

AN ALTERNATIVE ALTERNATIVE:
THE ROAD TO SUSTAINABLE TRANSPORTATION LAW

by

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THESIS ABSTRACT

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Title: An Alternative Alternative: The Road to Sustainable Transportation Law

The dominance of motor vehicle use throughout America reflects a massive government intervention on behalf of automobiles. Congress directs billions of dollars into America's highway system annually, assuming that building new roadways is the best option to move people and goods from one place to another. These policies stand in direct contradiction to today's travel patterns.

This research examines ways to improve federal law to achieve a more sustainable transportation future. First, it identifies the specific provisions in federal transportation law that inhibit the development of "low-build" transportation projects. Second, it describes challenges to halting roadway construction through litigation in federal court.

Understanding the problems of federal transportation law and litigation sheds light on the ways to make positive change in the next federal surface transportation reauthorization. This research culminates in recommendations for how Congress can implement policies that require a comprehensive approach to transportation planning.

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CHAPTER 1

INTRODUCTION

The dominance of motor vehicle use throughout America reflects a massive and sustained government intervention on behalf of automobiles.¹ Since the mid-1950s, the federal government's transportation policy has directed hundreds of billions of dollars into America's highway network, under the assumption that building new roadways is the best option to move people and goods from one place to another, and to reduce delays caused by traffic congestion. Today, the federal government's overemphasis on building new roads, instead of investing in sustainable transportation and land use alternatives, is largely unchanged. These policies are outdated, unsustainable, and stand in direct contradiction to today's travel patterns.

Extensive road building and motor vehicle use is linked to virtually every environmental problem, including air and water pollution, habitat and natural resource destruction, global climate change, and waste disposal.² The transportation sector is a primary source of air pollution,³ carbon emissions, and particulate matter, which cause cardiovascular, respiratory, and other health problems.⁴ With 97% of transportation fuel derived from fossil fuels, the transportation sector is particularly vulnerable to disruptions in oil supplies and price escalation.⁵ To make matters worse, the system is bankrupt. States struggle to maintain highways and bridges in the face of inadequate funding and skyrocketing construction and maintenance costs.⁶

¹ Paul M. Weyrich and William S. Lind, *Conservatives and Mass Transit: Is It Time for a New Look?* (American Public Transit Association, 1996), 11.

² Transportation Research Board, Committee for a Study on Transportation and a Sustainable Environment, "Toward a Sustainable Future: Addressing the Long-Term Effects of Motor Vehicle Transportation on Climate and Ecology—Special Report 251." (1997); Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There from Here?*, 29 *FORDHAM URB. L.J.* 1529, 1536, 1554-65 (2002).

³ Transportation produces 30 percent of the carbon dioxide in the United States. U.S. Environmental Protection Agency, *National Air Pollutant Emission Trends, 1900-1998* (Washington, DC: 2000), 2-6 tbl. 2-1, available at <http://www.epa.gov/ttn/chief/trends/trends98>.

⁴ Bethany Wieman, *How Does Pollution Affect All Living Things?*, National Geographic, <http://greenliving.nationalgeographic.com/pollution-affect-living-things-including-humans-2193.html> (April, 2013).

⁵ Statement of Anne P. Canby before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Regarding the Future of National Transportation Policy. April 28, 2009.

⁶ Conservation Law Foundation, *Modernizing Transportation*, <http://www.clf.org/our-work/healthy-communities/modernizing-transportation/> (April, 2013).

The dominance of automobile-based infrastructure investment began in 1893 when Congress founded the Office of Road Inquiry, which, through several iterations, became the Federal Highway Administration (“FHWA”) in 1966, an agency within the U.S. Department of Transportation. The FHWA addresses everything concerning U.S. highways, including construction, design, maintenance, and environmental concerns. The agency’s mission is to “improve highway mobility through leadership, innovation, and program delivery.”⁷ Its role is to oversee federal funds used for the construction and maintenance of the national highway system, and to supervise projects using these funds to ensure that they comply with federal requirements for project eligibility and environmental review.

In creating the FHWA and in establishing road-based funding priorities, the federal government has failed to acknowledge the demand for more and different types of transportation options. Transportation preferences are changing: Americans are moving back into cities, are driving less, are using public transportation more, and are fundamentally changing their travel patterns.⁸ While this has occurred, federal policy has not followed suit. Congress has not adequately invested in alternative modes or infrastructure that can provide Americans with greater transportation options.

Furthermore, current research demonstrates that building or widening roads is not an effective long-term solution to reducing or eliminating traffic congestion. To the contrary, building more roads can have the opposite effect of stimulating additional trips (called “latent demand”) and accelerating new development (“induced growth”), which generates more traffic.⁹ After they are built, new facilities fill up as commuters change their routes, travel time, and travel mode, to take advantage of the new capacity.¹⁰ In the

⁷ U.S. Department of Transportation, Federal Highway Administration, *Who We Are*, <http://www.fhwa.dot.gov/about/> (Sept. 7, 2012).

⁸ American Public Transportation Association, *Record 10.5 Billion Trips Taken On U.S. Public Transportation In 2012*, http://www.apta.com/mediacenter/pressreleases/2013/Pages/130311_Ridership.aspx (March 11, 2013).

⁹ See, e.g. Jill Kruse, *Do New Roads Cause Congestion?* (Surface Transportation Policy Project, 1998); Patrick DeCorla-Souza and Henry Cohen, *Accounting for Induced Travel in Evaluation of Urban Highway Expansion*. (FHWA, 1997).

¹⁰ See Anthony Downs, *Stuck in Traffic: Coping with Peak-Hour Traffic Congestion* (Brookings Institution Press, 1992), 27.

long-term, adding travel lanes induces new trips, longer trips, and increases congestion.¹¹ New roads spur fringe development and reduce the feasibility of alternative transportation options, making the automobile the only viable mode of travel.¹² As this occurs, traffic accumulates and congestion worsens. As one court pointed out, “highways create demand for travel and expansion by their very existence.”¹³

At the same time, there is extensive evidence that targeted investment in “low-build” alternatives, such as public transportation services, bicycle and pedestrian infrastructure, and transportation system and demand management strategies (“TSM” and “TDM”), can help reduce traffic congestion. Investing in alternative transportation modes alleviates automobile dependence, resulting in fewer vehicle miles traveled (“VMT”) and reducing the need to build new facilities at all.¹⁴ Although travel lanes can reduce traffic congestion in the short-term, low-build alternatives offer lasting solutions and create long-term behavioral change.

Similarly, the establishment of land use policies that stimulate dense, mixed-use, infill redevelopment can also successfully reduce congestion. As the mix and density of land use increases, the amount of automobile driving decreases, and the use of other transportation modes increases.¹⁵ People who live in more dense and diverse neighborhoods own fewer cars,¹⁶ drive less often,¹⁷ and for shorter distances¹⁸ than those living in less dense and more homogenous environments. Similarly, those who commute to work sites located in diverse neighborhoods are more likely to travel by non-

¹¹ Stephen H. Bunting, *Restoring the Rule of Law and Respect for Communities in Transportation*. 5 N.Y.U. ENVTL L.J. 691, 702 (1996).

¹² See Kolata, “What if They Closed 42d Street and Nobody Noticed?,” *New York Times*, Dec. 25, 1990 (Science), 14.

¹³ *Sierra Club, Illinois Chapter v. U.S. Dep’t of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997); Andrea C. Ferster and Elizabeth S. Merritt, “Legal Tools for Fighting Freeways and Saving Historic Roads,” *Forum Journal* (Summer 2000): 34.

¹⁴ See, e.g. 1000 Friends of Oregon. “Making the Land Use Transportation Air Quality Connection. Analysis of Alternatives.” Vol. 5, (1996).

¹⁵ Philip Langdon, “Studies: Mixed Use, Walkable Development Alleviates Traffic.” *New Urban News* (Sept. 2008): 1.

¹⁶ Daniel Baldwin Hess and Paul M. Ong. “Traditional Neighborhoods and Automobile Ownership,” 1805 *Transp. Res. Rec.* 35 (2002): 42.

¹⁷ Robert Cervero and Kara Kockelman. “Travel Demand and the 3Ds: Density, Diversity, and Design.” 2 *Transp. Res. Part D* 199 (1997): 218.

¹⁸ Peter Newman & Jeffrey Kenworthy, *Cities and Sustainability: Overcoming Automobile Dependence* (Island Press, 1999), 100-103.

automobile modes than those working in single-use locations.¹⁹ Dense neighborhoods with a mix of land uses provide access to a large range of potential activities within close proximity.²⁰ Increased accessibility reduces VMT and makes alternative transportation modes more convenient.

Local and state governments are beginning to realize the importance of low-build strategies and the reality that they cannot “pave their way out of congestion.”²¹ Since the 1950s, mobility has declined across America and traffic congestion has worsened. A study by the U.S. Department of Transportation acknowledged that despite record levels of funding, “it is not possible to build enough lanes or roads to address congestion.”²² Increasing roadway capacity alone will not suffice in the future.

Despite this fact, the federal government has failed to offer any real solutions. Congress continues to prioritize roadway projects that focus on *mobility*— the speed at which people can travel from point to point— rather than on *accessibility*— the ease of reaching a destination. While mobility is one means to accessibility, others include remote connectivity and proximity. Federal transportation policy’s traditional focus on mobility as its metric of success short-circuits the other two means, and mistakes means for ends.²³

The time is ripe to question these policies and past practices. Congress’ goal of improving transportation options by reducing congestion and increasing mobility is outdated. Transportation policy’s main point of focus should not be on moving people from point to point as quickly as possible, but should be based on a larger goal of providing a wide range of options for people to get around. Federal policy should strive to maximize *accessibility* not *mobility*. So far, it has failed to do so, either through federal

¹⁹ Robert Cervero. *America’s Suburban Centers: The Land Use – Transportation Link* (Unwin Hyman, 1989), 165.

²⁰ G. S. Rutherford et al., “Travel Impacts of Urban Form: Implications from an Analysis of Two Seattle Area Travel Diaries,” Urban Design, Telecommuting and Travel Forecasting Conference, Williamsburg, VA (L. Day ed., 1997).

²¹ Kozlak, *Traffic Congestion: A Major Public Policy Issue in the Twin Cities Area*, 10 *HAMLIN J. PUB. L. & POL’Y* 219, 223 (1989).

²² U.S. Department of Transportation, Bureau of Transportation Statistics, *The Changing Face of Transportation* (2000), 1-13. It has been estimated that 1,800 miles of new highways and 2,500 new lane-miles of streets would have had to have been built between 1998 and 1999 alone to have kept congestion from getting worse in sixty-eight major metropolitan areas. Alternatively, congestion levels between 1998 and 1999 would not have gotten worse if 6.1 million new trips had been taken by transit, carpooling, or some other mode of transportation.

²³ Jonathan Levine, “Getting There: From Mobility to Accessibility in Transportation Planning,” Resources for the Future, RFF Policy Commentary Series (June 20, 2011).

transportation planning law or through environmental litigation that challenges traditional approaches.

This research is presented in three major parts. Section I describes the current state of federal law as it relates to transportation project planning, implementation, and review. It examines the transportation planning requirements imposed on regional and state governments, *see* 23 U.S.C. §§ 134-135, and it describes the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (“NEPA”), which is used by the public to challenge major federal actions that do not comply with statutorily mandated procedures designed to protect the environment. Section II describes the challenges or “roadblocks” that are inherent in both the federal transportation planning requirements and in NEPA litigation. Section III presents recommendations for how Congress should draft the next federal transportation authorization to require a more comprehensive approach to transportation planning, and how opponents can be more successful in challenging roadway projects through NEPA litigation.

CHAPTER II

FEDERAL LAW

A. FEDERAL TRANSPORTATION LAW

1. The Surface Transportation Reauthorization: A Brief History

Beginning in 1956 with the Federal Aid Highway Act, Congress funded, programmed, and built America's national surface transportation system. The \$25 billion, 13-year surface transportation act launched an unprecedented effort to construct 41,000 miles of highways, with the federal government paying over 90% of the cost.²⁴ It expanded and solidified the role of federal and state governments in shaping the nation's transportation system, and it afforded a far lesser role for local government officials, impinging on local autonomy and further dividing transportation decisionmaking from local land use planning.²⁵ For the next 35 years, federal transportation policy focused on the completion of the interstate system.²⁶ This extensive network provided easy access to suburban areas where land was cheap, expansion possible, and property taxes low. America grew into the suburbs and rapidly became a culture dominated by the automobile.

Subsequent federal surface transportation authorizations have been some of Congress' largest multi-year funding programs. These laws play a major role in shaping transportation policies and projects throughout America, and address a number of interrelated issues, including traffic congestion, passenger and freight movement, intermodal connectivity, safety, and environmental protection.²⁷ They provide direction for project funding, eligibility, policy mandates, and planning, offering fiscal certainty to

²⁴ Federal Aid Highway Act of 1956, 23 U.S.C. 101-118 (2002). The Act authorized what has been characterized as "the largest construction program in world history." Christopher B. Leinberger, "The Metropolis Observed," *Urban Land* (Oct. 1998): 30.

²⁵ Robert Jay Dilger, Congressional Research Service Report for Congress, *Federalism Issues in Surface Transportation Policy: Past and Present* (July 27, 2012), 10.

²⁶ *Id.*

²⁷ Federal Highway Administration, Office of Legislation and Intergovernmental Affairs. *A Summary of Highway Provisions in SAFETEA-LU*. (2005). Available at <http://www.fhwa.dot.gov/safetealu/summary.htm>.

state and local governments and enabling them to build multi-year transportation projects and plan for the future.²⁸

Following the completion of the interstate highway system, Congress sought to redefine modern transportation priorities by passing the Intermodal Surface Transportation Efficiency Act, Pub. L. 102-240 (1991) (“ISTEA”).²⁹ ISTEA altered the existing transportation funding system by giving state and local governments more decisionmaking authority, creating new non-highway programs, and mandating a transparent planning process.³⁰ Instead of focusing exclusively on highway construction, ISTEA emphasized intermodalism—the seamless linking of highway, rail, air, and marine transportation.³¹

At the time, ISTEA was hailed as a turning point in the history of surface transportation policy. Despite this fact, the three subsequent multi-year reauthorizations—the Transportation Equity Act for the 21st Century, Pub. L. 105-178 (1998) (“TEA-21”),³² the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59 (2005) (“SAFETEA-LU”),³³ and Moving Ahead

²⁸ Costas Panagopoulos and Joshua Schank. *All Roads Lead to Congress: The \$300 Billion Fight Over Highway Funding* (CQ Press, 2008).

²⁹ ISTEA was a \$155 billion act, which authorized federal highway funding for fiscal years 1992 through 1997. The Act was an attempt to break away from traditional strategy by requiring a coordinated, long-term transportation planning process. For the first time, MPOs were required to consider factors beyond just vehicular demand and road capacity; however, the planning factors were vaguely worded, discretionary, and therefore rarely seriously considered. Ellen Schweppe, Federal Highway Administration, “Legacy of a Landmark: ISTEA After 10 Years” (April 7, 2011), <http://www.fhwa.dot.gov/publications/publicroads/01novdec/legacy.cfm>.

³⁰ *Id.*

³¹ *Id.*

³² TEA-21 increased funding for highways, highway safety, and transit for fiscal years 1998 through 2003 to \$218 billion. The Act extended ISTEA, but enhanced autonomy of state and local planning agencies by reducing the number of factors that they had to address when making transportation planning decisions. Also provided that the failure of a state or MPO to consider those planning factors would not be judicially reviewable. *Id.*

³³ SAFETEA-LU dedicated \$244.1 billion to transportation programs and projects between FY 2005 and 2012. The Act authorized more than 108 individual programs and set-asides. The funding and policies of these programs filtered down to state DOTs and MPOs to determine which projects will be funded and distribute funds among those projects. Lilly Shoup and Marisa Lang, et. al., Transportation for America, *Transportation 101: An Introduction to Federal Transportation Policy* (March, 2011), 33. Overall, SAFETEA-LU sought more integration between transportation and planning but it stopped short of any substantial change. SAFETEA-LU called for transportation plans to promote consistency between transportation improvements and state and local planned growth and economic development patterns. 23 USC § 134 (h)(1)(E). In outlining the requirements for developing long-range plans, it added requirements for consultation with state and local agencies responsible for land use management, natural resources, environmental protection, conservation and historic preservation. 23 USC § 134(i)(4). (Note: “consultation,” was limited in effect. To sufficiently integrate planning, federal legislation must broaden the role of the MPO to include land use as well as transportation planning. Shoup, 6, 33.

for Progress in the 21st Century, Pub. L. 112-141 (2012) (“MAP-21”)³⁴— have failed to articulate clear national objectives to guide sustainable transportation investment.³⁵ Since ISTEA, Congress has allocated approximately 80 percent of total transportation funding to roadway projects. It has ignored the important benefits of non-automobile travel options and has overlooked the important connection between transportation and land use planning.³⁶ Federal transportation planning requirements, 23 U.S.C. §§ 134-135, preclude judicial review of regional and statewide transportation planning decisions, and have failed to expand intermodalism, produce a sustainable infrastructure network, or adapt to changing trends in transportation demand. The following section describes these important planning mandates.

2. Federal Transportation Planning Requirements (23 U.S.C. §§ 134-135)

All federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes. *See* 23 U.S.C. §§ 134 -35. Over the years, Congress has refined and strengthened the transportation planning process as the foundation for project decisionmaking. It is according to these federal mandates that roadway projects are imagined, planned, programmed, and funded with federal money. It is therefore through changes to these provisions that transportation planning and project development can be put on a path toward a more sustainable future.

23 U.S.C. § 134 requires the designation of Metropolitan Planning Organizations (“MPOs”) in urbanized areas with populations over 50,000 to plan transportation infrastructure services.³⁷ MPOs maintain long-range transportation plans, develop programs, evaluate alternatives, and facilitate cooperation between local and state

³⁴ MAP-21, signed into law on July 6, 2012, funds federal surface transportation program at over \$105 billion per year for fiscal years 2013 and 2014.

³⁵ Shoup, 19.

³⁶ Liam A. McCann. “TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America’s Dependence on the Automobile.” 23 WM. & MARY ENVTL. L. & POL’Y REV. 857, 858. (1999).

³⁷ Although the makeup and responsibilities of MPOs vary greatly from region to region, MPOs generally consist of four basic components: 1) a policy board of elected local government officials and representatives of affected groups, 2) a technical committee of federal, state, and local transportation staff, 3) MPO support staff, and 4) members of the public participating in the decisionmaking process. Benjamin Olson “The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas.” *Transportation Law Journal* (2000). In rural areas and small towns outside the census-defined urbanized areas, individual towns and counties participate in regional planning organizations while the state DOT plays the lead role in developing the transportation plan and the capital program. Shoup, 42.

governments.³⁸ The rationale for placing transportation planning authority in multi-jurisdictional, regional entities is that the metropolitan scale is the level at which most economic activities are organized.³⁹

MPOs are responsible for identifying and coordinating funding for regional transportation projects, and for developing transportation plans that promote “intermodal transportation systems.”⁴⁰ MPOs draft and update long-range (20-year) Metropolitan Transportation Plans (“MTPs”) and develop short-term (4-year) Transportation Improvement Programs (“TIPs”).⁴¹ MTPs assess transportation facilities, describe environmental mitigation activities, establish financial plans, and develop operational and management strategies to improve performance, relieve congestion, and maximize safety and mobility.⁴² They include forecasts for travel demand, land use patterns, populations, and pollutant emissions.⁴³ TIPs are priority lists of proposed highway and transit projects and strategies that require federal funding for implementation.⁴⁴ TIP projects are determined by the transportation needs identified in the region’s MPT and must be “fiscally constrained,” so that each project is supported by reasonable estimates of available funding.⁴⁵

23 U.S.C. § 135 grants state Departments of Transportation (“state DOTs”) official transportation planning, programming, and project implementation authority.⁴⁶ State DOTs develop programs related to their state’s system of highways, roads, and bridges; railways; public transportation services; and safety programs.⁴⁷ Similar to MPOs,

³⁸ Adam Lovelady, “MPOs and the Integration of Transportation and Land Use Planning.” 27 VA. ENVTL. L. J. 275, 293 (2009).

