American Association of
State Highway and
Transportation Officials

Bradley L. Mallory, President
Secretary
Pennsylvania Department
of Transportation

John Horsley
Executive Director

May 28,2002

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, NW.
Washington, DC 20503

Re: Suggestions for Regulatory Reform – 23 C.F.R. Parts 450 and 771

Dear Mr. Morrall:

The American Association of State Highway and Transportation Officials ("AASHTO") welcomes the opportunity to submit suggestions for regulatory reform in response to the notice published in the Federal Register on March **28,** 2002 (67 Fed. Reg. 15014). Our comments focus on the regulations that govern the planning and environmental review procedures for federally aided highway and transit projects.

I. Background

The planning and environmental regulations for federally aided highway and transit projects were issued jointly by the Federal Highway Administration ("FHWA") and the Federal Transit Administration **("FTA").** The regulations are currently codified as follows:

- 23 C.F.R. Part 450, "Planning Assistance and Standards"
- 23 C.F.R. Part 771, "Environmental Impact and Related Procedures"

In May 2000, the FHWA and FTA proposed to replace these existing regulations with the following new regulations:

- 23 C.F.R. Part 1410, "Metropolitan and Statewide Planning" (to replace Part 450)
- 23 C.F.R. Part 1420 "NEPA and Related Procedures for Transportation Decisionmaking" (to replace part 771.101 through 771.133)

- 23 C.F.R. Part 1430, "Protection of Parks, Wildlife and Waterfowl Refuges, and Public Parks" (to replace part 771.135)

In September 2000, AASHTO submitted comments to the FHWA and FTA stating that the proposed regulations would tend to complicate – not streamline – existing procedures. In May 2001, AASHTO adopted a resolution formally requesting that the rulemaking process be closed and that any new rulemaking be deferred until after the reauthorization of the transportation program, which is expected in 2003.

The FHWA and FTA have not formally withdrawn the May 2000 proposed regulations. The rulemaking docket remains open pending a decision by the agencies about how to proceed.

11. AASHTO Position

AASHTO and its individual members remain concerned about the increasing cost and complexity of the federal planning and environmental review procedures for highway and transit projects. We continue to believe that environmental streamlining – that is, a comprehensive effort to simplify the planning and environmental procedures – must remain a top policy priority for the U.S. Department of Transportation.

To achieve the goal of environmental streamlining, we believe changes are needed not only in regulations and guidance, but also in legislation. We also believe that the changes in legislation should be made first, in order to provide a framework for the subsequent development of new regulations and guidance.

Therefore, while we believe the current and proposed planning and environmental regulations allow too little flexibility and create unnecessary delays, we are *not* seeking any changes to those regulations at this time. Instead, our position is as follows:

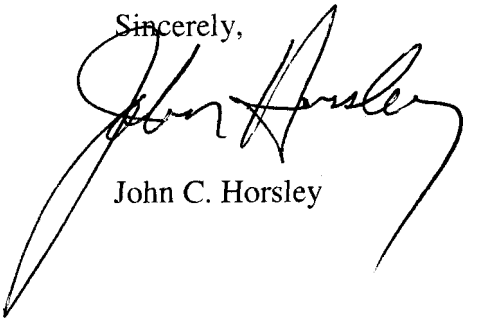
- The FHWA and FTA should formally withdraw the May 2000 proposed regulations, and should close the rulemaking dockets for those regulations.

- The FHWA and FTA should defer any new rulemaking involving these issues (i.e., the modification or replacement of 23 CFR Parts 450 and 771) until after the upcoming reauthorization of the federal surface transportation program.

To provide further information on our position, we are enclosing copies of our comments on the May 2000 proposed regulations as well as a copy of the resolution adopted by the AASHTO Board of Directors in May 2001 seeking withdrawal of the proposed regulations and deferral of any new rulemaking until after reauthorization.

If you would like further information, please do not hesitate to let me know. Once again, thank you for the opportunity to submit these comments.

