29)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1500. Purpose, Policy, and Mandate (Refs & Annos)

40 C.F.R. § 1500.2

§ 1500.2 Policy.

Currentness

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) 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. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Mar. 5, 1970, as amended

by Executive Order 11991, May 24, 1977).

Notes of Decisions (1417)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1501. NEPA and Agency Planning (Refs & Annos)

40 C.F.R. § 1501.2

§ 1501.2 Apply NEPA early in the process.

Currentness

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and Executive Order 11514, Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (7)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.1

§ 1502.1 Purpose.

Currentness

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (48)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.2

§ 1502.2 Implementation.

Currentness

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

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Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.5

§ 1502.5 Timing.

Currentness

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (18)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

Currentness

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1393)

Current through January 5, 2017; 82 FR 1591.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.24

§ 1502.24 Methodology and scientific accuracy.

Currentness

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (45)

Current through January 5, 2017; 82 FR 1591.

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