³⁹ Peter Calthorpe and William Fulton. *The Regional City: Planning for the End of Sprawl* (Washington, DC: Island Press, 2001).

⁴⁰ 23 U.S.C. § 134(a).

⁴¹ *Id.* at § 134(j).

⁴² *Id.*

⁴³ U.S. Department of Transportation, Federal Highway Administration, Federal Transit Administration. *The Transportation Planning Process: Key Issues* (Washington, DC, 2007), <http://www.planning.dot.gov/documents/briefingbook/bbook.htm>.

⁴⁴ *See* 23 USC § 134(j).

⁴⁵ 23 U.S.C. § 134(j)(3)(D); 23 U.S.C. § 134(j)(3)(C).

⁴⁶ 23 U.S.C. § 135..

⁴⁷ http://www.oregon.gov/ODOT/Pages/about_us.aspx

state DOTs develop Statewide Transportation Improvement Programs (“STIPs”), which incorporate all of the projects listed in all of the TIPs of the MPOs within their borders. Although MPOs plan for and select these projects, state DOTs decide which projects will ultimately receive federal funding.⁴⁸ As a result, federal law grants state officials the authority to prioritize local needs, precluding critical evaluation of whether road-building projects are the best use of federal dollars or the best type of investment for local communities.

Once transportation projects are incorporated into TIPs and STIPs and are selected to receive federal funding, the FHWA assumes a supervisory role that includes the responsibility for ensuring that projects comply with federal environmental laws before they are implemented. The National Environmental Policy Act (“NEPA”) is one of the most prevalent environmental statutes that aggrieved parties use to challenge the building of new roadway projects. NEPA mandates specific procedures that federal agencies must follow to ensure that they consider the environmental impacts of their actions. This review includes a detailed statement of each project’s “purpose and need” and an evaluation of its “reasonable alternatives.”⁴⁹ When federal agencies fail to comply with NEPA’s mandate, NEPA litigation suspends all continued activity until the agency fixes its procedural error.

It is not until roadway projects reach this federal environmental review process that citizen opponents have an opportunity to challenge them in court. Federal law unambiguously precludes local transportation plans and decisions from judicial review.⁵⁰ Congress resolved that “transportation planning involves social, economic, and policy considerations best left to regional and state political entities,” and courts have uniformly concluded that there is no implied cause of action.⁵¹

⁴⁸ See 23 U.S.C. § 134(j)(3)(C); 23 U.S.C. § 134(j)(5); 23 § U.S.C.134(j)(5).

⁴⁹ 42 U.S.C. §§ 4321, *et. seq.*

⁵⁰ See 23 U.S.C. §§ 134(h)(3), 135(d)(3).

⁵¹ Memo from Ronald F. Kirby, Director of Transportation Planning to the TPB Technical Committee. “Complaint Against TPB in the Inter-County Connector (ICC) Lawsuit.” National Capitol Region Transportation Planning Board (July 6, 2007).

For example, federal law requires MPOs and state DOTs to “consider” a number of planning factors when developing projects and strategies for transportation system development. These factors include:

1. Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
2. Increase the safety of the transportation system for motorized and nonmotorized users;
3. Increase the security of the transportation system for motorized and nonmotorized users;
4. Increase the accessibility and mobility of people and for freight;
5. 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;
6. Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;
7. Promote efficient system management and operation; and
8. Emphasize the preservation of the existing transportation system.”⁵²

The failure for MPOs or state DOTs to consider these factors is not judicially reviewable “concerning any matter affecting a transportation plan, a TIP/STIP, a project or strategy, or the certification of a planning process.”⁵³ Although planning provisions require MPOs and state DOTs to “accomplish the objectives” of “protecting the environment,” “promoting local land use consistency,” and encouraging a multi-modal transportation system generally,⁵⁴ there is no legal mechanism to enforce these goals until projects are fully formed, funded, and subject to NEPA’s environmental review mandates. At this point, it is usually too late to meaningfully oppose proposed projects.

⁵² 23 U.S.C. §§ 134(h)(1), 135(d)(1).

⁵³ 23 U.S.C. §§ 134(h)(3) and 135(d)(3).

⁵⁴ It is the FHWA’s policy 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 and foster economic growth and development within and between states, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes.” *See* 23 U.S.C. § 134(a) and 49 U.S.C. § 5303(a).

B. THE NATIONAL ENVIRONMENTAL POLICY ACT

1. Policy Objectives

NEPA declares a broad national commitment to protecting and promoting environmental quality.⁵⁵ Signed into law by President Nixon in 1970, NEPA requires federal agencies to comply with certain procedures by assessing the environmental effects of their proposed actions prior to making decisions. NEPA mandates the consideration of environmental values alongside the technical and economic considerations that are inherent in federal decisionmaking.

NEPA requires all federal agencies to include “in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement on

1. the environmental impact of the proposed action
2. any adverse environmental effects which cannot be avoided should the proposal be implemented
3. alternatives to the proposed action
4. the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity and
5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”⁵⁶

Prior to NEPA’s passage, environmental considerations were systematically underrepresented in federal agency decisionmaking. Agencies emphasized the benefits of development and gave limited consideration to less environmentally damaging alternatives for meeting program objectives.⁵⁷ Federal agencies could embark on massive projects without public consultation and with virtually no advanced notice.⁵⁸ By enacting NEPA, Congress resolved to create and maintain conditions under which “man and nature could exist in productive harmony and fulfill the social, economic, and environmental requirements of present and future generations.”⁵⁹

⁵⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

⁵⁶ 42 U.S.C. § 4332(2)(C).

⁵⁷ Tarlock, “Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs’ Coordinating Committee v. AEC,” 47 *IND.L.J.* 645 (1973).

⁵⁸ Robert G. Dreher. *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*. Georgetown Environmental Law and Policy Institute. (2005), 6.

⁵⁹ 42 U.S.C. § 4331(a).

NEPA ensures that important environmental consequences will not be overlooked or underestimated only to be discovered “after resources have been committed or the die otherwise cast.”⁶⁰ NEPA recognizes that each generation is a “trustee of the environment for succeeding generations,”⁶¹ requiring the evaluation of a project’s environmental consequences early in project planning.⁶² NEPA substitutes a “look-before-you-leap” philosophy for what was an unduly enthusiastic regime of public works that was building roads and consuming the natural environment at an alarming rate.⁶³ The Act mandates a form of rational decisionmaking in an otherwise political process, based on consideration of impacts and alternatives.⁶⁴

The Council on Environmental Quality (“CEQ”) in the Executive Office of the President provides guidance on NEPA implementation.⁶⁵ CEQ’s implementing regulations “are binding on all federal agencies, and CEQ’s interpretation of NEPA is “entitled to substantial deference.”⁶⁶ Each federal agency also promulgates NEPA implementing regulations, which are specific to their individual actions and entitled to substantial deference.⁶⁷

Considering NEPA’s procedural mandates (which are described in detail in Appendix A) and policy objectives at face value, the law would seem like an excellent enforcement mechanism to challenge road-building projects that are destructive to the natural environment. As is evident in the following sections, however, NEPA provides minimal support: regional and state agencies design large-scale transportation projects, the FHWA funds them and undertakes NEPA’s procedural analysis without second-guessing local judgment, and, when challenged, courts almost always defer to the FHWA’s decisions. Furthermore, NEPA only requires compliance with proper

⁶⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁶¹ 42 U.S.C. § 4331(b)(1).

⁶² *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

⁶³ James Allen, “NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives.” 25 J. LAND RESOURCES & ENVTL. L. 287, 289 (2005).

⁶⁴ *Id.*

⁶⁵ See 40 C.F.R. §§ 1500-1518.

⁶⁶ *Sugarloaf Citizens Ass’n v. Fed. Energy Reg. Comm’n*, 959 F.2d 508, 512 n. 3 (4th Cir. 1992).

⁶⁷ See, e.g. 23 C.F.R. § 771 *et. seq.* (FHWA’s NEPA implementing regulations); *Conservation Law Found. v. Federal Highway Admin.*, 24 F.3d 1465, 1480 (1st. Cir. 1994).

procedure—it does not mandate specific results or require that federal agencies make the most environmentally-friendly decisions.

2. The FHWA’s NEPA Implementing Regulations

In accordance with CEQ regulations, the FHWA enacted its own set of procedural NEPA regulations.⁶⁸ Under the FHWA’s regulations, a full EIS is usually required for a “new controlled access highway or a road project of four or more lanes on a new location.”⁶⁹ For more minor projects, such as widening or expanding the capacity of an existing highway, the FHWA must normally only prepare an EA.

It is FHWA’s policy that:

1. To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.
2. Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, state, and local environmental protection goals.
3. Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.
4. Measures necessary to mitigate adverse impacts be incorporated into the action.⁷⁰

3. Judicial Review and the Problem with Deference

Since its founding, courts have played an indispensable role in interpreting NEPA and in defining agency obligations. NEPA’s basic authority flows from an accrued “common law,” which depends on federal courts to hold agencies accountable for their actions. When agencies fail to properly comply with NEPA’s procedural mandates, aggrieved private parties may seek direct judicial enforcement. This process is important: judges decide both the relevant facts and the applicable law when deciding whether

⁶⁸ See 23 C.F.R. § 771 *et. seq.*; see also 40 C.F.R. § 1507.3 (2006) (directing that “each agency shall as necessary adopt procedures to supplement these regulations”).

⁶⁹ § 771.115(a).

⁷⁰ 23 C.F.R. § 771.105.

agencies meet NEPA's commitments.⁷¹ When compliance falls short, litigation enforces proper environmental review and public consultation. Justice Thurgood Marshall once observed that the judicial development of common law enforcing NEPA "is the source of [the Act's] success."⁷² Despite this fact, few suits result in court orders blocking government action;⁷³ instead, successful NEPA litigation stalls—but does not prevent—agency action.

NEPA does not mandate particular results or environmentally-favorable decisions. The Act merely requires federal agencies to take a "hard look" at the environmental consequences of their actions by complying with specific procedures.⁷⁴ This "hard look" must be timely and 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."⁷⁵ While other statutes impose substantive environmental obligations on federal agencies, NEPA merely prohibits uninformed, rather than unwise, agency action.⁷⁶ So long as agencies adequately identify and evaluate the adverse environmental effects of their proposed actions, NEPA does not constrain them from concluding that other values outweigh the environmental costs.⁷⁷

Furthermore, federal courts will not substitute their judgment for those of federal agencies.⁷⁸ Courts consider only whether the agency's decision was "based on a consideration of relevant factors," whether there was "a clear error in judgment,"⁷⁹ and whether the agency's decision was "within the bounds of reasoned decisionmaking."⁸⁰

⁷¹ Dreher, 6.

⁷² *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part).

⁷³ Dreher, 15. For example, in 2001 and 2002, preliminary injunctive relief was granted in NEPA cases only 21 times, and permanent injunctions were issued only 28 times. The courts ordered a remand of certain issues to the federal agency in 33 cases in those two years. On the other hand, the courts ruled for the defendant agency 114 times during this period, and dismissed NEPA cases in another 139 cases.

⁷⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). An agency takes a hard look when it "obtains opinions from experts outside the agency, gives careful scientific scrutiny, and responds to all legitimate concerns that are raised." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

⁷⁵ *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

⁷⁶ *Robertson*, 490 U.S. at 350.

⁷⁷ *Id.* at 150-151.

⁷⁸ *Committee to Preserve Boomer Lake Park*, 4 F.3d at 1551.

⁷⁹ *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360 (1989).

⁸⁰ *Baltimore Gas & Elec. Co., v. Natural Res. Def. Council*, 462 U.S. 87 (1983).

Courts take a holistic review of the agency's assessment without "flyspecking environmental analysis or looking for deficiencies, no matter how minor."⁸¹ The challenging party has the burden of showing that the agency did *not* take a hard look.⁸²

The federal Administrative Procedure Act ("APA"), 5 U.S.C. § 706 *et. seq.* provides for judicial review of agency compliance with NEPA and is the basis for such highly deferential review. Pursuant to the APA, the role of a court in reviewing agency decisionmaking is carefully circumscribed by the "abuse of discretion" standard of review.⁸³ Courts may only compel agency action "unlawfully withheld or unreasonably delayed," and may only hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious,"⁸⁴ an abuse of discretion, or otherwise not in accordance with the law."⁸⁵

This narrow standard of review prevents courts from determining the *correctness* of agency actions; they are limited to determining only the *legality* of agency action.⁸⁶ Courts may not substitute their judgments for those of federal agencies, and may not engraft additional procedural or substantive standards.⁸⁷ Courts may not select what they believe to be optimum alternatives or coax agency decisionmakers to reach certain results or follow certain policies.⁸⁸ So long as an agency complies with NEPA's procedural mandate, and the record supports the choice made, courts must afford the agency's decision substantial deference.⁸⁹

⁸¹ *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988).

⁸² *Sierra Club v. Callaway*, 499 F.2d 982, 992 (5th Cir. 1974).

⁸³ NEPA itself does not provide its own standard of review. "Standard of review" is the amount of deference a court applies when reviewing decisions previously made. In the case of NEPA, these are the decisions made by federal agencies, such as preparing an EA instead of an EIS, failing to create a valid purpose and need statement, and selecting and rejecting alternatives.

⁸⁴ An agency decision is "arbitrary and capricious" if "the agency relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

⁸⁵ 5 U.S.C. § 706(2)(A); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971).

⁸⁶ *Di Vosta Rentals, Inc. v. Lee*, 488 F.2d 674, 678 (5th Cir. 1973) (emphasis in original).

⁸⁷ *See North Slope Borough v. Andrus*, 642 F.2d 589, 598-99 (D.C. Cir. 1980).

⁸⁸ *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983).

⁸⁹ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989).

Furthermore, NEPA does not call on courts to resolve differences of opinion or make *de novo* determinations of comparative accuracy, modeling approaches, or interpretations of data. Courts should not question whether the goal of a local planning office is impermissible or unwise. *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1222 (S.D. Fla. 2010). Courts may not impose their own preferences regarding methodology or expert opinion; instead, agencies are entitled to select their own methodology, so long as it is reasonable and relies on expert opinion. *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1999).

The reason for judicial deference is based on the premise that courts are not in the position to decide between differing experts and competing methodologies. *Committee to Preserve Boomer Lake Park*, 4 F.3d at 1551. The elements that make up agency decisionmaking are so diverse that they are deliberately granted to officials with specialized knowledge, experience, resources, and mechanisms for broad public participation that courts do not possess. *Clairton Sportsmen's Club v. Pennsylvania Turnpike Commn*, 882 F. Supp. 455, 460 (W.D. Pa. 1995). Thus, while federal agencies must consider a wide range of issues when deciding what form their transportation objectives will take, courts review agency actions only to ensure that they are genuinely considered. *Id.*

Deferential review, however, does not mean no review. Courts must ensure that agencies properly carry out their duties under NEPA, make reasoned choices, and provide discussions that fully and frankly explain the environmental consequences of proposed actions. *Hwy. J Citizens Group, U.A. v. U.S. Dept. of Transp.*, 656 F. Supp. 2d 868, 886 (E.D. Wis. 2009). Courts may set aside decisions when agencies “rely on factors which Congress [did] not intend them to consider, entirely fail to consider an important part of the problem, or offer explanations that run counter to available evidence or are so implausible that they could not be ascribed to a difference in view or the product of agency expertise. *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001). In the context of transportation problems, courts also look to the sufficiency of the FHWA’s articulation of a project’s purpose and need, and its evaluation of a reasonable range of alternatives.

4. Intergovernmental Coordination of Transportation Planning and NEPA Documentation

a. Procedural Requirements

NEPA and its implementing regulations, *see* 40 C.F.R. § 1500 *et. seq.* (CEQ regulations) and 23 C.F.R § 771 *et. seq.* (FHWA regulations) encourage intergovernmental integration and cooperation for transportation planning. When federal environmental review and transportation planning are not well coordinated, federal agencies can end up duplicating work and delaying action. Thus, metropolitan and statewide transportation planning is the foundation for highway and transit project decisions.

Specifically:

- 40 C.F.R. 1501.1(a) requires decisionmakers to integrate the NEPA process into early planning to ensure appropriate consideration of NEPA's policies and to eliminate delay.
- 40 C.F.R. 1501.1(b) emphasizes the need for cooperative consultation among agencies before the environmental impact statement is prepared.

Similarly, FHWA's regulations highlight the link between NEPA and local transportation planning:

- 23 C.F.R. 771.105(a) requires, to the fullest extent possible, all environmental investigations, reviews and consultations be coordinated as a single process.
- 23 C.F.R. 771.105(b) directs that alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic and environmental impacts of the proposed transportation improvement; and of national, State and local environmental protection goals.

Furthermore, federal transportation planning law requires formal consultation between MPOs and state DOTs to employ with environmental, regulatory, and resource agencies in the development of mitigation activities and long-range transportation plans. For example:

- 23 U.S.C. 134(i)(2)(B) requires that the discussion of potential environmental mitigation activities shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.
- 23 U.S.C. 134(i)(4) and 135(f)(2)(D) require MPOs and state DOTs to 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. Federal Reliance on Local Plans and Projects

The relationship between the FHWA and regional and state transportation planning organizations is premised on the idea that local officials are best suited to make decisions regarding their transportation needs, with the FHWA respecting local sovereignty. 23 U.S.C. § 450, App. A. If the FHWA were to define project goals and alternatives in isolation from transportation planning, the federal environmental assessment process would “supplant the local and regional planning processes envisioned by Congress, and the evaluation of alternatives would be transportation planning *de novo* on the part of the FHWA.” *Jones v Peters* 2007 WL 2783387, *18 (D. Utah 2007).

In this context, the FHWA ensures only that objectives and decisions derived from transportation plans 1) are based on the transportation planning factors established by federal law, 2) reflect a credible and articulated planning rationale, 3) are founded on reliable data, and 4) are developed through transportation planning processes that meet the FHWA’s statutory and regulatory requirements. 23 U.S.C. § 450, App. A. The FHWA does not review whether local assumptions, data, and analytical methods are the best available; it only assures that they are reasonable, scientifically acceptable, and consistent with local and regional goals, objectives, and policies. 23 U.S.C. § 450, App. A. In this context, NEPA is merely intended to regulate the FHWA’s decisionmaking process to ensure that transportation planning adequately considers environmental concerns.⁹⁰ When challenged, courts are reluctant to disrupt the FHWA’s reliance on regional and state-level plans and decisions.