Sincerely,



John C. Horsley

cc: Mr. Bradley Mallory
Mr. James Codell

American Association of
State Highway and
Transportation Officials

Thomas R. Warne, President
Executive Director
Chief **Administrative** Officer
Utah **Department** of Transportation

John Horsley
Executive Director

September 20,2000

Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, **SW**
Washington **D.C** 20590-0001

Subject: AASHTO response to Docket No. FHWA-99-5989

Dear **Madam** or Sir:

The American Association **of** State Highway and Transportation Officials (AASHTO) has reviewed the proposed changes to the NEPA and related procedures and for **Section** 4(f) and is submitting its views and concerns.

Our primary response to the NEPA and related procedures and **for** Section 4(f) *NPRM* docket (FHWA-99-5989) ***is*** included in two documents labeled **as** follows:

- "Comments of the American Association **of** State Highway and Transportation Officials", Docket No. 99-5989; and
- Appendix to Comments **of** the American Association of State Highway and Transportation Officials, Docket No. 99-5989.

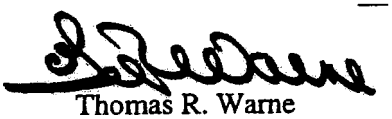
Because of overlap between the NEPA and related procedures NPRM with the Statewide and Metropolitan Planning ***NPRM*** and the **ITS** NPRM, we are also providing with our submittal our comment and appendix documents regarding the Statewide and Metropolitan Transportation Planning NPRM for docket number 99-5933, and our comment and two appendix documents regarding the ITS NPRM for docket number 99-5899. We will also be submitting this package of materials to the other two dockets **as** well.

Also attached is a resolution regarding the Planning and NEPA proposed rulemakings titled "Regarding the Proposed Statewide and Metropolitan Planning and National Environmental Policy Act Regulations", which **was** approved by the **AASHTO** Board of Directors on August 16, 2000. This resolution outlines major concerns of the

AASHTO Board of Directors with the proposed regulations for Planning and NEPA. Further, the resolution urges FHWA and **FTA** to comprehensively revise these two NPRMs based on AASHTO concerns, and then issue a revised notice of proposed rulemaking before proceeding with a final rule.

AASHTO staff is available to **work** with **FHWA** and **FTA** staff should they have questions regarding **any of** these materials.

Sincerely,



Thomas R. Warne
President

cc: **Ken** Wykle, **FHWA**
Nuria **Fernandez, FTA**

American Association of
State Highway and
Transportation Officials

September 20,2000

Docket Clerk
U.S.DOT Dockets
Room PL-401
400 Seventh Street, SW
Washington D.C. 20590-0001

Subject: AASHTO response to Docket No. FHWA-99-5933

Dear Madam or Sir:

The American Association of State Highway and Transportation Officials (AASHTO) has reviewed the proposed changes to the Statewide and Metropolitan planning requirements and is submitting its views and concerns.

Our primary response to the Statewide Transportation Planning and Metropolitan Transportation Planning *NPRM* docket (FHWA-99-5933) is included in two documents labeled as follows:

- "Comments of the American Association of State Highway and Transportation Officials", Docket No. 99-5933; and
- Appendix to Comments of the American Association of State Highway and Transportation Officials, Docket No. 99-5933.

Because of overlap between the Statewide and Metropolitan Planning NPRM and the NEPA and ITS NPRMs, we *are* also providing with our submittal our comment and appendix documents regarding the NEPA NPRM for docket number 99-5989, and our comment and two appendix documents regarding the ITS *NPRM* for docket number 99-5899. We will also be submitting this package of materials to the other two dockets as well.

Also attached is a resolution regarding the Planning and NEPA proposed rulemakings titled "Regarding the Proposed Statewide and Metropolitan Planning and National Environmental Policy Act Regulations", which was approved by the AASHTO Board of Directors on August 16,2000, This resolution outlines major concerns of the

AASHTO Board of Directors with the proposed regulations for Planning and NEPA. Further, the resolution urges FHWA and FTA to comprehensively revise these two NPRMs based on AASHTO concerns, and then issue a revised notice of proposed rulemaking before proceeding with a final rule.