⁹⁰ Federal agencies should participate in local and regional transportation planning. Such involvement is consistent with the cooperative relationship envisioned by statute and reinforced by the courts. Federal participation gives agencies better insight into the needs and objectives of the locality and provides an important opportunity for federal concerns to be identified and addressed early in the process.

The following cases illustrate the extent of judicial deference over the FHWA's incorporation of local decisions and analyses into its required NEPA documents.

- *Jones v Peters* 2007 WL 2783387 (D. Utah 2007) (holding that the FHWA's reliance on local planning documents, which eliminated alternatives prior to the NEPA process, did not foreclose consideration of reasonable alternatives. "Consistency" with local plans was reasonable, and relying on locally preferred alternatives did not "reverse-engineer" the success of the proposed project. Alternatives that were inconsistent with the criteria and goals of local transportation plans were properly rejected before the NEPA process).
- *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533 (11th Cir. 1990) (upholding the FHWA's reliance on the MPO's articulation of the project's goals, which mandated a new multi-lane highway instead of mass transit).
- *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002) as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003) (upholding the FHWA's reliance on local transportation plans, which anticipated an increase in regional travel demand and recommended the construction of new roadway infrastructure).
- *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1222 (S.D. Fla. 2010) (upholding the FHWA's purpose and need statement, which relied primarily on decisions made by the MPO, and rejecting plaintiff's contention that the region's MPO had an "impermissible influence" on the FHWA's decisionmaking process based on its previous endorsement of the FHWA's preferred alternative).
- *Sierra Club v. U.S. Dept. of Transp.*, 310 F. Supp. 2d 1168 (D. Nev. 2004) (upholding the FHWA's reliance on the local transportation planning process to determine which alternatives were feasible and appropriate to meet project goals. The local process "contained many of the hallmarks of the NEPA process," including studies of project impacts, significant public involvement, and a comparison of alternatives).
- *HonoluluTraffic.com v. Fed. Transit Admin.*, 2012 WL 5386595 (D. Haw. 2012) (holding that the FTA's elimination of a "managed lane" alternative was appropriate because it was based on the local government's decision to eliminate the lane).
- *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 438 (5th Cir. 1981) (holding that the FHWA was not required to "reiterate facts and figures" that were available in regional planning documents that were readily available to the public).
- *Citizens for Smart Growth v. Sec. of Dept. of Transp.*, 669 F.3d 1203, 1218 n. 2 (11th Cir. 2012). (holding that the FHWA satisfied NEPA by incorporating by reference

local feasibility studies and corridor reports and did not have to republish this information because it was already publically available).

Judicial deference provides little opportunity for project opponents to meaningfully impact or challenge roadway-building projects. Courts uphold the FHWA's deference to regional and state decisions, and federal law specifically precludes judicial review over regional and state plans and projects. Nevertheless, opponents still object to the FHWA's compliance with NEPA, specifically with respect to the adequacy of the agency's "purpose and need" statements and its analyses of "reasonable alternatives." The following section describes the current state of the law.

5. NEPA Case Law: Purpose and Need Statements and Alternatives Analyses

a. Purpose and Need Statements

i. Procedural Requirements

The foundation for any viable NEPA document is a well-defined and articulated statement of purpose and need for proposed actions. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1169-71 (10th Cir. 2002). CEQ regulations require that federal environmental impact statements ("EISs") "briefly specify the underlying purpose and need to which an agency is responding in proposing the alternatives, including the proposed action." 40 C.F.R. § 1502.13. (See Appendix A for a detailed discussion of EISs.) The FHWA's statement of purpose and need is largely dependent on (or directly copied from) the goals and objectives identified in regional and statewide transportation plans and projects.

Drafting a purpose and need statement is the first step in the federal project development and environmental review process. A clear, well-justified statement explains to the public and decisionmakers why a project is warranted and why environmental impacts are acceptable based on the project's importance.⁹¹ Without this clear "what and why" statement, the public is kept in the dark and there is no basis on

⁹¹ FHWA, NEPA and Transportation Decisionmaking, *The Importance of Purpose and Need in Environmental Documents*, <http://environment.fhwa.dot.gov/projdev/tdmneed.asp> (September 18, 1990).

which to evaluate project alternatives. *Id.* Although NEPA does not prohibit agencies from taking actions for whatever political, ecological, or economic reasons they desire, it does require a transparent process. *Id.*

In the case of transportation projects, the purpose and need statement describes the problem to be solved and explains why the project is necessary. The statement is often presented in two parts: the “purpose” defines the transportation problem and outlines the goals and objectives that should be included as part of a successful solution. The purpose is not an expected outcome (such as “to reduce congestion along a particular corridor”) and should not state a specific solution (such as “building a bypass” or “constructing a new bridge”). Rather, the purpose statement broadly addresses the agency’s strategic goals, so that more than one alternative can be considered and multi-modal solutions are not dismissed prematurely. *Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). A project’s “need” provides the factual and numerical data to support the transportation problem. The need establishes evidence that a problem exists, or will exist if projected population and land use developments are realized.⁹²

Purpose and need statements guide the development of reasonable project alternatives, and are relied on when selecting preferred actions. *Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Thus, when agencies define project purpose and need statements broadly, there is a broad range of alternatives that may be found to be reasonable and necessarily analyzed. When agencies define statements narrowly, there are fewer alternative solutions that can satisfy the conditions and reasonably achieve the stated goals.”⁹³

ii. Court Interpretation of the FHWA’s Purpose and Need Statements

The purpose and need of a project is a slippery concept, susceptible of no hard-and-fast definition. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). NEPA does not substantively constrain an agency’s choice of objectives or

⁹² FHWA Office of Policy, *FHWA Strategic Plan* (July 2012).

⁹³ FHWA, NEPA and Transportation Decisionmaking, *The Importance of Purpose and Need in Environmental Documents*, <http://environment.fhwa.dot.gov/projdev/tdmneed.asp> (September 18, 1990).

mandate specific results. *City of Alexandria*, 198 F.3d at 867. Agencies have discretion in articulating their policies and objectives for their projects and actions.

Courts apply a “rule of reason” standard of review in evaluating purpose and need statements, which grants agencies considerable discretion. *See City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) (stating that the preparation of an EIS necessarily calls for judgment, and that judgment is the agency’s).⁹⁴ Courts evaluate the reasonableness of an agency’s objective with considerable deference to the agency’s expertise and policy-making role. *City of Alexandria*, 198 F.3d 862, 867 (D.C.Cir 1999). Absent a finding that an agency acted in an arbitrary or capricious manner, courts uphold purpose and need statements contained in an EIS.⁹⁵

Such discretion, however, is not unlimited. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998). Agencies may not define a project’s purpose and need in terms so unreasonably narrow that they foreclose consideration of a reasonable range of alternatives or produce only one alternative that can satisfy the project’s goals. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3rd 664 (7th Cir. 1997) (stating that an obvious way for agencies to slip past the strictures of NEPA is to contrive a purpose and need statement so slender so that it defines competing reasonable alternatives out of consideration, and even out of existence). When this occurs, the EIS becomes a foreordained formality. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir 1991). On the other hand, agencies may not frame their goals in terms so unreasonably broad that an infinite number of alternatives could accomplish those goals and the project would collapse under the weight of possibilities. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir.1991).

The following sections describe and evaluate court decisions that analyzed challenges to the FHWA’s statements of purpose and need for roadway projects. Most

⁹⁴ *See also Alliance*, 69 Fed.Appx. at 622 (“we defer to the agency if the statement is reasonable”); *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C.Cir.1999) (courts evaluate whether an agency’s objectives are reasonable “with considerable deference to the agency’s expertise and policy-making role.”); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir.1991) (“As the phrase ‘rule of reason’ suggests, we review an agency’s compliance with NEPA’s requirements deferentially” and *663 “uphold an agency’s definition of objectives so long as the objectives that the agency chooses are reasonable”).

⁹⁵ In the case of transportation projects, other federal agencies afford substantial deference to the FHWA’s articulation of purpose and need. 49 U.S.C. § 101(b)(5). This deference reflects the CEQ’s expectation and experience in other settings where a single agency has the primary substantive expertise and program responsibility. Letter from James L. Connaughton, CEQ to the Honorable Norman Y Mineta, Secretary, Department of Transportation (May 12, 2003).

challenges were unsuccessful, based on judicial deference to the FHWA's articulation of project purpose and need.

a) Situations Where Courts Reject Federal Articulation of Purpose and Need

There are specific situations where courts reject federal articulation of a project's purpose and need. Courts have consistently agreed that agencies may not define a project's purpose and need statement in terms so unreasonably narrow so that they foreclose the consideration of a reasonable range of alternatives. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); *see also Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *City of New York v. U.S. Dept. of Transp.*, 715 F.2d 732, 743 (2nd Cir. 1983). Agencies may not use purpose and need statements to reverse engineer solutions or to predetermine alternatives. In the transportation project context, the FHWA may not include specific factors in purpose and need statements, such as mode, location, or project size, because doing so conflates the alternatives analysis with the selection of final project proposals.⁹⁶

Preselecting project attributes dictates the selection of alternatives "by placing the choice of how society is better served at a point prior to the NEPA decisionmaking process."⁹⁷ This process precludes agencies from disclosing how (or if) they balance environmental values against others. While NEPA forbids only "uninformed not unwise" agency actions,⁹⁸ it also assures that the public will have access to sufficient information to determine if the government acts wisely with respect to the environment.⁹⁹ By defining the project's purpose and need through specific factors that agencies want to see in final projects, the NEPA process is converted into an exercise in justifying a pre-selected course of action, rather than in open decisionmaking.

Although unrelated to roadway building, *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997) is the preeminent example of a federal agency

⁹⁶ Allen, 311.

⁹⁷ *Id.*

⁹⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 351 (1989).

⁹⁹ *See Calvert Cliffs Coordinating Comm., Inc. v. U. S. Atomic Energy Comm.*, 449 F. 2d. 1109, 1114 (D.C. Cir. 1971) ("NEPA provides evidence that the mandated decision making process has in fact taken place, and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.")

“defining-away” alternatives by establishing an overly narrow purpose and need statement. In *Simmons*, the City of Marion, Illinois, applied to the U.S. Army Corps of Engineers (the “Corps”) for permission to build a dam and to supply water to Marion and to the Lake of Egypt Water District. *Id.* at 667. The Corps defined the project’s purpose and need as “supplying . . . water from a *single source*”—the new reservoir. *Id.* (emphasis added). The court rejected this purpose and need statement, explaining that although a single water source may have been the best project solution, there were other reasonable alternatives that the Corps could have considered if the purpose and need statement was drawn more broadly. “If NEPA mandates anything, it mandates that a federal agency cannot ram a project through before first weighing the pros and cons of the alternatives.” *Id.* at 669-70. By establishing a purpose and need statement that limited analysis to a single source alternative, the Corps never considered an entire category of reasonable alternatives, thereby ruining its EIS. *Id.*

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002), is an example of the FHWA defining a project’s purpose and need so narrowly that it foreclosed consideration of reasonable alternatives. In *Davis*, the Tenth Circuit held that the FHWA’s purpose and need statement “to provide a new bridge across the Jordan River at Highway 11400 South” was defined so narrowly that it eliminated reasonable alternatives from detailed consideration. Although there were viable alternatives to expanding traffic capacity across the river at other locations, the FHWA’s purpose and need mandated the extra capacity only at 11400 South, making any alternative that avoided a crossing this location “*per se* unreasonable.” The court rejected this statement as unreasonably narrow and remanded the case for the agency to reevaluate the project’s goals and objectives.

b) Situations Where Courts Defer to Federal Articulation of Purpose and Need

Although *Simmons* and *Davis* describe the rare circumstances where courts invalidate statements of purpose and need drafted by the FHWA, the vast majority of purpose and need statements are upheld. This truism is based on the deferential judicial review of agency decisionmaking, and the fact that NEPA does not substantively constrain agencies’ objectives or mandate specific results. *City of Alexandria*, 198 F.3d at 867. Agencies are free to define a project’s purpose however they see fit, and courts are reluctant to disturb agency expertise. Although agencies may not “define away”

alternatives by crafting overly-narrow purpose and need statements, the vast majority of courts simply do not second-guess the FHWA's decisions.

For example, courts uphold purpose and need statements that require the construction of "roads" or "highways," so long as the FHWA also considers broader transportation objectives and does not completely obviate the need to analyze other modes.

- *Audubon Naturalist Society v. U.S. Dep't of Transp.* 524 F. Supp. 2d 642 (D.MD. 2007) (upholding the FHWA's purpose and need statement, which called for the construction of a new "east-west highway that limited access and accommodated passenger and goods movement," because the agency considered broader transportation objectives, which permitted a wide range of reasonable alternatives, including non-highway alternatives).
- *City of South Pasadena v. Slater*, 56 F.Supp.2d 1106 (C.D.Cal.1999) (holding that the FHWA did not define a project's purpose and need of "completing the freeway network" too narrowly because the FHWA included non-freeway criteria).
- *Sierra Club v. U.S. Dep't of Transp.*, 962 F.Supp. 1037, 1042-43 (D.Ill.1997) (holding that the FHWA's purpose of "providing a north-south corridor" was not "excessively narrow" because the FHWA also considered more general objectives, such as improving local travel, relieving congestion, and enhancing community linkage).
- *N. Carolina Wildlife Fedn. v. N. Carolina Dept. of Transp.*, 677 F.3d 596 (4th Cir. 2012) (upholding a purpose and need statement to "construct a facility that allows for safe, reliable, high-speed regional travel in the corridor, and improves mobility while maintaining access to properties along the route").
- *Citizens for Smart Growth v. Sec. of Dept. of Transp.*, 669 F.3d 1203 (11th Cir. 2012) (upholding the FHWA's purpose and need statement to "provide an additional river crossing to accommodate infrastructure needs, safety demands, and emergency evacuation." Although the FHWA's alternatives were limited to bridges that crossed the southern portion of the river, the court upheld the limited statement as reasonable because the FHWA explained that existing bridges already met this purpose and need in the central and northern parts of the region).
- *Jones v Peters* 2007 WL 2783387 (D. Utah 2007) (upholding a purpose and need statement to improve mobility and "provide the transportation infrastructure to support economic development," despite plaintiffs' contention that this statement "eliminated alternatives that would serve the broader purpose of accommodating transportation needs while lessening adverse impacts of the proposed project").

Courts also uphold purpose and need statements that are expressed in specific, quantitative terms based on the FHWA's desired level of service ("LOS") for the project corridor.¹⁰⁰

- *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997) (upholding the FHWA's identification of a specific traffic capacity and the achievement of LOS C in a highway project's purpose and need statement. Although the plaintiffs argued that the preferred alternative was preordained because it was the only alternative that could achieve LOS C, the court held that the FHWA's actions were reasonable. Although only one alternative successfully met the specified LOS, other alternatives that would not meet the LOS at all times nevertheless "merited consideration." *Id.* at 1156-57).
- *Burkholder v. Wykle*, 268 F. Supp. 2d 835 (N.D. Ohio 2003) (upholding the purpose and need of a highway improvement project based on level of service because it "did not preclude a meaningful discussion of alternatives." The FHWA justified its decision with data that showed that the LOS on the existing road was seriously deficient and that traffic was expected to increase).
- *Route 9 Opposition Leg. Fund v. Mineta*, 213 F. Supp. 2d 637 (N.D.W. Va. 2002) (upholding a purpose and need statement to "provide sufficient capacity to serve projected traffic volumes at an acceptable LOS, and to support the ongoing efforts to reduce congestion" because it did not preclude the FHWA from considering other alternatives, including a TSM alternative, an upgrade alternative, a public transit alternative, and roadway improvements with fewer lanes).
- *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (upholding a purpose and need that was based on a quantitative goal for the flow of vehicles at certain locations).

Highly deferential judicial review makes it virtually impossible to successfully challenge the FHWA's narrow articulation of a project's purpose and need. Furthermore, given that "the scope of reasonable alternatives to be considered is a function of how narrowly or broadly the agency views project objectives," *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), courts also defer to the FHWA's analysis of which alternatives can reasonably achieve the stated purpose and need. The following

¹⁰⁰ LOS standards are generally used to define the operational characteristics of a roadway, intersection or transit system. LOS is measured by comparing the volume of traffic to the roadway system capacity. LOS analyses describe conditions such as "speed and travel time, freedom to maneuver, traffic interruptions, comfort and convenience, and safety." LOS is rated on a scale from "A" to "F," with "A" representing free-flow conditions and "F" representing forced or breakdown conditions. Robert H. Freilich, "Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis." 24 LOY. L.A. L. REV. 915, 942-43 (1991).

section analyzes NEPA’s “reasonable alternatives” requirement and provides a history of court interpretations of the FHWA’s alternatives analyses.

b. Alternatives Analyses

i. Procedural Requirements

The identification and analysis of project alternatives are crucial elements to the NEPA process. Consideration of alternative actions can lead to solutions that satisfy project purpose and needs while protecting environmental resources. The CEQ refers to the alternatives analysis as the "heart" of NEPA, and requires agencies to:

1. 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.
2. Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
3. Include reasonable alternatives not within the jurisdiction of the lead agency.
4. Include the alternative of no action.
5. 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.
6. Include appropriate mitigation measures not already included in the proposed action or alternatives.¹⁰¹

The alternatives analysis presents the environmental impacts of a proposed project and its alternatives in comparative form, sharply defining the issues and providing a clear basis for choice. *Piedmont Heights Civic Club Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981). By examining both the environmental impacts of a desired project and the impacts of other reasonable alternatives, NEPA enables federal agencies and the public to evaluate whether there are other options that are less damaging to the natural environment. *Robertson v Methow Valley Citizens Council*, 490, U.S. 332, 349 (1989). The alternatives analysis includes a discussion of what alternatives were eliminated, why they were eliminated, and what criteria were used to assess them.

For the FHWA, alternatives may include the comparison of roadway locations or alignments, the number of travel lanes, whether a facility is tolled, and different travel

¹⁰¹ 40 C.F.R. § 1502.14.

modes, even if they are outside of the FHWA's funding authority.¹⁰² Alternatives may also include low-build options, such as bicycle and pedestrian infrastructure, public transportation facilities, TSM techniques as potential design options, and TDM strategies to control facility demand. As described above, the FHWA rarely analyzes low-build alternatives in any real depth, preferring instead to only evaluate roadway projects.

By NEPA's terms, a "no-build alternative," must always be included in the analysis. In some cases, the no-build alternative may be reasonable, especially when the impacts are great and the need is relatively minor. However, the "no-build" generally serves as a baseline against which the other alternatives are compared.

Agencies must consider a "reasonable range" of alternatives

There is no statutory minimum number of alternatives that agencies must analyze, and courts have not imposed a numerical requirement as the bellwether of reasonableness. *See N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541 (11th Cir. 1990) (finding adequate the agency's analysis of two alternatives); *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140–42 (D.C.Cir.1991) (finding adequate the agency's elimination of thirteen out of fourteen alternatives, and its discussion of only one alternative in detail). The substance of the alternatives is the main focus. Agencies are only required to consider "reasonable" alternatives and to provide appropriate explanations for why they rejected others.

The range of alternatives considered must simply be "sufficient to permit a reasoned choice." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir.1973); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (stating that a detailed alternatives analysis cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency did not ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved. Certainly, the requirement to consider "all reasonable alternatives" is bounded by some notion of feasibility).

¹⁰² FHWA, NEPA and Transportation Decisionmaking, *Development and Evaluation of Alternatives*, <http://environment.fhwa.dot.gov/projdev/tdmalts.asp>.

Furthermore, NEPA says nothing about which alternative to choose. Therefore, like every other aspect of NEPA, which requires only the proper procedure, federal agencies have the authority to decide which alternatives to analyze, which to eliminate, and which to select for implementation. *Citizens Against Burlington*, 938 F.2d at 195-96. In practice, this means that agencies are required to study alternatives that appear reasonable and appropriate at the time of drafting the EIS, as well as “significant alternatives” suggested by other agencies or the public during the comment period. *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041 (1st Cir. 1982).

Alternatives that do not achieve a project’s purpose and need statement are, by definition, unreasonable, and may properly be eliminated. *Vermont Yankee*, 435 U.S. at 551. Agencies are similarly not required to evaluate alternatives that they reject in good faith as too “remote, speculative, or impractical or ineffective based on other factors,” including environmental impacts, engineering, and cost.¹⁰³ See, e.g. *Assocs. Working for Aurora's Res. Env't v. Colo. Dept. of Transp.*, 153 F.3d 1122, 1131 (10th Cir.1998).¹⁰⁴ Agencies need not analyze alternatives that are unlikely to be implemented or would be inconsistent with their basic policy objectives. *Seattle Audubon Soc’y v. Mosely*, 80 F.3d 1401, 1404 (9th Cir. 1996). They are not required to separately analyze alternatives that are indistinguishable from those already considered or which have substantially similar consequences. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990).

ii. Court Interpretations of the FHWA’s Alternatives Analyses

Like all other aspects of NEPA, courts evaluate agency-selected alternatives under the theory that “ultimate decisions concerning the environmental consequences of transportation projects are to be made by the executive and legislative branches of government.” *Rankin v. Coleman*, 401 F. Supp. 664, 653 (E.D.N.C. 1975). Courts do not review the wisdom of proposed project alternatives. *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223, 240 (D. Conn. 1974) aff’d, 517 F.2d 1077 (2nd Cir. 1975). They ensure only

¹⁰³ The primary purpose of conducting an alternatives analysis is to address the general question of whether the stated purpose and need for the project can be met by means that can avoid or minimize adverse impacts to the environment, including options that would make the proposed project unnecessary.

¹⁰⁴ Keith Bartholomew, “Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership,” 36 *FORDHAM URB. L.J.* 159, 199-200.

that the alternatives analysis is “in good faith, objective . . . and sufficient to permit a reasoned choice among the options.” *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977). The extent to which agencies discuss alternatives and their reasons for eliminating them must merely be reasonable and supported by factual information in the record. *City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C.Cir. 1994).

NEPA litigation often involves challenges to the FHWA’s preference for roadway projects and its rejection of low-build alternatives. In these circumstances, the FHWA will evaluate these low build alternatives through traffic modeling and other technical methods, but will typically find that they cannot immediately reduce congestion or increase travel capacity to the extent specified in the project’s purpose and need statement. The FHWA may properly eliminate these alternatives as “unreasonable” or “remote and speculative,” and courts defer to these decisions so long as the agency articulates its reasoning.

Courts only reject the FHWA’s decision to exclude alternatives when plaintiffs can demonstrate that an excluded alternative would have been at least equally successful in meeting the project’s goals.¹⁰⁵ While some courts have invalidated the FHWA’s decision to eliminate low-build alternatives,¹⁰⁶ most courts uphold the FHWA’s distinction between reasonable and unreasonable alternatives.¹⁰⁷ Existing case law is consistent with the premise that NEPA does not require the FHWA to analyze a minimum number or particular type of alternatives; NEPA simply mandates that the agency adequately comply with its procedural mandates and explain its reasons for the decisions it makes.

¹⁰⁵ Allen, 302.

¹⁰⁶ See, e.g. *Coalition for Canyon Preservation v. Bowers*, 622 F.2d 774, 784-85 (9th Cir.1980) (holding that an improved two-lane road was a reasonable alternative to be considered); *Rankin v. Coleman*, 394 F. Supp. 647, 658-59 (E.D.N.C. 1975) (EIS was invalid because it failed to consider alternative of improving existing state roads); *I-291 Why? Ass’n v. Burns*, 372 F. Supp. 223, 248-50 (D. Conn. 1974), aff’d, 517 F.2d 1077 (2d Cir. 1975) (same).

¹⁰⁷ See *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (upholding FHWA’s refusal to consider bridge replacement alternatives involving fewer than 12 lanes); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999) (upholding FHWA’s refusal to consider road improvement alternative); *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1550 (10th Cir. 1993) (“The inability of an alternative to accommodate future traffic volumes is justification for rejecting that alternative”); *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 164 (4th Cir. 1990) (same).

a) Situations Where Courts Reject Federal Alternatives Analyses

Like the purpose and need analysis, there are limited situations where courts have invalidated the FHWA's procedural process in selecting project alternatives. Because NEPA requires agencies to present a fair opportunity for the public to meaningfully evaluate alternatives to proposed projects, "passing mention of reasonable alternatives in a conclusory and uninformative manner" renders environmental review fatally inadequate. *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223, 249 (D. Conn. 1974) aff'd, 517 F.2d 1077 (2nd Cir. 1975). Although courts are reluctant to overturn agency decisions, they will not allow agencies to reject alternatives without providing an adequate explanation for their reasons for doing so.

The following cases exemplify this line of reasoning:

- *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (invalidating the FHWA's elimination of alternatives that included alignment shifts, TSM policies, and mass transit, because the FHWA only considered them as stand-alone alternatives that could not individually meet the project's purpose and need. The court held that because the FHWA did not consider these alternatives *together*, or in conjunction with road expansions and alignments, it did not undertake a proper analysis. Furthermore, there was no evidence that these alternatives were "remote, speculative, impractical, or ineffective").
- *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002) as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003) (invalidating the FHWA's failure to rigorously explore and objectively evaluate an alternative construction sequence to the preferred alternative, which contemplated improving and expanding an interstate and increasing transit. Because the FHWA did not fully consider an alternative that expanded public transit *before* starting construction on the interstate, the court held that the EIS violated NEPA for not rigorously exploring what could have been a reasonable alternative).
- *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 783 (9th Cir. 1980) (holding that the FHWA violated NEPA for failing to adequately analyze an improved and widened two-lane road in addition to the preferred four-lane alternative. The two-lane road was both "reasonable and obvious" in light of the state DOT's transportation planning objectives, its ability to use auxiliary lanes in the highway design to address traffic congestion, and the general preference by nearby jurisdictions for slower traffic).
- *S.E. Alaska Conservation Council v. Fed. Hwy. Admin.*, 649 F.3d 1050 (9th Cir. 2011) (holding that the FHWA violated NEPA for failing to give "substantial treatment" to plaintiffs' alternative. The proposed project contemplated the construction of a new highway segment and ferry terminal. Plaintiffs' alternative

involved specific changes to the ferry system, such as revising routes and scheduling, reassigning vessels, increasing staff, reducing fares, and improving the management structure, all of which would have alleviated the need to build the new roadway altogether. Because the FHWA failed to consider this “viable and reasonable” alternative, or give an adequate justification for its omission, the court held that FHWA violated NEPA. Furthermore, the FHWA’s rejection of plaintiffs’ alternative was limited to three brief paragraphs, which could not give policymakers or the public sufficient information to make an informed comparison of the alternatives).

- *Rankin v. Coleman*, 394 F. Supp. 647, modified, 401 F. Supp. 664 (E.D.N.C. 1975), (rejecting the FHWA’s alternatives analysis because it failed to consider several “critical” alternatives, and “analyzed superficially” those that were present in the EIS. *Id.* at 658. The FHWA gave no consideration to alternatives that would have improved existing roadways, which could have eased traffic flow, potentially eliminating the need to build a new facility at all. The agency did not provide an explanation or factual data, stating only that the rejected alternatives “were investigated and found to be unsatisfactory.” Thus, the court held that the EIS did not provide “information sufficient to permit a reasoned choice of alternatives.” *Id.* at 658. Furthermore, the FHWA evaluated and dismissed the no-build alternative in three sentences, which was not the “full disclosure” statement required by NEPA. *Id.*).
- *I-291 Why? Ass’n v. Burns*, 372 F. Supp. 223, 249 (D. Conn. 1974) aff’d, 517 F.2d 1077 (2nd Cir. 1975), (rejecting the FHWA’s alternatives analysis after it eliminated a street improvement alternative, a mass transit alternative, and the no build alternative in a “conclusory and perfunctory manner.” *Id.* at 252. The FHWA stated that modernizing the existing network “would not improve traffic flow,” that the mass transit alternative “would not provide sufficient flexibility,” and that the no-build alternative “would lead to increased congestion and economic loss.” The court found these statements to be mere “generalities and heavy-handed self-justifications,” treating crucial decisions not as “impending choices to be pondered” but as “foregone conclusions to be rationalized.” *Id.* at 249. Because no data was produced to support these conclusions, the court rejected the FHWA’s choice of alternatives. *Id.* at 248.
- *Hwy. J Citizens Group, U.A. v U.S. Dep’t of Transp.*, 565 F.Supp. 2d 868 (E.D.Wis. 2009) (holding that the FHWA violated NEPA for failing to analyze whether plaintiffs’ preferred roadway corridor would satisfy the project’s purpose and need. Although the FHWA rejected similar corridors, which “would not divert enough traffic,” the agency did not identify the criteria it relied on when making this conclusion, show that its conclusion was the product of expertise or careful study, or adequately explain why plaintiffs’ alternative merited the same conclusion as the previously rejected alternatives. The court held that the FHWA was required to either study plaintiffs’ alternative in detail, or adequately discuss its reasons for dismissing it).

Federal agencies may also be required to consider alternatives that only partially meet a project's purpose and need. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2nd Cir. 1975). If a project has two distinct purposes, each of which is vital to the project, an alternative that fails to meet one of those purposes is not reasonable and may properly be eliminated.¹⁰⁸ However, if an alternative satisfies the primary purpose of a project and only fails to satisfy some non-essential secondary purpose, then that alternative may still be reasonable and necessarily evaluated. Thus, agencies must evaluate alternatives that satisfy the significant project purposes, even for multi-purpose projects.

- *Town of Matthews v. U.S. Dept. of Transp.*, 527 F. Supp. 1055 (W.D.N.C. 1981) (invalidating the FHWA's decision to eliminate a bypass alternative because it only accomplished one purpose of a multi-purpose project. The FHWA did not sufficiently study the bypass alternative to determine whether it would reduce traffic to such an extent that would eliminate the need to build the proposed roadway alternative at all).
- *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223 (D. Conn. 1974) aff'd, 517 F.2d 1077 (2d Cir. 1975) (stating that although alternatives that were rejected would only serve one purpose of the proposed project, the rejected alternatives were technically feasible were no so *prima facie* unreasonable as to warrant exclusion).

b) Situations Where Courts Defer to Federal Alternatives Analysis

The previous cases illustrate the rare instances where courts have rejected the FHWA's alternatives analyses. These invalidations, however, are rare and only occur when the FHWA fails to provide enough information for how it made its decision. The following cases demonstrate courts' reluctance to overturn the FHWA's analysis and selection of reasonable alternatives.

-The FHWA may properly reject alternatives so long as it explains its rationale

- *Virginians for Appropriate Roads v. Capka*, 2009 WL 2160454 (W.D. Va. 2009) (upholding the FHWA's decision to eliminate an access management alternative to highway construction because it demonstrated a rational connection between its analysis, decisionmaking process, and its ultimate decision).

¹⁰⁸ American Association of State Highway and Transportation Officials (AASHTO) Practitioner's Handbook. *Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects*. (2007), 6.

- *Carolina Wildlife Fedn. v. N. Carolina Dept. of Transp.*, 2011 WL 5042075 (E.D.N.C. 2011) vacated and remanded, 677 F.3d 596 (4th Cir. 2012) (upholding the FHWA’s decision to eliminate no-build alternatives, including TDM and TSM policies, mass transit, and improvements to existing facilities, because it analyzed them in “peat detail” and explained in the EIS its reasons for eliminating them).
- *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1222 (S.D. Fla. 2010) (upholding the FHWA’s elimination of plaintiffs’ alternative, which proposed a combination of traffic management mechanisms and road improvements rather than constructing a new bridge. The FHWA based its decision on a “comprehensive evaluation process,” which analyzed technical studies and models that addressed concerns related to social demands, emergency response needs, multimodal interrelationships, economic development, environmental impact, land uses, safety, and noise).
- *Alaska Center for the Environment v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997) (upholding the FHWA’s decision to build a new road instead of improving rail service because the agency adequately explained why rail would not meet mobility demand, would not provide sufficient access for emergency service, and created increased safety risks).
- *Prairie Band Pottawatomie Nation v. Fed. Hwy. Admin.*, 684 F.3d 1002 (10th Cir. 2012) (upholding FHWA’s decision to eliminate citizens’ alternative alignment for a proposed highway project because the agency demonstrated an early and open scoping and evaluation process, which initially identified 27 options, and offered a reasonable explanation as to why plaintiffs’ alternative was inferior to the one chosen).
- *Communities, Inc. v. Busey*, 956 F.2d 619 (6th Cir. 1992) (upholding the FHWA’s consideration of only two alternatives because the agency “fully explained” its reasons for rejecting other alternatives and included a “thorough discussion” of the rejected alternatives, including a “graphic configuration, an engineering analysis, and an explanation of why the alternatives were imprudent or infeasible).

-The FHWA may properly reject alternatives that do not achieve the project’s purpose and need

As described above, the reasonableness of a project is judged in light of the project’s purpose and need. *City of Alexandria v. Slater*, 198 F.3d 862 (1999). Alternatives that do not meet the stated purpose and need are, by definition, unreasonable, and may properly be eliminated. *Vermont Yankee*, 435 U.S. at 551. The following cases demonstrate this pattern.

- *City of Alexandria* (upholding the FHWA’s decision to approve a 12-lane bridge project and eliminate a 10-lane alternative because the 10-lane bridge failed to adequately eliminate future congestion or satisfy traffic and mobility needs, access demands, and safety requirements, which were specified in the project’s purpose and need statement).
- *Associations working for Aurora’s Residential Environment v. Colorado Dep’t of Transp.* 153 F.3d 1122 (10th Cir. 1998) (upholding the FHWA’s rejection of a mass transit alternative to a new highway interchange because the FHWA determined that mass transit could not fully eliminate traffic congestion to the extent specified in the project’s purpose and need section).
- *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997) (upholding the FHWA’s desired traffic capacity of LOS C in the purpose and need statement of a proposed highway project. Although opponents to the project argued that the preferred alternative was foreordained because it was the only alternative that could meet LOS C, the court held that the FHWA acted reasonably. Although only the preferred alternative successfully achieved LOS C, other alternatives that would not meet LOS C at all times nevertheless merited consideration. Furthermore, because several disputed alternatives not receiving consideration fell short of the desired LOS C, the court upheld the FHWA’s decision that they were not reasonable. Because a quantitative goal like achieving LOS C involves a technical analysis, courts defer to agency judgment).
- *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533 (11th Cir. 1990) (upholding the FHWA’s approval of a new six-lane highway and elimination of a no-build/mass transit alternative because the mass transit alternative would provide little congestion relief and could not adequately achieve the future traffic volumes set forth in the project’s purpose and need section. Opponents’ common-sense assumption that mass transit might harm the environment less than the proposed highway was a “policy argument better reserved for those legislative bodies with responsibility for local planning.” *Id.*).
- *Route 9 Opposition Leg. Fund v. Mineta*, 213 F. Supp. 2d 637, 643 (N.D.W. Va. 2002) (upholding the FHWA’s elimination of an alternative that had fewer lanes and included TSM strategies, facility upgrades, and public transit because they could not meet the project’s purpose and need of “providing sufficient capacity to serve projected traffic volumes at an acceptable LOS, and to support the ongoing efforts to reduce congestion”).
- *Sierra Club North Star Chapter v. LaHood*, 693 F.Supp.2d 958 (2010) (upholding the FHWA’s decision to eliminate TSM/TDM strategies and mass transit alternatives because even when combined with other alternatives, they would have an “imperceptible effect” on peak traffic volumes and congestion in the project area. Also upholding the FHWA’s failure to analyze a two-lane bridge

- alternative, instead of the FHWA's preferred wider alternative, because it would not meet the project's travel forecasts and demands).
- *Conservation L. Found. v. Fed. Hwy. Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007) (upholding the FHWA's approval of a road-widening project and elimination of a rail alternative because rail alone would not alleviate the road's congestion problems, as required by the purpose and need).
 - *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517 (9th Cir. 1994) (upholding the FHWA's approval of an eight-lane road project and elimination of a four-lane alternative with TDM and pricing mechanisms, because the four-lane alternative would not meet the project's goal of reducing traffic congestion).
 - *Coalition to Preserve McIntire Park v. Mendez*, 862 F. Supp. 2d 499 (W.D. Va. 2012) (upholding the FHWA's approval of a new highway interchange project and elimination of a no-build alternative that incorporated TSM policies and mass transit improvements, because these policies would not adequately satisfy the project's purpose and need of improving traffic congestion); *see also Karst Envtl. Educ. and Protec., Inc. v. Fed. Hwy. Admin.* 2011 WL 5301589 (W.D. Ky. 2011) (same).
 - *Coalition for a Sustainable 520 v. U.S. Dept. of Transp.*, 881 F.Supp. 2d 1243 (W.D. Wash. 2012) (upholding the FHWA's selection of a six-lane facility instead of a four-lane road because the four-lane road would not meet the mobility goals of the region as articulated in the project's purpose and need statement).
 - *Senville v. Peters*, 327 F. Supp. 2d 335, 345 (D. Vt. 2004) (upholding the FHWA's approval of a new four-lane road and elimination of an "alternative transportation modes" alternative, which included expanded bus service, park-and-ride, and van pooling on the existing road, because this alternative would not sufficiently alleviate congestion to the extent required by the project's purpose and need).
 - *Citizens for Smart Growth v. Sec. of Dept. of Transp.*, 669 F.3d 1203 (11th Cir. 2012) (upholding the FHWA's elimination of an alternative to a new bridge project, which incorporated traffic management mechanisms and road improvements, because it did not meet the project's purpose and need of reducing traffic by "providing another river crossing").
 - *Burkholder v. Wykle*, 268 F. Supp. 2d 835 (N.D. Ohio 2002) *aff'd sub nom. Burkholder v. Peters*, 58 Fed. Appx. 94 (6th Cir. 2003) (unpublished) (upholding the FHWA's decision to construct a new road instead of making improvements to the existing facility because improvements alone would not achieve the specified LOS or improve economic development, as specified in the project's purpose and need statement).