AASHTO staff is available to work with FHWA and FTA staff should they have questions regarding any of these materials.

Sincerely,

Thomas R. Warne
President

cc: Ken Wykle, FHWA
Nuria Fernandez, FTA

Introduction

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to comment on the proposed national Environmental Policy Act (NEPA) and Section 4(f) regulations issued by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) on May 25,2000. These comments consist of three parts: (1) an executive summary of AASHTOs position on the proposed regulations, (2) an in-depth explanation of AASHTOs views on six major issues of concern, and (3) detailed section-by-section comments, which are provided in a table attached to this document. For the reasons explained below, work on these proposed regulations should be suspended, the relevant committees of Congress should hold oversight hearings, and the USDOT should comprehensively revise the proposed regulations and issue a revised notice of proposed rulemaking, before proceeding with a final rule.

Separately, AASHTO is also submitting comments on two sets of regulations that were issued by **FHWA** and **FTA** concurrently with these proposed NEPA/Section 4(f) regulations: **(1)** the proposed regulations governing statewide and metropolitan transportation planning, Docket No. 99-5933, and *(2)* the proposed regulations governing the development of a national architecture for Intelligent Transportation Systems (ITS), Docket No. 99-5899. Where appropriate, these comments on the NEPA/Section 4(f) regulations contain cross-references to **AASHTOs** comments on the proposed planning and ITS regulations.

Executive Summary

Two years ago, when Congress passed the Transportation Equity Act for the 21st Century (TEA-21), it sent a clear and unmistakable message that the environmental review process for major transportation projects needed fundamental reform. Congress itself took the first steps, by granting State Departments of Transportation (State DOTs) additional flexibility in several key areas - for example, design-build contracting. But Congress did not attempt to prescribe across-the-board, program-level changes. Instead, it left FHWA and **FTA** with the responsibility to review the existing process, identify areas where it has broken down, and develop practical ways to restore efficiency and balance while preserving existing levels of environmental protection.

Within the first year after TEA-21 was passed, there were indications that the effort to streamline the environmental review process could be overridden by other policy agendas. This concern was heightened in February 1999, when FHWA and FTA issued their "Options Paper," a lengthy review of potential approaches to reforming the agencies' planning and environmental regulations. **As** AASHTO stated in its comments on the Options Paper, the paper raised serious concern that revised regulations could actually slow down and complicate - not streamline - the environmental review process. Many members of Congress, of both parties, expressed similar concerns,

emphasizing that FHWA and **FTA** should not lose sight of the core objective of streamlining the environmental review process.

In a few areas, the proposed NEPA regulations include reforms that should - if properly implemented - help to streamline the environmental review process and subsequent project development. These welcome reforms include: **(1)** endorsing the concept of using NEPA as an "umbrella" to **unify** compliance with other laws; **(2)** allowing **final** design and right-of-way acquisition to be undertaken by project applicants, with non-federal funds, on an "at risk" basis prior to the completion of the **NEPA** process; **(3)** establishing a new categorical exclusion for acquisition of right-of-way for corridor preservation purposes; **(4)** specifically recognizing that the **USDOT** agencies can satisfy their NEPA responsibilities through programmatic approvals; and (5) allowing alternative procedures to be approved for a particular State, in lieu of the USDOT's regulations. In addition, the regulations contain statutorily mandated language allowing the use of a single contractor to prepare a NEPA document and conduct subsequent engineering and design work. While AASHTO has recommended wording changes to some of the provisions, **AASHTO** supports the overall concepts as presented in these regulations.

Despite these favorable new provisions, the proposed regulations for implementing NEPA and related statutes fall far short of achieving the goal of streamlining the environmental review process. To carry out the intent **of** Congress, substantial changes are needed in six areas:

1) Expediting the NEPA process for large, complex projects. The proposed regulations provide little assurance that the NEPA process will be expedited for large, complex projects requiring the preparation of **an** environmental impact statement (EIS). The regulations fail to incorporate key elements of the streamlined process mandated by TEA-21 - most importantly, *deadlines* for agencies to submit comments **and** resolve disputes. In addition, the regulations contain new provisions that will increase the size and complexity of every EIS, and they leave in place many elements of the previous regulations that caused delays.