- *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999) (upholding the FHWA’s approval of a new four-lane highway instead of improving an existing facility, because improvements alone would not meet the project’s purpose and need of providing basic facilities essential for economic growth in the region).
- *Citizens Advoc. Team v. U.S. Dept. of Transp.*, 2004 WL 725279 (N.D. Ill. 2004) (upholding the FHWA’s rejection of a no-build alternative to a bridge project that failed to meet the project’s purpose and need of increasing access across a river).
- *Comm. to Preserve Boomer Lake v. U.S. Dep’t of Transp.*, 4 F.3d 1543, 1549-50 (10th Cir. 1993) (upholding the FHWA’s elimination of alternative routes to a proposed road because the number and type of turns in the disputed alternative required fell short of the project’s “direct route” purpose and need); *Residents in Protest-I-35E v. Dole*, 583 F. Supp. 653, 659 (D. Minn. 1984); *Buckingham Tp. v. Wykle*, 157 F. Supp. 2d 457 (E.D. Pa. 2001) aff’d, 27 Fed. Appx. 87 (3d Cir. 2002) (unpublished) (same).
- *N. Crawfish Frog (Rana Areolata Circulosa) v. Fed. Hwy. Admin.*, 858 F. Supp. 1503 (D. Kan. 1994) (upholding the FHWA’s decision to eliminate alternative corridors, in part because they did not adequately relieve traffic congestion and would not divert enough vehicles that traveled through the area).

-The FHWA may properly reject alternatives that are “remote and speculative”

The FHWA may properly reject alternatives that are “remote and speculative” or unreasonable based on other factors. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549-50 (1978). When opponents challenge the rejection of low-build alternatives, the FHWA may simply explain why these alternatives are remote and speculative and therefore unreasonable and properly eliminated.

For example, the FHWA may properly eliminate as “remote and speculative” those alternatives that are not the subject of a discrete, well-defined proposal.

- *City of Romulus v. Wayne County*, 392 F. Supp. 578 (589-90) (E.D. Mich. 1975) (upholding the FHWA’s elimination of an alternative that linked Detroit with other regional cities through rapid rail transit because no such plan existed).
- *Coalition for Responsible Regional Development v. Coleman*, 555 F.2d 398, 402 (4th Cir. 1977) (upholding the FHWA’s elimination of alternative locations for a new bridge crossing because they were not proposed by any official source).

The FHWA may also reject alternatives as “remote and speculative” that involve changes to local land use plans or policies because such alternatives are not within the federal government’s jurisdiction.

- *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002) as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003) (upholding the FHWA’s decision to eliminate an alternative that involved land use scenarios because they were wholly under the jurisdiction of five different local governments, which “resoundingly declined” to alter their plans).
- *Virginians for Appropriate Roads v. Capka*, 2009 WL 2160454 (W.D. Va. 2009) (upholding the FHWA’s elimination of plaintiffs’ access management alternative because the state DOT had no legal authority to control the access point that the plaintiffs’ contemplated, and such an alternative was not reasonable because it was wholly dependant upon the region’s local authorities for success).

Finally, the FHWA may properly eliminate “remote and speculative” alternatives that are inferior in some way to the preferred alternative.

- *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 543 (8th Cir. 2003) (upholding the FHWA’s exclusion of alternate routes because they involved steeper slopes, longer distances, and higher construction costs).
- *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985), (upholding the FHWA’s elimination of an alternative route because it was “significantly more costly”).
- *N. Crawfish Frog (Rana Areolata Circulosa) v. Fed. Hwy. Admin.*, 858 F. Supp. 1503 (D. Kan. 1994) (upholding the FHWA’s elimination of alternative corridors, in part because they were significantly more expensive to build and garnered no public support).
- *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002) as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003) (upholding the FHWA’s approval of an unusually wide median because it anything narrower would create major water quality issues).
- *HonoluluTraffic.com v. Fed. Transit Admin.*, 2012 WL 5386595 (D. Haw. 2012) (upholding the FTA’s elimination of alternative technologies, such as light-rail, monorail, magnetic levitation, and rubber-tired rail, because they did not offer substantial proven performance, cost, and reliability benefits as compared to the preferred steel-on-steel technology).
- *Burkholder v. Wykle*, 268 F. Supp. 2d 835 (N.D. Ohio 2002) aff'd sub nom. *Burkholder v. Peters*, 58 Fed. Appx. 94 (6th Cir. 2003) (unpublished) (upholding FHWA’s approval of a new road instead of establishing TSM policies and

improving the existing facility because such no-build alternatives were not “feasible or prudent”).

-The FHWA may properly prefer one alternative at the outset of NEPA

An agency’s preference for a particular alternative from the outset of NEPA does not, by itself, violate NEPA. *Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng’rs*, 492 F.2d 1123, 1129 (5th Cir. 1974).

NEPA does not require agency officials to be subjectively impartial. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). NEPA assumes as inevitable an institutional bias, and erects the procedural requirements to insure that there is no way the decisionmaker can fail to note the facts and understand the very serious arguments advanced by other interested parties. *Envtl. Def. Fund v. Corps of Eng’rs*, 470 F.2d 289, 295 (8th Cir.1972). So long as an agency performs its environmental tasks with good faith objectivity, it may prefer one alternative from the outset. *Sierra Club v. Fed. Highway Admin.*, 2011 WL 3281328, at *4 (5th Cir. 2011).

Arguments that an agency predetermined the outcome of an EIS must meet a high standard. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir. 1991). Bad faith is not proven by showing that an agency was 1) committed to a project before it initiated its environmental study, 2) used data provided by an interested party, refused to change its position after preparing an impact statement, or 3) decorated its EIS with “rhapsodic prose.” *Conservation L. Found. v. Fed. Hwy. Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007). Rather, bad faith is reserved to describe conduct that amounts to a flagrant violation of NEPA’s procedural provisions that would be readily reviewable in court, such as fraud, refusal to comply, or showing of a “callous disregard” of environmental consequences. *Conservation L. Found. v. Fed. Hwy. Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007). Unreasonable pre-determination only occurs when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent on the NEPA environmental analysis producing a certain outcome before the agency completes that environmental analysis. *Forest Guardians*, 611 F.3d at 714.

The following cases illustrate this line of analysis.

- *Conservation L. Found. v. Fed. Hwy. Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007) (the FHWA did not demonstrate bad faith or an improper bias even though state

officials indicated that highway widening was their preferred alternative before rail ridership numbers were projected).

- *Friends of Congaree Swamp v. Fed. Hwy. Admin.*, 786 F. Supp. 2d 1054 (D.S.C. 2011) (the FHWA did not “improperly predetermine design plans” for the construction of a new bridge because it altered the original design based on suggestions from the public and other agencies).
- *Karst Envtl. Educ. and Protec., Inc. v. Fed. Hwy. Admin.* 2011 WL 5301589 (W.D. Ky. 2011) (the FHWA did not “irreversibly and irretrievably” commit itself to the chosen alternative, even though it was planning to build a large-scale connector road for a long time. The agency properly rejected all other alternatives because comprehensive analysis demonstrated their inability to adequately meet the project’s purpose and need).

It is strikingly clear that NEPA litigation involving challenges to the FHWA’s articulation of a project’s purpose and need or its evaluation of reasonable alternatives is doomed by a highly deferential standard of judicial review. At the same time, federal law precludes opponents from challenging projects during the regional or state transportation planning and project-selection process. As a result, there is little opportunity for the public to meaningfully questions transportation decisions that affect their communities. The following section describes these “roadblocks” to a more democratic transportation planning process.

CHAPTER III
ROADBLOCKS TO A DEMOCRATIC TRANSPORTATION PLANNING
PROCESS

A. ROADBLOCKS IN FEDERAL TRANSPORTATION PLANNING LAW

1. Federal Law Does Not Require Regional and State Governments to Integrate Land Use and Transportation Planning when Developing Transportation Plans and Selecting Projects

The connection between transportation and land use is well established.¹⁰⁹ Automobile-oriented transportation investments shape the rate and location of development, fueling sprawl and stalling the revitalization of existing communities. Suburban, low-density, single-use development, often with liberal parking requirements, induces automobile reliance, increases vehicle congestion, and makes alternative transportation modes infeasible.¹¹⁰ In contrast, compact, mixed-use development requires fewer and shorter vehicle trips, consumes less land, requires less environmentally harmful infrastructure, and reduces air pollution.¹¹¹

Despite the obvious relationship between transportation investments and development patterns, federal law does not require the integration of land use and transportation planning. States decide which transportation projects will be built; regional MPOs design long-range transportation plans; and local governments develop land use plans and enact zoning laws to control development patterns. Federal law fails to integrate these planning activities or mandate adequate inter-governmental coordination.

¹⁰⁹ Robert H. Freilich and S. Mark White. "Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis." 24 LOY. L.A. L. REV. 915, 918-19 (1991).

¹¹⁰ Senate Urban Growth Policy Project, *Does California Need a Policy to Manage Urban Growth?: A Report From the California Senate Urban Growth Policy Project* (June 1989), 24-25; R. Cervero, 34-41.

¹¹¹ U.S. Environmental Protection Agency, *Our Built and Natural Environments: A Technical Review of the Interactions between Land Use, Transportation, and Environmental Quality*, <http://www.epa.gov/smartgrowth/built.htm> (Jan. 2001).

There is no enforceable requirement that transportation plans and projects be compatible or coordinated with local land use goals. *See* 23 U.S.C. §§ 134(h)(1), 135(d)(1).¹¹²

Admittedly, federal law contains some encouraging language. For example, MPOs are encouraged to “consult with officials responsible for other types of planning activities that are affected by transportation in the area,” 23 U.S.C. §134(g)(3), and “to consult with state and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation.” 23 U.S.C. § 134(i)(5)(A). When developing projects and strategies for system development, MPOs and state DOTs are encouraged to promote, among other things, “the consistency between transportation improvements and state and local planned growth and economic development patterns.” 23 U.S.C. §§ 134(h)(1), 135(d)(1). Furthermore, transportation planners must “consider the effect of transportation decisions on land use and development.” 23 C.F.R. §450.208(a)(14).

These provisions, however, are unenforceable, unsupported by incentives, unreviewable by courts, and therefore limited in effect. They require only the “consideration” of land use and development patterns, and “consultation” requires only a “comparison of transportation plans with state conservation plans or maps, if available.” 23 U.S.C. § 134(i)(4). Federal law does not mandate a vertical consistency between local and regional plans, or an analysis of local land use in transportation plans at all. “Encouragement” does not effectively push MPOs or state DOTs to think critically about how transportation projects will impact, relate to, or conflict with the future development goals and land use patterns envisioned by local governments.

Furthermore, although MPOs coordinate long-range plans and strategies, they are relatively powerless because most federal funding is controlled by state DOTs. MPOs lack the power to implement the projects in their TIPs or enforce their long-range plans.¹¹³ They are not official units of government, and they rarely deliver any public services, operate public facilities, or make expenditures of their own. States have the final

¹¹² In undertaking the transportation planning process, MPOs and state DOTs are encouraged to promote, among other things, “the consistency between transportation improvements and State and local planned growth and economic development patterns.” 23 U.S.C. §§ 134(h)(1), 135(d)(1). The failure to do so, however, is unreviewable.

¹¹³ Lovelady, 297.

authority in selecting projects for funding, which results in the construction of projects that may not be the best use of limited federal funds.¹¹⁴

State DOTs often make funding decisions that are based on political motivations rather than on the specific transportation needs of the diverse regions within their boundaries. A 2010 study by the U.S. Government Accountability Office found that state DOTs make funding decisions based on their governor's funding priorities far more often than they do based on public support, economic analysis, or land use interests of local governments.¹¹⁵ Federal law does not require state DOTs to look at project impacts on fuel savings, travel time, greenhouse gas emissions, water quality, or public health.¹¹⁶ It offers no clear goals for state spending and there is no way of knowing what benefits the public gets in return for such spending.¹¹⁷ Federal law's focus is only in *process* (e.g. whether plans allow for public review or demonstrate fiscal constraint) not on *outcomes* (e.g. whether plans reduced congestion, improved mobility options or reduce environmental harm).

Furthermore, because representatives from rural areas dominate many state legislatures, there is often a political bias toward selecting highway projects that are more suited to rural environments, such as large roads that permit high speeds and do not accommodate non-vehicular traffic or incorporate public transportation.¹¹⁸ The funneling of money to these types of projects encourages metropolitan decentralization and negatively impacts cities by contributing to automobile dependency and creating environments that are not conducive to transit. Consequently, the federal transportation planning scheme can have the effect of curtailing funding for transportation improvements that are better suited to urban environments, such as roads with slower design speeds that accommodate bicyclists, pedestrians, and public transportation;

¹¹⁴ William J. Mallett, Congressional Research Service Report for Congress. Metropolitan Transportation Planning (February 3, 2010), 7.

¹¹⁵ Ya-Ting Liu, *GAO: Transportation Spending an Investment with Uncertain Returns*, Streetsblog DC, <http://dc.streetsblog.org/2011/01/25/gao-transportation-spending-an-investment-with-uncertain-returns/> (January 25, 2011).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Mallett, 7.

operations and management strategies; and the use of “highway” funds on other modes.¹¹⁹

2. Federal Law Does Not Require Regional and State Governments to Evaluate Low Build/Land Use-Based Alternatives When Developing Transportation Projects

Similar to the failure to require integrated land use and transportation planning, federal law does not require MPOs and state DOTs to analyze low-build or land use-based strategies, programs, or technologies, or to compare these types of projects to the “build” projects that are advanced into TIPs and STIPs. As a result, “build” projects are funded without serious consideration if more sustainable strategies can reasonably achieve the region’s transportation objectives.¹²⁰

Low-build alternatives, such as constructing bicycle and pedestrian facilities, expanding public transportation options, instituting infill and mixed-use redevelopment programs, developing supply-side strategies, and fixing existing infrastructure, can reduce demand for building new roadway facilities because they diminish the need to get into a car at all. These alternatives are less costly, less polluting, more energy efficient, and offer relief from traffic congestion.¹²¹ Facilitating physical activity as part of the national transportation agenda will simultaneously improve health, reduce obesity, and limit the rise in health care costs. Federal law, however, does not require transportation agencies to analyze low-build alternatives.

For example, when developing projects and strategies for system development, MPOs and state DOTs are required to consider a number of factors, including:

1. Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
2. Increase the safety of the transportation system for motorized and nonmotorized users;
3. Increase the security of the transportation system for motorized and nonmotorized users;

¹¹⁹ *Id.*

¹²⁰ Statement of Anne P. Canby before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Regarding the Future of National Transportation Policy (April 28, 2009).

¹²¹ Pollard, 1540.

4. Increase the accessibility and mobility of people and for freight;
5. 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;
6. Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;
7. Promote efficient system management and operation; and
8. Emphasize the preservation of the existing transportation system.¹²²

These factors, which apply to MPOs and state DOTs equally, are good, in theory, but fail to provide criteria that will actually change transportation policy and reduce automobile dependence in favor of other transportation modes. They do not specifically require the analysis of low-build alternatives, and instead allow transportation planners to develop alternatives that are focused exclusively on building new roadway capacity. Although federal law refers to environmental and energy conservation and efficient system management, it does not require transportation agencies to seriously evaluate alternatives that respect these values.

3. Federal Law's Failure to Define the Types of Projects that Regional and State Governments Must Evaluate Limits the Types of Projects that the Federal Government Must Analyze During the NEPA Process

NEPA does not confer the power or responsibility for long-range transportation planning on federal agencies. *North Buckhead*, 209 F.3d at 1542-42. The federal government exercises no control over the substantive aspects of local and regional transportation planning, but is concerned only with whether the *process* complies with NEPA, which is only triggered after projects receive dedicated federal funding. *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n.*, 599 F.2d 1333, 1340 (5th Cir. 1979). Once funded, the FHWA assumes responsibility for undertaking environmental analyses and is subject to NEPA's mandates.

If the regional and statewide transportation planning process involves analyses and stakeholder involvement similar to that required by NEPA, local data, decisions, and designs may be incorporated by reference, described, and relied on by the FHWA when

¹²² 23 U.S.C. §§ 134(h)(1), 135(d)(1).

undertaking NEPA's procedural mandates.¹²³ The FHWA does not develop transportation projects, design facilities, or decide which modes are best suited for individual communities. It does not question local objectives or use NEPA to substitute its judgment for those of local jurisdictions.¹²⁴ The FHWA ensures only that regional and state decisions have a rational basis, are based on accurate data, and can fit into NEPA's procedural confines. *See* 23 U.S.C. § 450, App. A.

Based on the FHWA's deferential review, there are two ways that the regional and statewide transportation planning processes limit the number and type of alternatives that the FHWA must analyze during the NEPA process. First, regional and statewide transportation planners shape the purpose and need statements of transportation projects, narrowly defining goals and objectives to be achieved. Second, regional and statewide planners eliminate alternatives and select a preferred project for federal funding. It is at this point that NEPA is triggered, and as a result, the FHWA is left with a single preferred project, and is only required to comply with NEPA's procedural mandates to ensure that the purpose and need is clearly defined and alternatives are studied.

a. Purpose and Need Statements Are Shaped During the Planning Process

Locally-defined purpose and need statements can narrow the range of alternatives that the FHWA must analyze during the NEPA process. Regional and state governments, with public and stakeholder involvement, establish visions for their future transportation systems, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing them. 23 U.S.C. § 450, App. A. The transportation planning process provides a forum to define the purposes and needs for new transportation projects by framing the scope of existing problems. This scope is further refined as more information about transportation need is collected and as consultation with the public and stakeholders clarifies other regional goals. *Id.* The process ends with a narrow articulation of the region's transportation problems and the

¹²³ 23 C.F.R. § 450 Appendix A. Locally prepared alternatives analyses may be used to comply with NEPA, so long as they meet certain prerequisites, including that a) the federal lead agency furnish guidance during the alternatives analysis process and independently evaluate the document, 23 U.S.C. § 139(c)(3), and b) alternatives analysis is conducted with public review and a reasonable opportunity to comment, 23 C.F.R. § 450.318(b)(2)(ii)-(iii).

¹²⁴ 23 C.F.R. § 450 Appendix A. The use of planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document.

specific ways that the local jurisdictions decide to solve them. The FHWA directly incorporates these decisions into purpose and need statements in NEPA documents and refrains from second-guessing decisions made during the planning process.

b. Alternatives Are Evaluated and Eliminated During the Planning Process

After regional governments identify transportation goals and objectives, they advance projects that can achieve these goals into their TIPs and STIPs. During this process, MPOs identify travel modes, corridors, and locations that can address the identified transportation problem, designing facilities and adding travel lanes that increase vehicle capacity. These projects become the “alternatives” that the FHWA analyzes during the NEPA process, and the FHWA is only required to analyze those alternatives that survive the local planning process, plus any additional reasonable alternatives identified during NEPA’s scoping process that the local agencies did not consider. For alternatives that were properly eliminated at the regional level, the FHWA is only required to identify them, explain why they were eliminated, and summarize the local analysis. 23 U.S.C. § 450, App. A. If MPOs and state DOTs reject alternatives for being unreasonable or for not achieving project goals and objectives, the FHWA is not required to include them in its alternatives analysis. 23 U.S.C. § 450, App. A.

As a result of this process, by the time the public is finally given the opportunity to challenge transportation projects through NEPA litigation, project goals, objectives, preferred designs, and alternatives have already been established by regional and statewide planning agencies. Presenting new alternatives or requesting that the FHWA re-frame issues has limited impact at this point. The FHWA directly incorporates decisions made during the planning process without questioning whether local officials arrived at the best objectives or selected the optimum project alternatives. As a result, local transportation planning severely limits the federal alternatives analysis.

4. Courts Defer to Federal Reliance on Local Plans and Decisions

Based on the highly deferential standard of review of agency decisionmaking, federal courts almost always uphold the FHWA’s reliance on local studies, plans, and decisions in its NEPA environmental review process. *See infra* pp. 14-17. The FHWA drafts purpose and need statements that are taken directly from local goals and objectives,

and it analyzes a range of alternatives that have already been developed by local governments. Therefore, although NEPA provides an opportunity to challenge the FHWA's decisionmaking process, it provides little recourse for challenging transportation projects because courts defer to the agency's reliance on studies, plans and decisions already made during the local planning process.¹²⁵

5. Local Plans and Decisions Themselves Are Not Judicially Reviewable

Decisions made by local, regional, and state governments during the transportation planning process are exempt from NEPA. *See generally Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979). The purpose of NEPA is to compel federal decisionmakers to consider the environmental consequences of their actions; Congress did not intend for NEPA to apply to local, state, or private actions. *Atlanta Coal. on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979). Local transportation plans are not submitted to the FHWA for review or approval, and although the FHWA approves TIPs and STIPs, such approval does not constitute a "major federal action" subject to NEPA review.¹²⁶

Likewise, while the transportation planning process preserves the eligibility for federal funding of transportation projects, the possibility of federal funding does not make a project a "major federal action" during the planning stage. *See, e.g. City of Boston v. Volpe*, 1 Cir., 1972, 464 F.2d 254, 258 (1st Cir. 1972) ("the adoption of certain federal standards and specifications in the hope of qualifying for federal assistance cannot

¹²⁵ *Sierra Club v. U.S. Dept of Transportation*, 310 F.Supp.2d 1168. *See also North Buckhead*, 903 F.3d at 1541-42 (stating that NEPA does not confer the power or responsibility for long range local planning on federal or state agencies and that federal reliance on state and local assistance in NEPA process was not arbitrary and capricious); *Sierra Club*, 310 F. Supp. 2d at 1193; *see also Laguna Greenbelt, Inc. v. U.S. Dep't. of Transp.*, 42 F.3d 517, 524 n. 6 (9th Cir. 1994) (stating that "the absence of a more thorough discussion in the EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA."); *Citizens for Smart Growth*, 669 F.3d at 1211 (stating that incorporation of local planning documents is permissible and that references to such documents can satisfy the requirements of NEPA.); *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 438 (5th Cir. 1981) (stating that the reference to the [regional planning document] contained in the EIS was sufficient to satisfy the procedural and substantive requirements of NEPA).

¹²⁶ Any decision by the Secretary concerning a plan or program described in this section shall not be considered to be a Federal action subject to review under NEPA. 23 U.S.C. § 134(o); *see also* 23 U.S.C. § 135(i). Since plans and TIPs are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under [NEPA], and since decisions by the Secretary [of the Department of Transportation] concerning plans and TIPs have not been reviewed under such act . . . 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. 23 U.S.C. § 134(p), 135(j).

transform a state or local project into a federal one”). Until the project receives dedicated federal funding, “the only relevant decision makers . . . are local officials.” *Friends of the Earth*, 518 F.2d at 329. Where local, regional, or state agencies are solely responsible for the contents of a plan and the proposed projects, and the adoption of the plan does not obligate the federal government, transportation plans are not considered “federal” for the purposes of NEPA.

It makes perfect sense that local, regional, and state plans are not reviewable under NEPA. However, federal law also expressly and unambiguously precludes judicial review of MPO and state planning decisions. *See* 23 U.S.C. §§ 134(h)(3) and 135(d)(3) (“the failure to consider any factor . . . shall not be reviewable by any court . . . in any matter affecting a transportation plan, TIP/STIP, a project or strategy, or the certification of a planning process.”). Although the statutory language requires MPOs to “accomplish the objectives” of protecting the environment, promoting local land use consistency, and encouraging a multi-modal transportation system,¹²⁷ there is no legal mechanism for opponents to enforce these goals. They cannot challenge regional or statewide long-range plans or the projects included in TIPs/STIPs.

The only opportunity for opponents to challenge transportation projects is once they are already planned, designed, approved for funding, and are being reviewed by the FHWA for NEPA compliance. At this point it is simply too late to have meaningful impact on whether projects go forward.

B. ROADBLOCKS TO SUCCESSFUL NEPA LITIGATION

Based on the foregoing analysis, it is clear that the first time that citizens have the opportunity to challenge roadway projects is during NEPA’s environmental review process. Courts have consistently held that if citizens propose a reasonable alternative that differs significantly from the alternatives that the FHWA is proposing, but still meets the FHWA’s purpose and need statement, then the agency must analyze the citizens’

¹²⁷ It is the FHWA’s policy 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 and foster economic growth and development within and between states, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes.” *See* 23 U.S.C. §134(a) and 49 U.S.C. § 5303(a).

alternative, even if the local planning process did not consider it. *See infra* pp. 31-33. Because of this, the FHWA typically drafts purpose and need statements so narrowly that they can only be achieved by the locally preferred alternative. Although “agencies may not narrow the objectives of their actions artificially and circumvent the requirement that relevant alternatives be considered,” *Committee to Stop Route 7 v. Volpe*, 346 F.Supp. 731, 739–41 (D.Conn.1972), courts nevertheless uphold specific, quantitative purpose and need statements. *See infra* pp. 24-27. When this occurs, the FHWA may properly eliminate low-build alternatives that cannot instantly achieve the stated goals.

The FHWA is narrowly focused on single-mode, build alternatives and does not recognize low-build options as reasonable alternatives or solutions to transportation problems. For example, in proposing roadway projects, the FHWA’s purpose is often “to expand highway capacity from point A to point B and achieve LOS C.” Because this purpose and need is defined so narrowly, the FHWA properly eliminates low build alternatives that cannot meet the specified traffic levels immediately. *See infra* pp. 34-37. The FHWA’s view is that overly broad definitions of purpose and need, as well as wide-ranging alternatives, are not within the range of what is reasonable.¹²⁸ While adding roadway capacity reduces traffic congestion in the short term and can instantly achieve a specified LOS, low build alternatives do not have the same immediate effect, and are often effective only after years of targeted investment and long-term behavior change. Therefore, the FHWA rejects low-build alternatives for not achieving the project’s narrowly-drawn purpose and need, and courts defer to these decisions.

On the other hand, opponents prefer broader purpose and need statements that are written to allow low-build infrastructure projects to emerge as reasonable solutions. An example of a broader purpose and need statement could be “to improve accessibility of people and goods between point A and B.” Broader statements permit more and different types of alternatives to reasonably solve the stated problem, necessarily dictating that the FHWA evaluate a more expansive range of low-build alternatives.¹²⁹ Unfortunately, the FHWA rarely drafts purpose and need statements with such broad intent.

¹²⁸ Baseline Report, Executive Order 13274 Purpose and Need Work Group (March 15, 2005.), 11.

¹²⁹ *Id.*, at 10.

The FHWA's current tactic of defining overly narrow purpose and need statements makes the NEPA analysis a decision justification rather than a mechanism to drive decisionmaking. Purpose and need statements are crafted to fulfill their own prophecies, and the alternatives analysis necessarily collapses into an evaluation of specific modes and alignments that the agency anticipated from the start.¹³⁰ Establishing pre-formed value judgments shields the FHWA's decisionmaking process and sends a message to the public that the agency "had no other choice."¹³¹ According to case law, however, dismissing alternatives because they fail to meet projects' specific, automobile-oriented statements of purpose and need is within the FHWA's discretion. *See infra* pp. 34-37. Courts do not question the FHWA's methodologies, modeling techniques, or decisions to uphold conclusions made by regional and state agencies. This highly deferential review makes it almost impossible for opponents to successfully challenge roadway projects, either at the federal environmental review level, or during the local transportation planning process.

¹³⁰ Allen, 311-12.

¹³¹ *Id.*, at 311.

CHAPTER IV

RECOMMENDATIONS

A. MODIFY FEDERAL TRANSPORTATION PLANNING REQUIREMENTS IN 23 U.S.C. §§ 134-135

The traditional approach to funding automobile-dominated infrastructure is no longer a viable option. Financial constraints, community opposition, expanding urban populations, and changing demographics and traffic patterns all indicate that America has to seriously reconsider the way it funds and prioritizes the national transportation network.¹³² By investing in highways, Congress has ignored the true costs of automobile dependence and the benefits of alternative modes.¹³³ During a time of great economic and environmental uncertainty, the next federal transportation reauthorization must start moving in a more efficient, sustainable, and less environmentally destructive direction.

There are numerous hurdles to changing transportation policy at a national level. A shift to more sustainable transportation policies demands fundamental change to policies that have been dominant since the 1950s. Subsidies that encourage driving are so pervasive that they are no longer recognized as skewing transportation choices.¹³⁴ Powerful transportation bureaucracies are resistant to change, and special interests have tremendous political strength that profit from policies that favor highways, motor vehicles, and sprawl.¹³⁵ Nevertheless small changes to federal transportation planning law can begin to move the country in the right direction.

1. Require Integrated Transportation and Land Use Planning

MPOs prepare and adopt long range transportation plans for the urbanized areas they serve; however MPOs have no authority to enforce their plans or select projects for

¹³² Kozlak, "Traffic Congestion: A Major Public Policy Issue in the Twin Cities Area." 10 *HAMLIN J. PUB. L. & POL'Y* 219, 223 (1989).

¹³³ Liam A. McCann. "TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile," 23 *WM. & MARY ENVTL. L. & POL'Y REV.* 857, 886 (1999).

¹³⁴ Pollard, 1552.

¹³⁵ These interests include real estate developers, highway builders, concrete suppliers, trucking companies, car dealers, and oil companies. Developers in the Washington, D.C. area, for example, launched a \$3 million campaign to build support for their highway-centered transportation proposals. Peter Behr & Victoria Benning, "Businesses to Move Ahead on Road Strategy," *The Washington Post*, June 12, 1999, at B1.

implementation. This disjointed scheme severely limits the value of MPO transportation planning. The next federal transportation bill should include MPOs in the land use planning process and should grant them more influence in determining which projects receive federal funding by providing more detailed requirements for the types of projects MPOs must include in their TIPs.

a. Require MPOs to Incorporate Local Land Use Plans into Regional Transportation Plans

Federal law should require consistency between regional long-range transportation plans and local land use plans and zoning codes by requiring MPOs to analyze and incorporate local plans and policies into their transportation plans.¹³⁶ This change would not remove land use authority from local governments; it would simply require local-regional collaboration and coordination to ensure that transportation projects and land use development progress in harmony. MPOs already receive federal funding to develop transportation plans; those plans should be put in the context of land use growth patterns.¹³⁷

If federal law required consistency between transportation and land use plans, transportation projects would have to conform to local land use goals. Because federal law, 23 U.S.C. § 134(j)(1)(A)(ii), already requires TIPs to be consistent with long-range transportation plans, any project in the TIP would necessarily be consistent with local land use plans. Federal funding could be allocated to TIP/STIP projects only if they are consistent with local plans, and only if they examine the impact of proposed projects on land use, development, and population projections for the future. Furthermore, federal law could require local governments to “sign-off” on regional transportation plans and TIPs, ensuring that MPOs fully realize and respect local plans.

Taking one step further, Congress could require coordination between local and federal planning, so that the goals of local land use planning would have to be consistent with the federal goals of environmental remediation and protection.¹³⁸ Intergovernmental

¹³⁶ Myron Orfield. *American Metropolitcs: The New Suburban Reality* (Brookings Institution Press, 2002), 149-50.

¹³⁷ D. Brennen Keene, “Transportation Conformity and Land Use Planning: Understanding the Inconsistencies,” 30 U. RICH. L. REV. 1135, 1177 (1996).

¹³⁸ Keene, 1177-78.

coordination would create a comprehensive planning scheme that would put all states on an equal level and negate the “race of laxity”¹³⁹ concerns inherent in land use regulation.¹⁴⁰

Suggested statutory language is indicated in bold:

23 U.S.C. § 134(g)(3)(A) MPO Consultation in Plan and TIP Coordination— In general — The Secretary shall ~~encourage~~ **require** 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, environmental protection, airport operations, and freight movements) ~~or~~ **and** to coordinate its planning process, to the maximum extent practicable, with such planning activities. **Projects included in TIPs shall be consistent with land use plans and policy goals of local jurisdictions.**

23 U.S.C. § 134(i)(5)(A) Development of Transportation Plan— 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, **and shall incorporate local land use plans and policy goals into their transportation plans.**

23 U.S.C. § 134(i)(7) Development of Transportation Plan—Publication—A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, . . . 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. **Prior to publication, all transportation plans must be approved by local jurisdictions to ensure that they adequately incorporate local land use plans and development goals.**

23 U.S.C. § 134(j)(1)—Metropolitan TIP—Updating and Approval—The TIP shall be:

...
(ii) approved by the metropolitan planning organization, ~~and~~ the Governor, **and all involved local jurisdictions.**

¹³⁹ This term was apparently introduced by *Justice Brandeis. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

¹⁴⁰ See, e.g. Zygmunt J.B. Plater et. al., *Environmental Law and Policy: Nature, Law and Society* (Aspen Publishers,1992), 726-27 (stating that states had a “race of laxity” in order to attract businesses who were looking for as few environmental regulations as possible).

b. Grant MPOs More Influence in Determining the Projects that Receive Federal Funding by Requiring that They Analyze “Low Build” Alternatives

It is imperative for MPOs to help decide which transportation projects best meet their regional goals. MPOs are uniquely situated to evaluate the specific needs of the areas they serve, and can spread limited funding more efficiently than can state DOTs.

Federal law does not provide adequate authority to MPOs to influence transportation policies or to prioritize and select transportation projects for their regions. Although MPOs coordinate plans and strategies and recommend projects to be incorporated into TIPs, they are relatively powerless because most federal funding flows through state DOTs.¹⁴¹ See 23 U.S.C. § 134(j)(5)(A) (“the selection of federally funded projects in metropolitan areas shall be carried out from the approved TIP by . . . the state . . . in cooperation with the metropolitan planning organization”).

Federal law should grant MPOs more influence in determining the projects that receive federal funding by more specifically delineating the types of projects that MPOs must include in their TIPs. Federal law could require MPOs to develop, analyze, and incorporate low build alternatives and compare them to “build” roadway projects that are traditionally advanced in TIPs. Each project included in a TIP could be paired with a low-build alternative that modifies land use policies, invests in pedestrian, bicycle, and transit infrastructure, and evaluates TSM/TDM policies. Because projects listed in TIPs are directly uploaded into STIPs, low build alternatives would necessarily be part of the fiscally constrained list of projects that states may choose from to receive federal funding.

This additional analysis of low-build alternatives would force regional decisionmakers to take a more comprehensive look at the environmental, social, and economic differences between building new infrastructure and investing in existing resources and communities. With more information, state DOTs might realistically choose low-build alternatives for federal funding.¹⁴²

Suggested statutory language is indicated in bold:

¹⁴¹ Lovelady, 297.

¹⁴² Statement of Anne P. Canby before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Regarding the Future of National Transportation Policy. April 28, 2009.

23 U.S.C. §§ 134(c)(3) and 23 U.S.C. 135(a)(3) General requirements—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. **TIPs shall include low-build alternatives that evaluate how changes in local land use policy and investments in non-road-based transportation options can collectively achieve regional transportation goals and objectives.**

23 U.S.C. §§ 134(j)(2)(A) Metropolitan TIP—Contents—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 . . . **Each proposed project shall be matched with a “low-build” alternative that incorporates alternative transportation management and land use strategies that can collectively achieve transportation goals and objectives.**

2. Enhance Transportation Planning Criteria

To successfully require MPOs to develop and evaluate low build alternatives, federal transportation law must include substantive project planning criteria that is judicially enforceable.

As described above, transportation law, 23 U.S.C. §§ 134(h)(1), 135(d)(1), requires MPOs and state DOTs to “consider” a number of factors when developing projects and strategies for system development. *See infra* pp 10-11. A truly sustainable transportation policy must include additional factors that reflect intelligent land uses choice for local and state governments to follow.¹⁴³ Planning authorities should be required to consider criteria such as enhancing sustainability and livability, reducing greenhouse gas emissions and dependence on foreign oil, improving public health, and linking the development of transportation projects and land use development.¹⁴⁴ They should be required to develop performance measures and strategies to meet federally mandated targets so that the factors are accurately reflected on the ground. Maintaining the existing factors in subsequent transportation law will not force regional and state governments to seriously consider a full range of transportation options.

Suggested statutory language is indicated in bold:

¹⁴³ McCann, 869.

¹⁴⁴ Mallett, 14-15.

23 U.S.C. §§ 134(h)(1) and 135(d)(3) Scope of Planning Process—In general—[The metropolitan planning process for a metropolitan planning area under this section] // [Each state shall carry out a statewide transportation planning process that] shall provide for consideration of projects and strategies that will . . .

- . . .
- (I) reduce greenhouse gas emissions and vehicle miles traveled**
- (J) support non-motorized transportation modes and policies that encourage mixed-use, infill, and transit-oriented development**
- (K) improve public health**
- (L) achieve social equity**

3. Establish Judicial Review over MPO and State DOT Plans and Decisions

The failure of MPOs and state DOTs to consider the factors listed in 23 U.S.C. §§ 134(h)(1) and 135(d)(1) is not judicially reviewable concerning any matter affecting a transportation plan, a TIP/STIP, a project or strategy, or the certification of a planning process. While the statutory language promotes a diverse transportation system that protects the environment, promotes local land use consistency, and encourages a multi-modal transportation system,¹⁴⁵ there is no legal mechanism to enforce these goals.

The next surface transportation bill should establish a cause of action against MPOs and state DOTs for not adequately considering the factors in the enhanced list of substantive, meaningful criteria. Citizens should have the opportunity to challenge plans if they exclude elements that would reduce greenhouse gas emissions and VMTs, improve public health, and incentivize sustainable land use development. The public should be able to challenge projects that articulate overly narrow purpose and need statements, or those that evaluate a too-limited range of alternatives. Providing a cause of action at the planning stages of development is particularly important because challenges under NEPA happen far too late in the game and only address the adequacy of the FHWA’s environmental review *procedure*. Without the ability to challenge the *substance* of transportation projects as they are being developed, citizens have virtually no opportunity to provide meaningful input into the future of their communities.

¹⁴⁵ It is the FHWA’s policy 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 and foster economic growth and development within and between states, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes.” 49 U.S.C. § 5303(a).

It is significant, too, that local, regional, and state-level planning documents and decisions are not “major federal actions,” and therefore not subject to NEPA.¹⁴⁶ While citizens can challenge the adequacy of transportation projects once they receive federal funding and are under the FHWA’s control, they should also be able to challenge MPO and state-level decisions regarding long-range transportation plans and project selection. It is during this regional transportation planning process that major decisions about mode choice, corridor location, and travel modes are made. Once projects receive funding and are incorporated into the FHWA’s jurisdiction, it is usually too late to introduce new or modified alternatives for the agency to study. Although NEPA only applies to federal actions—and will therefore never apply to local and state decisions—federal law could provide for a separate cause of action that demands similar expectations of MPOs and state DOTs.

Suggested statutory language is indicated in bold:

~~23 U.S.C. §§ 134(h)(3) and 135(d)(3) Failure to consider factors.—The failure to consider any factor specified in paragraphs (1) and (2) shall not be reviewable by any court . . . in any matter affecting a transportation plan, a TIP [or STIP], a project or strategy, or the certification of a planning process.~~
To the fullest extent possible, all MPOs and state DOTs shall include for every project included in a TIP/STIP
A) a statement briefly specifying the underlying purpose and need to which the agency is responding, and
B) an objective evaluation of all reasonable alternatives to the project, and for alternatives which were eliminated from detailed study, a brief discussion for their having been eliminated. The MPO/state DOT shall:
i) devote substantial treatment to each alternative, including the proposed project so that reviewers may evaluate their comparative merits
ii) include the alternative of no action
iii) include the alternative of “low-build” action.