2) Expediting the **NEPA** process for small, uncontroversial projects. **The** proposed regulations provide little assurance that the NEPA process will be expedited for small and uncontroversial projects - that is, the vast majority of projects that can be approved with **an** environmental assessment (EA) or categorical exclusion (CE). The coordinated review process developed for EIS projects may not be the most effective tool for expediting smaller-scale projects. In addition, the regulations create **new** requirements that will further complicate and slow down the process for obtaining approval of small and uncontroversial projects, and they leave in place existing requirements that cause delays.

3) Reducing Litigation Risks. The proposed regulations contain several provisions that could become lightning rods for litigation. These provisions - in particular, the

commitment to "maximize attainment" of seven goals – reflect USDOT's intention to place a greater emphasis on achieving specific outcomes, not just on assuring compliance with procedural requirements. Unfortunately, the way these provisions are written, they could easily end up giving courts a new basis for setting aside USDOT decisions. To avoid that result, these new provisions should be substantially revised.

4) Reforminn Section 4(f). The proposed regulations re-number and re-organize the existing Section 4(f) regulations, without proposing significant reforms. In addition, the regulations include "editorial" changes that would actually cause significant new problems. At the very least, the Section 4(f) regulations should be revised so that they do not impose any new burdens or create any new opportunities for litigation and delay. Beyond that, the Section 4(f) regulations can and should be revised to incorporate several key changes – consistent with existing case law – that would help restore a sense of balance and common-sense to USDOT's interpretation of Section 4(f).

5) Allowing transition time. The proposed regulations contain no transition time or grandfather clause whatsoever, despite the fact that (a) the regulations would impose significant new requirements and (b) there are major studies in progress in virtually every State, which would have to be delayed – perhaps greatly – in order to achieve compliance with the new regulations if the regulations took effect immediately.

6) Guidance to be issued. The preamble to the proposed regulations indicates that guidance is to be issued in numerous areas, from conflict-of-interest disclosure statements, to "at-risk" expenditures by State DOTs, to the standards for defining purpose-and-need and screening alternatives. On all issues where guidance is to be issued, AASHTO strongly urges that (1) the USDOT agencies provide an opportunity for State DOT involvement before the guidance is actually issued, and (2) the guidance be in the form of best management practices, rather than prescriptive requirements.

In short, while the proposed environmental regulations contain some important improvements, they contain new requirements that could easily mushroom into major new causes of delay, cost overruns, and litigation. In addition, they leave many existing problems unaddressed, resulting in missed opportunities to achieve the fundamental reforms that Congress envisioned. As a result, a rulemaking effort that started out as an effort to reform the environmental process appears headed in exactly the opposite direction. For these reasons, AASHTO has concluded that, for now, the goals of TEA-21 are more likely to be advanced by *temporarily retaining the existing NEPA and Section 4(f) regulations* – with all their flaws – than by adopting the new regulations proposed by USDOT. Of course, **AASHTO** still believes the regulations need to be updated to reflect the statutory changes implemented in TEA-21. Therefore, **AASHTO** recommends that:

(1) work be suspended on these proposed regulations, in their current form;

(2) the relevant committees of Congress hold oversight hearings; and

(3) after such hearings have been held, the USDOT comprehensively revise the proposed planning regulations and then issue a revised notice of proposed rulemaking, before proceeding with a final rule.

Table of Contents

Analysis of Major Issues

As noted above, AASHTOs objections to the proposed environmental regulations focus on *six* major issues. This section of the comments presents an in-depth explanation of AASHTOs concerns in each of these areas. Additional recommendations are provided in AASHTOs section-by-section analysis of the proposed regulations, which is attached.