¹⁴⁶ See, e.g. *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1347-49 (5th Cir. 1979) (rejecting plaintiff’s argument that an EIS was necessary for a regional long-range transportation plan. Although the plan embodied important decisions concerning the future growth of the area that would have a continuing and significant effect on the human environment, those decisions were made by state and local authorities, were not reviewed by any federal agency, and did not obligate federal funds).

4. Develop Citizen Alternatives to Transportation Projects Early in the Local and Regional Planning Processes

Because individual transportation projects that are approved for federal funding need to be drawn from TIPs and STIPs opportunities to evaluate projects occur long before they move into design and possible construction phases.¹⁴⁷ Citizens should be involved in transportation planning decisions in the early stages of local and MPO planning and project development, and citizens should develop their own alternatives or identify modifications to existing alternatives, so that they can be evaluated at opportune points in the process. Once plans are approved and projects are incorporated into TIPs and STIPs, there is little opportunity for significant change or meaningful public involvement.

The best opportunity to challenge transportation project decisions or encourage the analysis of new or modified alternatives occurs long before NEPA is triggered or the FHWA is involved. To achieve sustainable development and transportation options, citizens need to push local agencies to consider low-build alternatives before they are adopted into TIPs and STIPs and handed over to the FHWA for final environmental review.

B. ANALYSIS AND RECOMMENDATIONS FOR DEALING WITH NEPA

If Congress institutes the recommended statutory changes to the federal transportation planning requirements, then potential plaintiffs would be able to rely less on NEPA litigation to challenge roadway projects. If MPOs are statutorily required to seriously consider low-build alternatives during transportation planning phases and incorporate them into TIPs and STIPs, then the FHWA would be far more likely to review them as reasonable alternatives in its NEPA analysis. Although the FHWA is free to select whatever alternative it wants, so long as it complies with NEPA's procedural mandate, it may find that low build alternatives can achieve transportation goals and objectives in the long run, are less costly, more economically sustainable, and can more appropriately improve livability in existing communities.

¹⁴⁷ Bartholomew, 199.

If Congress does not include the recommended changes in the next transportation authorization, the following suggestions describe specific ways that plaintiffs can be more successful at challenging roadway projects through NEPA litigation.

1. Recommendations for NEPA Litigation

a. Challenge the FHWA's Alternatives Analysis for Only Evaluating Alternatives that Increase Road Capacity

Building more roadway capacity usually cannot eliminate congestion, no matter how much capacity is added.¹⁴⁸ At the same time, low-build alternatives can significantly reduce traffic and VMT by reducing the need to get into a vehicle at all. Challenges to roadway projects should be premised on this evidence. Opponents should challenge the FHWA's alternatives analyses when it exclusively analyzes single-mode roadway alternatives and rejects low-build alternatives. If plaintiffs can demonstrate that 1) building a new/expanded facility cannot eliminate congestion to the extent specified by the project's purpose and need, and 2) low-build/land use-based alternatives *can* collectively increase accessibility to meet the purpose and need's specifications, then the FHWA would be required to study this second class as reasonable alternatives. If that basic threshold is reached, it is more likely that selecting build alternatives is “arbitrary and capricious,” and that low-build projects are reasonable—and preferable—alternatives.

Challenging the FHWA's alternatives analyses—even if regional and state planning processes eliminate low build alternatives—is still appropriate because although the FHWA is only required to analyze alternatives that survive the local planning process, it must also analyze “significant alternatives” identified during NEPA's scoping process or comment period that local agencies did not consider. *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041 (1st Cir. 1982). Without evaluating reasonable low-build alternatives, the FHWA would be shirking its responsibility to study a range of alternatives “sufficient to permit a reasoned choice.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

¹⁴⁸ See generally, Anthony Downs, *Stuck in Traffic* (Cambridge: The Brookings Institution and The Lincoln Institute of Land Policy, 1992).

Furthermore, the FHWA should be required to openly and honestly enumerate the value judgments it applies in analyzing a limited number or type of alternatives, or preferring a single mode or alignment. Removing the shield of “achieving the goals articulated in the purpose and need statement” invites honesty by agencies as to how and why they make decisions. This approach would allow courts to remain deferential to the FHWA’s policy decisions while forcing it to show its rationale for rejecting alternative courses of action.¹⁴⁹

b. Challenge the FHWA’s Purpose and Need Statement for Articulating Overly-narrow Objectives

If history is any indicator, courts will almost always uphold the FHWA’s articulation of a transportation project’s purpose and need. However, “agencies may not define a project’s purpose and need in terms so unreasonably narrow that they foreclose consideration of a reasonable range of alternatives or produce only one alternative that can satisfy the project’s goals.” *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997). When this occurs, NEPA becomes a foreordained formality. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir 1991). Purpose and need statements should not be permitted to singularly focus on adding roadway capacity and improving mobility. The FHWA should be required to focus on broader transportation and livability goals and improving accessibility, not just how fast cars travel from point to point.

Under the right circumstances—such as when it is exceedingly clear that the FHWA preordained a certain result by crafting a purpose and need statement so that it could only be achieved by a single alternative—it is possible that a court will invalidate the statement. If a plaintiff can show that the larger issue is not “getting cars from point A to point B and achieving LOS C,” but that it is really about “improving accessibility of people, goods, and services between point A and B,” then courts may be convinced that there are multiple ways of solving the problem, including implementing low-build alternatives. In these cases, the court will remand the alternatives analysis to the FHWA, requiring it to do a more complete evaluation of a wider range of low-build alternatives.

¹⁴⁹ Haws, 573.

2. Modifications to the FHWA’s NEPA Implementing Regulations

a. Require Analysis of “Low-build” Alternatives

When undertaking its alternatives analysis, the FHWA should be required to evaluate “low-build” alternatives, in addition to NEPA’s required “no-build” alternative. Requiring such analysis would provide additional information to decisionmakers and might convince them that choosing a more environmentally-favorable alternative is more sustainable in the long-term. Furthermore, if the FHWA did not evaluate a low build alternative, opponents would have a cause of action to challenge the agency’s procedural compliance.

Suggested statutory language is indicated in bold:

23 C.F.R. § 771.125(a)(1) Final Environmental Impact Statements— . . . The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. The final EIS shall include, as a reasonable alternative, “low build” strategies that can collectively achieve project purpose and needs.

3. Become Involved in Roadway Projects Early.

Recommend citizen alternatives early in the regional transportation planning processes so that MPOs have the time and capacity to seriously consider them. If alternatives are rejected during regional long-range transportation planning, they will never be analyzed by the FHWA.

CHAPTER V

CONCLUSION

Since the 1950s, the federal government has prioritized automobile use as the dominant transportation mode in America. Despite sustained changes in the demand for more and different types of transportation options, Congress has failed to keep pace or acknowledge these changes.

The federal surface transportation law is scheduled to be reauthorized in 2014. This research provides support for and examples of specific statutory modifications that can be made to the current federal transportation planning provisions. If the bill incorporates part or all of these policy recommendations, Congress will have gone a long way in updating transportation policy to match the multi-modal travel patterns and demands of the American population.

APPENDIX A

NEPA'S PROCEDURAL REQUIREMENTS

1. Environmental Impact Statements

NEPA's environmental protection policy is supported by a set of action forcing provisions, which are triggered when a federal agency proposes a "major federal action significantly affecting the quality of the human environment."¹⁵⁰ A "major federal action" is an action "with effects that may be major," both in importance and impact, and which are "potentially subject to federal control and responsibility."¹⁵¹ This includes most transportation projects that are selected for implementation from a STIP and receive dedicated federal funding. At this point, the FHWA takes control of the project, making it a "major federal action."¹⁵² Because local governments establish project purposes, goals and objectives, travel modes, and alternatives before they reach federal environmental analysis, the FHWA simply incorporates these decisions into its federally mandated process.

Once NEPA is triggered, Section 102 directs agencies to prepare an Environmental Impact Statement ("EIS"), which includes a discussion of the purpose and need for the action, an objective evaluation of all reasonable alternatives to the proposed action (including the alternative of no action), the affected environment, and the environmental consequences of the proposed action.¹⁵³ Although neither Congress nor the courts have indicated precisely how much detail an EIS must contain, courts have

¹⁵⁰ 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.7. Significantly" and "human environment" are defined in 40 CFR 1508.27. Regulations promulgated by the Council on Environmental Quality ("CEQ") provide guidance for the implementation of NEPA. See 40 C.F.R. 1500-15158. These regulations "are binding on all federal agencies, and CEQ's interpretation of NEPA is entitled to substantial deference." *Sugarloaf Citizens Ass'n v. Fed. Energy Reg. Comm'n*, 959 F.2d 508, 512 n. 3 (4th Cir. 1992); see also 40 C.F.R. § 1500 *et seq.* In addition, FHWA has promulgated its own NEPA regulations. See 23 C.F.R. Pat 771. Both sets of regulations are entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Conservation Law Found. V. Federal Highway Admin.*, 24 F.3d 1465, 1480 (1st Cir. 1994).

¹⁵¹ 40 C.F.R. § 1508.18.

¹⁵² See, e.g. *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972).

¹⁵³ 40 C.F.R. § 1502.

held that, at minimum, NEPA imposes a duty on federal agencies to take a “hard look” at environmental consequences of their actions.¹⁵⁴

By requiring this detailed analysis, the EIS serves three major purposes. First, it insures that agency decisionmakers have available, and will carefully consider, detailed information concerning significant environmental impacts.¹⁵⁵ Producing an EIS puts agencies on notice of a project’s expected environmental consequences and gives them the opportunity to plan and implement corrective measures in a timely manner. Second, the EIS guarantees that relevant information will be made available to the larger audience that may play a role in the decisionmaking process.¹⁵⁶ This transparency requirement compels agencies to articulate why they settle on particular plans and what environmental harms (or benefits) the choice entails.¹⁵⁷ Third, the EIS insures the integrity of the administrative process by ensuring that decisionmakers have before them all possible approaches to a particular project.¹⁵⁸

The EIS process begins with a publication of a Notice of Intent (“NOI”), stating the agency’s intent to prepare an EIS for a particular project. The NOI is published in the Federal Register and provides basic information, including a brief description of the proposed action and possible alternatives.¹⁵⁹ The NOI also describes the agency’s proposed scoping process, including any meetings and how the public can get involved.

The scoping process identifies issues, establishes schedules, and defines the scope of the issues that will be addressed in the EIS. CEQ regulations require the scoping process to 1) identify people and organizations who are interested in the proposed action, 2) identify and eliminate from detailed review those issues that will not be significant or those that have been adequately covered in prior environmental review, and 3) identify

¹⁵⁴ *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C.Cir. 1972).

¹⁵⁵ *Robertson*, 490 U.S. at 349.

¹⁵⁶ *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004).

¹⁵⁷ *Simmons*, 120 F.3d at 666.

¹⁵⁸ *State of Alaska v. Andrus*, 580 F.2d 465, 474 (D.C.Cir.), *vacated in part sub nom. Western Oil & Gas v. Alaska*, 439 U.S. 922, (1978).

¹⁵⁹ Public hearings are run in a formal manner, with a recording or minutes taken of speakers’ comments. Public meetings may be held in a variety of formats, and may be much more informal than hearings. *Citizens Guide to NEPA*, 13, n. 27,

the significant issues that will be analyzed in the EIS.¹⁶⁰ Some of the most constructive interaction between agencies and the public occurs during this process.

At the close of scoping, the agency prepares a draft EIS and solicits comments from the public and other federal agencies that have jurisdiction by law or special expertise with respect to any environmental impact involved.¹⁶¹ Comments often request 1) modifications to existing alternatives, including the proposed action, 2) developments and evaluations of alternatives not previously considered, and 3) improvements or modifications to current analyses.¹⁶² The draft EIS must show that the agency analyzed the consequences of, and alternatives to, its contemplated acts, and must ensure that citizens get the opportunity to consider the rationales offered.¹⁶³

Two major components to the EIS are the agency's statement of purpose and need for a proposed project, and its identification and evaluation of alternatives. These are the main pressure points for citizens to challenge roadway projects by either suggesting that the FHWA defined a project's purpose and need too narrowly so as to permit the exclusive evaluation of roadway projects, or by failing to include reasonable alternatives, such as low-build strategies and investments in its NEPA analysis.

Agencies draft a purpose and need statement to describe what they are trying to achieve by proposing the action. The purpose and need statement explains why the proposed action is necessary, and serves as the basis for identifying the reasonable alternatives that can meet project goals. Based on this statement, the federal agency must, "objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."¹⁶⁴ Reasonable alternatives are those that "substantially meet the agency's purpose and need;" they include those that are practical or feasible from the technical and economic standpoint, rather than simply desirable to the agency or applicant.¹⁶⁵ Agencies

¹⁶⁰ 40 C.F.R. § 1501.7.

¹⁶¹ 40 C.F.R. §§ 1501(a)(1-4).

¹⁶² 40 C.F.R. § 1503.4(a).

¹⁶³ *Simmons*, 120 F.3d at 666.

¹⁶⁴ 40 C.F.R. § 1502.14.

¹⁶⁵ White House Council on Environmental Quality. *A Citizens Guide to the NEPA*. Washington: GPO, 1997.

are required to evaluate a “range of reasonable alternatives” in enough detail so that a reader can compare and contrast the environmental effects of the various options.

Agencies must always describe and analyze a “no action alternative,” which describes what would happen if the agency did not act upon the proposal for agency action.¹⁶⁶ If an agency has a preferred alternative when it publishes a draft EIS, the draft must identify which alternative the agency prefers. All agencies must identify a preferred alternative in the final EIS.¹⁶⁷

The EIS must also include a discussion of the full range of direct, indirect, and cumulative effects of the preferred action and its alternatives.¹⁶⁸ “Effects” include ecological, aesthetic, historic, cultural, economic, social, or health impacts, whether adverse or beneficial.”¹⁶⁹ Indirect effects include “growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”¹⁷⁰ Agencies must address a proposed action’s indirect effects in an EIS if they are reasonably foreseeable,¹⁷¹ sufficiently definite,¹⁷² and significant.¹⁷³ Human beings are part of the environment, so when an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, the EIS should discuss all of these effects.¹⁷⁴

¹⁶⁶ *Citizens Guide to the NEPA*, 17.

¹⁶⁷ *Id.*

¹⁶⁸ 40 C.F.R. § 1502.16. Direct effects are effects caused by the action that occur at the same time and place. Indirect effects are effects which were caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 C.F.R. § 1508.8.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Reasonable Foreseeability means that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision. *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996).

¹⁷² Whether an indirect effect is too speculative to require analysis depends on several factors: “With what confidence can one say that the impacts are likely to occur? Can one describe them “now” with sufficient specificity to make their consideration useful? If the decisionmaker does not take into account “now,” will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge as a practical matter will prove irrelevant to the government’s decision?” *Sierra Club v. March*, 769 F.2d 868, 878 (1st Cir. 1985).

¹⁷³ *Dubois*, 102 F.3d at 1286. An indirect effect’s significance depends on both its “context” and “intensity.” 40 C.F.R. § 1508.27. Among the relevant factors are 1) the degree to which the proposed action affects public health or safety, 2) the degree to which the possible effects on the human environment are likely to be controversial, and 3) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. *Id.*

¹⁷⁴ 40 C.F.R. § 1508.14.

When the public comment period is finished, agencies analyze comments, conduct further analysis as necessary, and prepare a final EIS. In the final EIS, agencies must respond to substantive comments by making factual corrections, modifying alternatives, identifying new alternatives, or explaining why a comment does not require agency response.¹⁷⁵ Agencies then publish the final EIS in the Federal Register, and may make a final decision after 30 days. This interval provides time for agencies to consider the purpose and need of their actions, weigh the alternatives, balance their objectives, and make a well-informed decisions.

The Record of Decision (“ROD”) is the final step in the EIS process. The ROD is a document that states the agency’s final decision, identifies the alternatives considered, including the preferred alternative, and discusses mitigation plans.¹⁷⁶ The ROD discusses all of the factors that the agencies contemplated in reaching their decisions on how to proceed with proposed actions. RODs also discuss whether agencies adopt “all practical means to avoid or minimize environmental harm,” and if not, why they did not.¹⁷⁷

Although most highway projects require the FHWA to undertake a full EIS, there are some situations where a lesser review is warranted. These situations include projects that are “categorically excluded,” and those that require a less-intensive “environmental assessment.”

2. Categorical Exclusions, Environmental Assessments, and Finding of No Significant Impact

Categorical Exclusions (“CEs”) are “categories of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which an EIS is not required.”¹⁷⁸ Each agency develops its own list of CEs specific to their operations.¹⁷⁹ For the FHWA, CEs are actions “which do not induce significant impacts to planned growth or land use, do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational,

¹⁷⁵ 40 C.F.R. § 1503.4(a).

¹⁷⁶ 40 C.F.R. § 1505.2.

¹⁷⁷ 40 C.F.R. § 1505.2(c).

¹⁷⁸ 40 C.F.R. § 1508.4.

¹⁷⁹ See 23 C.F.R. § 771.117(c).

historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; and do not otherwise, either individually or cumulatively, have any significant environmental impacts.”¹⁸⁰

In cases where projects are not categorically excluded or for which it is not readily discernible how significant the environmental effects of a proposed action will be, federal agencies prepare Environmental Assessments (“EAs”).¹⁸¹ EAs are intended to be concise documents that briefly provide sufficient evidence and analysis for determining whether to prepare an EIS, aid an agency’s compliance with NEPA when no EIS is necessary, and facilitate preparation of an EIS when one is necessary.¹⁸² EAs should include discussions of 1) the need for the proposed project, 2) alternatives courses of action for proposals that involve unresolved conflicts concerning alternative uses of available resources, 3) the environmental impacts of the proposed action and alternatives, and 4) a list of agencies and persons consulted.¹⁸³

The EA process concludes with either a Finding of No Significant Impact (“FONSI”) or a determination to proceed to prepare an EIS. A FONSI is a document that presents the reasons why the agency concluded that there are no significant environmental impacts projected to occur upon implementation of the action.¹⁸⁴

Whether issuing an EA or an EIS, the agency’s “hard look” must encompass a thorough investigation into the environmental impacts of an agency’s action and a candid acknowledgement of the risks that those impacts entail.¹⁸⁵ Mere conclusions, unsupported by evidence or analysis, that the proposed action will not have a significant effect on the environment will not satisfy NEPA’s mandate.¹⁸⁶ Provided that the agency gives a

¹⁸⁰ 23 C.F.R. §771.117(a).

¹⁸¹ 40 C.F.R. § 1501.4(b).

¹⁸² 40 C.F.R § 1508.9.

¹⁸³ 40 C.F.R. § 1508.9(b). Section 102(2)(E) of NEPA does not specifically address EAs; in fact, NEPA does not mention EAs at all. Section 102(2)(E) requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” CEQ interpreted this general requirement to require an analysis of alternatives in the EA.

¹⁸⁴ Government Printing Office Electronic Information Enhancement Act of 1993, 44 U.S.C. 4101-4104.

¹⁸⁵ *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir.2005).

¹⁸⁶ *See Hodges v. Abraham*, 253 F.Supp.2d 846, 854–55 (D.S.C.2002).

requisite hard look, its determination that a project will not significantly impact the environment is entitled to substantial deference.¹⁸⁷

¹⁸⁷ *Shenandoah Ecosystems Def. Grp. v. U.S. Forest Serv.*, No. 98–2552, 1999 WL 760226, at *7 (4th Cir. Sept. 24, 1999).

APPENDIX B

MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY (“MAP-21”)

On July 6, 2012, President Obama signed into law P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act (“MAP-21”). This law reauthorizes and funds transportation projects throughout America.

MAP-21 focuses on highway spending instead of spending on mass transit and other strategies designed to curb urban sprawl and reduce automobile dependency.¹⁸⁸ Approximately 80 percent of the federal dollars allocated in MAP-21 are allocated to highways, while significantly fewer are apportioned to transit. Funding for transportation alternatives, such as HOV lanes, turning lanes, and diesel retrofits, dropped from \$1 billion annually under the previous authorization (SAFETEA-LU), to \$800 million under MAP-21.¹⁸⁹

MAP-21 further incentivizes new highway interstate construction by requiring states to provide only five percent of the total cost of construction, compared to the 20 percent they paid under the previous authorization.¹⁹⁰ Transit programs, by comparison, require a 50 percent match by local taxpayers.¹⁹¹ MAP-21 eliminated dedicated funding for infrastructure repair, even though there are nearly 70,000 structurally deficient bridges throughout the United States, and almost half of the highways are rated below “good” condition. Prior to MAP-21, states were required to reserve at least 30 percent of their funds to fix existing roads and bridges; now, repair is purely optional from a funding perspective.¹⁹²

MAP-21 reduced the flexibility to spend federal transportation dollars on freight rail, local street networks, and the expansion of transit. MAP-21 mandates that states

¹⁸⁸ Liam A. McCann. “TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America’s Dependence on the Automobile.” *William and Mary Environmental Law and Policy Review*. 23 *Wm. & Mary Env’tl. L. & Pol’y Rev.* 857. Fall, 1999. Pg. 858.

¹⁸⁹ http://www.advocacyadvance.org/site_images/content/Moving_Ahead_For_Progress_Final.pdf

¹⁹⁰ David Goldberg, *Ten Key Things To Know About the New Transportation Law*. Transportation 4 America. July 13, 2012. Available at <http://t4america.org/blog/2012/07/13/ten-key-things-to-know-about-the-new-transportation-law/>

¹⁹¹ *Id.*

¹⁹² Committee on Transportation and Infrastructure, U.S. House of Representatives. Memo to Members, Subcommittee on Highways and Transit, From Staff, Subcommittee on Highways and Transit. Re: Subcommittee Hearing on “Implementing MAP-21: Progress Report from U.S. DOT Modal Administrators.” March 8, 2013.

spend nearly 60 percent of their funding on the largest highways, those in the National Highway System, leaving a heavier burden on states and local governments to maintain other critical links in the transportation network. The most flexible pot of money, the Surface Transportation Program (“STP”), is now responsible for covering more projects, but without a commensurate increase in funding. While states will be able to use \$10 billion in STP funds to address a broad range of activities, they had more money and more flexibility under the previous bill.¹⁹³

MAP-21 eliminated three previous programs (Transportation Enhancements, Safe Routes to School, and Recreational Trails) by creating a new set-aside called Transportation Alternatives (“TA”). While prior transportation laws allocated a combined \$1.2 billion per year to these previous programs, MAP-21 cuts funding for the consolidated TA program by a third, to \$808 million.¹⁹⁴ Furthermore, states are now permitted to transfer up to half of this money to other programs, including those that fund new roadway construction. If communities do not want to spend TA money on walking and biking projects, then the state can choose to spend that money on any other project.¹⁹⁵ Congress also eliminated a Complete Streets proposal from the final bill.

Finally, before MAP-21, states were not allowed to toll interstate highways, except under very limited circumstances. MAP-21 allows states to toll all new interstate lanes, so long as the number of free lanes, excluding HOV lanes, remains the same. This decision misses a major opportunity to allow states to advance congestion pricing and other user-based charges that could generate revenue and tackle congestion on clogged urban interstates. Moreover, under prior transportation authorizations, states that converted free HOV lanes to “HOV toll” lanes, where solo drivers could pay for access, had to use the associated revenue primarily for projects that provided alternatives to solo

¹⁹³ David Goldberg, *Ten Key Things To Know About the New Transportation Law*. Transportation 4 America. July 13, 2012. Available at <http://t4america.org/blog/2012/07/13/ten-key-things-to-know-about-the-new-transportation-law/>

¹⁹⁴ Committee on Transportation and Infrastructure, U.S. House of Representatives. Memo to Members, Subcommittee on Highways and Transit, From Staff, Subcommittee on Highways and Transit. Re: Subcommittee Hearing on “Implementing MAP-21: Progress Report from U.S. DOT Modal Administrators.” March 8, 2013.

¹⁹⁵ Committee on Transportation and Infrastructure, U.S. House of Representatives. Memo to Members, Subcommittee on Highways and Transit, From Staff, Subcommittee on Highways and Transit. Re: Subcommittee Hearing on “Implementing MAP-21: Progress Report from U.S. DOT Modal Administrators.” March 8, 2013.

driving. Under MAP-21, states are allowed to build any type of project with those revenues.¹⁹⁶

¹⁹⁶ David Goldberg, *Ten Key Things To Know About the New Transportation Law*. Transportation 4 America. July 13, 2012. Available at <http://t4america.org/blog/2012/07/13/ten-key-things-to-know-about-the-new-transportation-law/>

APPENDIX C

RECOMMENDATIONS FOR ALTERING FUNDING PRIORITIES IN THE NEXT FEDERAL TRANSPORTATION AUTHORIZATION

Transportation investments are a critical tool for promoting more sensible growth patterns. In order to provide more transportation options, Congress must reduce its focus on roadway funding and increase investment in alternative modes and creative land use policies.¹⁹⁷

a. Establish programs that fund infill and mixed-use redevelopment

Local governments can reduce the environmental, economic, and social costs caused by inefficient development patterns through the careful use of planning and growth management techniques. To reduce the need for driving, the federal government must support sustainable land use patterns and community design, not just transportation infrastructure.

Transportation law should institute funding programs exclusively for areas within urban boundaries that are already served by public transportation and other infrastructure. Such programs could fund infill redevelopment efforts, affordable housing projects, and live/work spaces. They could improve and modernize existing infrastructure, offer incentives to developers to rehabilitate existing buildings and facilities, and fund planning efforts to create and implement infill, mixed-use, and transit-oriented development. MPOs and state DOTs could include these low-build projects in their TIPs and STIPs, making land use redevelopment projects competitive with new surface transportation projects. Establishing programs like these would have the effect of revitalizing areas devastated by urban blight caused by sprawl, and shifting land use patterns toward denser, mixed use communities that are less dependent on the car for their transportation needs.¹⁹⁸

¹⁹⁷ Pollard, 1550.

¹⁹⁸ Liam A. McCann. "TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile." William and Mary Environmental Law and Policy Review. 23 Wm. & Mary Envtl. L. & Pol'y Rev. 857. Fall, 1999. Pg. 888.

Recognizing that new development cannot be wholly eliminated, federal transportation law should, at minimum, provide funding incentives for new development that is more effectively served by public transportation and is located in mixed-use clusters of multi-family housing, employment, and shopping. By investing in these types of land use strategies, the federal government can offer more transportation options, support existing communities, protect the environment, and save money that it would have spent on building new roads to outlying areas.

b. Increase funding for alternative transportation modes

i. Increase funding for public transportation

Modern transportation law favors highways over transit by a huge extent. MAP-21 authorizes roughly \$40 billion for highways projects per year, but authorizes only \$8 billion for transit and bus.¹⁹⁹ Federal transportation law must address these funding inequities.

ISTEA and TEA-21 began to make this shift by allowing “highway” funds to be spent on a variety of transportation modes.²⁰⁰ TEA-21 provided guaranteed transit funding, which previously was more vulnerable than highways to budget cuts.²⁰¹ These changes, however, did not reverse the bias toward highway funding and did not carry over in subsequent authorizations.

Funding Inequities: For America to develop a truly intermodal transportation system, public transportation must be dramatically subsidized and states should be required to spend a larger percent of their allocated funding on transit infrastructure. These investments should be mandatory, not discretionary or “flexible,” and they should not be transferable to other programs. To further incentivize this shift, federal law should require states to pay a higher percentage match on construction costs for roadway building, and reduce their required share for transit infrastructure.

New Starts: MAP-21 maintained the New Starts program at \$1.9 billion, a program that funds almost all new transit construction. Unlike highway funding,

¹⁹⁹ <http://www.pbtransportationupdate.com/>

²⁰⁰ See, e.g., Jonathan Walters, *The Highway Revolution That Wasn't*, *Governing*, May 1995, at 30.

²⁰¹ Lisa Wormser, *Two for TEA*, *Planning*, Aug. 1998, at 10.

however, New Starts is subject to annual appropriations, so it is not guaranteed.²⁰² The next transportation authorization should guarantee and increase funding for the New Starts program.

Amtrak: The federal government should also provide dedicated funding to Amtrak, to provide a viable national rail system that can link major U.S. cities and serve as a viable alternative to driving or flying. Like planes and automobiles, which garnered significant governmental support in their early development, passenger rail needs to be nurtured back to life and permitted to become a vibrant component of America's transportation system.²⁰³ Although prior authorizations were silent concerning Amtrak funding, MAP-21 moved in the right direction (albeit very slightly) by allocating approximately \$900 million to Amtrak capital and debt.²⁰⁴ This allocation should be dramatically increased.²⁰⁵

Increase Ridership: Congress should develop large scale funding incentives to increase the use of public transportation. These incentives could be offered to communities that increase ridership by a stated amount, and could be used to invest in policies that encourage transit ridership, such as mixed use development near transit stations, revitalization of urban neighborhoods, and expanded transit service to popular destinations.²⁰⁶ Although communities will, ideally, require less money to build new roadway infrastructure after implementation of these policies, the dollars should stay local. Communities that invest in sustainable practices should be rewarded for their efforts.

²⁰² Transportation for America. Top 10 Things to Know About the MAP-21 Transportation Law.

²⁰³ Liam A. McCann. "TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile." William and Mary Environmental Law and Policy Review. 23 Wm. & Mary Env'tl. L. & Pol'y Rev. 857. Fall, 1999. Pg. 884.

²⁰⁴ Parsons Brinckerhoff, *Transportation Update*, 2013. Available at <http://www.pbtransportationupdate.com/>

²⁰⁵ Supporting passenger rail comes down to a simple choice for federal and state policymakers: In the long run, it is wiser to invest in \$6 million to construct one mile of a new 4-lane highway than to spend that same \$6 million covering the operating expenses for a passenger rail route spanning 300 miles. Robert Puentes and Joseph Kane. "Expand State Partnerships for Passenger Rail." March 13, 2013. Brookings Institution. Available at <http://www.brookings.edu/blogs/the-avenue/posts/2013/03/13-passenger-rail-state-subsidies-puentes-kane>

²⁰⁶ Jane Holtz Kay, "Asphalt Nation: How the Automobile Took Over America, and How We Can Take It Back 39 (1997) ("In a nation where 53% of the population lives within two miles of public transportation, the connection of bus, foot, train, and bicycle in intermodal linkages could return us to such once scorned means of circulation").

ii. Increase funding for bicycle and pedestrian infrastructure

The next transportation authorization should better address the imbalance between roadway spending and pedestrian/bicycle infrastructure. MAP-21 allocated \$800 million for transportation alternatives, including bicycle and pedestrian facilities, recreational trails, and safe routes to school.²⁰⁷ This is an extremely small share of federal spending,²⁰⁸ and these programs merely make it *possible* for states to use federal transportation funds for roadway alternatives.²⁰⁹ As a result, most states continue to use the bulk of their federal funds on highway projects.²¹⁰

The next transportation bill should include guaranteed funding for pedestrian and bicycle infrastructure, which will not only improve community quality of life, but also reduce traffic congestion and generate revenue in local economies.²¹¹ The authorization should fund bicycle lanes, sidewalks, crosswalks, speed bumps, medians, and public lighting to make walking and biking safer and more attractive options to more people.²¹² While the implementation of bicycle and pedestrian infrastructure will primarily be utilized in high density urban areas, less dense suburban areas will also benefit by allowing residents to walk or bike for short trips, that would otherwise be taken by car. By virtually ignoring pedestrian and bicycle infrastructure, federal transportation law has reinforced the automobile's dominance in the nation's transportation policy.²¹³ The next transportation bill should move towards reversing this trend.

²⁰⁷ Parsons Brinckerhoff, *Transportation Update*, 2013. Available at <http://www.pbtransportationupdate.com/>

²⁰⁸ Surface Transp. Policy Project, *Changing Direction: Federal Transportation Spending in the 1990s*, at 12 (2000) (noting that federal spending on bicycle and pedestrian projects rose from a little over \$7 million in 1990 to over \$222 million in 1999).

²⁰⁹ Liam A. McCann, TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile, 23 WM. & MARY ENVTL. L. & POL'Y REV. 857, 887 (1999)

²¹⁰ It has been estimated, for example, that eighty-seven percent of the \$50 billion flexible funds given to state transportation departments between 1992 and 1999 went to highway and bridge projects, while less than seven percent went to other transportation mo Surface Transp. Policy Project, *Changing Direction: Federal Transportation Spending in the 1990s*, at 1 (2000).

²¹¹ McCann, 886-87.

²¹² Robert H. Freilich, "The Land Use Implications of Transit Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl." 30 URB. LAW. 547, 557 (1998).

²¹³ McCann, 887.

c. Increase funding for supply-side strategies (TSM and TDM)

Local, regional, and state governments should use a combination of system and demand management techniques to develop an effective, comprehensive strategy to address traffic congestion and create sustainable transportation networks.²¹⁴ Widespread studies offer persuasive authority that supply-side transportation solutions, such as Transportation Systems Management (“TSM”) and Transportation Demand Management (“TDM”) can reduce traffic congestion without building new capacity for single occupancy automobiles.²¹⁵

TSM strategies alter travel behavior and traffic patterns by changing the ways that users interact with transportation systems. TSMs are supply-side systems, services, and projects that increase capacity and improve the overall performance of existing infrastructure without building or expanding roadways.²¹⁶ Examples of TSM actions include innovative roadway designs, improved signage and signals, access management, targeted traffic enforcement, congestion detection, high-occupancy vehicle lanes, incident response plans, and parking requirements.²¹⁷ Although these strategies cannot solve traffic congestion by themselves, TSM policies should be incorporated into all transportation programs to provide for better traffic movement and increased safety through low-cost and low-impact improvements.

TDM strategies are also cost-effective and sustainable ways to make more efficient use of current transportation facilities. TDM programs focus on changing or

²¹⁴ Robert H. Freilich and S. Mark White. “Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis.” 24 Loy. L.A. L. Rev. 915, 918. June, 1991.

²¹⁵ Andrea C. Ferster and Elizabeth S. Merritt. Legal Tools for Fighting Freeways and Saving Historic Roads. Forum Journal, Summer 2000., pg 35.

²¹⁶ The California Streets and Highways Code defines TSM projects as “those projects designed to increase the number of person-trips which can be carried on the highway system in a peak period without significantly increasing the designed capacity of the highway system when measured by the number of vehicle-trips and without increasing the number of through traffic lanes.” Cal. Sts. & High. Code § 164.1 (West 1990). Flexible congestion relief projects are defined as “those projects designed to reduce or avoid traffic congestion on existing routes by increasing the capacity of the transportation system, including new facilities.” *Id.* § 164.2. TSM differs from transportation demand management (TDM) policies in that it attempts to influence travel behavior through supply-side policies, such as by reserving highway lanes for carpools. TDM policies are designed to directly influence the demand side of traffic congestion through the land development or regulatory process. *See infra* notes 256-82 and accompanying text. Robert H. Freilich, “Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis,” 24 LOY. L.A. L. REV. 915, 978 (1991),

²¹⁷ *See generally* Institute of Transp. Eng’rs, A Toolbox for Alleviating Traffic Congestion (1989) (discussing coordinated plan to alleviate traffic congestion); South Coast Air Quality Management Dist. & Southern Cal. Ass’n of Gov’ts, Air Quality Management Plan (Mar. 1989) (discussing Air Quality Management Plan).

reducing travel demand, particularly at peak commute hours, instead of increasing road supply. With the right incentives, travelers can be influenced to use transportation systems in a way that contributes less to congestion. TDM strategies are typically implemented by employers, and include programs, such as ridesharing, parking management and park & ride lots, staggered work hours and telecommuting, facilitating the ease and use of alternative transportation modes, and other measures to reduce the number of trips generated and to control when those trips occur.²¹⁸ Implementing TSM and TDM techniques can make existing transportation systems more efficient without building costly, environmentally destructive new facilities. These techniques should be part of every transportation project and given serious consideration when modeling alternatives and comparing design options.

d. Invest in Existing Infrastructure Before Building New Facilities

Finally, a more sustainable transportation approach involves improving existing infrastructure before undertaking new construction. Over half of the urban highways in the United States are in fair or poor condition, and over a third of urban bridges are deficient.²¹⁹ Under previous transportation authorizations, states had to reserve at least 30 percent of their funds to fix roads and bridges. Under MAP-21, infrastructure repair is optional.²²⁰ A “fix it first” approach would increase the efficiency and safety of existing infrastructure, reducing the need for costly new projects. Such an approach would also reduce land consumption by new projects and aid smart growth efforts to guide development and investment into existing communities.²²¹ The next transportation bill should have dedicated funding programs to fix existing infrastructure. These “fixes” should include not just repaving, improving, and replacing existing facilities, but should also include analysis of how pedestrian and bicycle infrastructure and other low-build policies and designs can be implemented onto the existing facility as part of the process.

²¹⁸ See Ferguson, *Transportation Demand Management: Planning, Development, and Implementation*, 56 J. Am. Plan. A. 442, 447-48 (1990).

²¹⁹ U.S. DOT Bureau of Transp. Statistics, *supra* note 46, at 34-37 tbls. 1-23, 1-24.

²²⁰ Transportation for America. Top 10 Things to Know About the MAP-21 Transportation Law.

²²¹ Pollard, 1544.

Meeting the nation's future transportation demands involves more than expanding the overburdened highway system. A more sustainable approach requires redefining the objectives of transportation policies at the federal level. Although we cannot undo seventy years of sprawled development and transportation project construction, Congress can start to implement policies that do not exacerbate the problem.

Federal transportation policy needs to adopt a comprehensive approach that provides more transportation options for more people. This approach must place a higher value on strategies that reduce the need to drive, such as bringing different activities closer together to shorten trips and make alternative modes more feasible.²²² Subsequent transportation authorizations should mandate the repair of the existing highway system, allocate funding for only the most pressing new road projects, and dramatically increase funds for transit, biking, and walking, putting them on par with highway spending. By equalizing funding and focusing on repairing existing infrastructure, Congress can initialize a shift toward a new future for transportation.

²²² Todd Litman, Exploring the Paradigm Shifts Needed to Reconcile Transportation and Sustainability Objectives, 1670 Transp. Res. Rec. 8 (1999).

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