I. Expediting the NEPA Process for Large, Complex Projects

The environmental review process for large, complex projects - particularly controversial ones - can take many years to complete, cost millions of dollars, produce endless litigation, and still result in no decision about how to address critical transportation needs. This process must be reformed, as Congress recognized in TEA-21. However, as proposed, the regulations would not substantially improve the review process for major projects, and could even *increase* delays. AASHTOs concerns focus on four broad areas: (1) the use of the planning process to determine the scope of an EIS; (2) the use of the "coordinated review process" to expedite the completion of an EIS; (3) the level of detail required in an EIS; and (4) procedural flexibility allowed during the preparation of an EIS.

A. Improving the Linkage Between Planning and NEPA Will Not Expedite Projects Unless Stronger Measures Are Taken to Ensure That Planning Decisions Are Accepted in NEPA.

One objective of the proposed regulations is to streamline the NEPA process by improving the linkage between transportation planning and project development. In principle, AASHTO supports this objective. However, experience with the major investment study (MIS) requirement has shown that efforts to achieve this goal can backfire. All too often, after the conclusion of a lengthy MIS, the federal agencies would decide to "start over" in the NEPA process, treating the MIS as little more than a source of raw data - not as a decision-making tool. This basic shortcoming of the MIS process left the public (not to mention MPOs and the States) frustrated and confused, damaging the credibility of the entire transportation planning and project development process.

The proposed planning and environmental regulations seek to overcome the problems with the MIS by instituting a new, mandatory process that applies to all projects. As explained in AASHTO's comments on the planning regulations, the breadth of this new requirement is in direct violation of Section 1308 of TEA-21, and for that reason alone, the proposed regulation cannot be adopted as proposed. But a deeper flaw in the MIS replacement provisions - in both the planning regulations and the environmental regulations - is that they attempt to cure the problems with the MIS by simply imposing a new set of mandatory requirements on States, MPOs, and transit operators. These new mandates do not address the underlying reason that the MIS

failed - namely, *because it did not provide a reliable mechanism for making decisions in the planning process that would actually be accepted in the project development (NEPA) process.*

More specifically, the problem with the MIS process - and the problem with the new process mandated by the proposed planning and environmental regulations - is that it fails to establish the necessary linkage between two key decision points: (1) the "front-end" decision, in the planning process, about whether to undertake MIS-type analyses at all, and about the level of detail of those studies; and (2) the "back-end decision, in the NEPA process, about whether to accept the results of the planning studies. These two decisions are related as follows:

- Front-End Decision. In the planning process, State DOTs, MPOs, and transit operators ("project sponsors") must make a decision about whether to undertake MIS-type analyses of particular corridors or projects - i.e., whether to begin developing a purpose and need statement, identifying alternatives, and then evaluating those alternatives. In deciding how much time and money to invest in this effort, the project sponsors need to make a judgment about whether the effort will pay off - that is, whether the effort will result in a decision that is actually accepted in the NEPA process. Unfortunately, in most cases, *the project sponsors are asked to make this decision without receiving any reciprocal commitment from the agencies that will be making the back-end decision in the NEPA process - namely, USDOT and the federal resource agencies.* Without such a commitment, it is difficult to justify making any significant investment in the planning-level studies.
- Back-End Decision. In the NEPA process, the USDOT agencies - and, on some issues, federal resource agencies with permitting authority - decide whether any of the decisions made in the planning process will be accepted as the starting point for the NEPA study. Because their involvement in the planning process is generally minimal, the USDOT agencies and federal resource agencies often decide to "start over" in the NEPA process, rather than accepting decisions made in the planning process. The rejection of the planning-level decisions in the NEPA process makes the project sponsors even more reluctant to undertake extensive analysis of particular projects or corridors in future planning-level studies.

As this discussion indicates, the problem with the MIS can be traced to the lack of a connection between the front-end decision made by the project sponsors, and the back-end decision made by the USDOT and federal resource agencies. Until this basic disconnect is fixed, efforts to improve the linkage between the planning and NEPA processes will only reproduce the dysfunctional results of the MIS.

The way to make real progress toward curing the defects of the MIS is to *provide incentives* for the development of an *optional* process that actually delivers on the promise of the MIS - that is, a process capable of producing planning-level decisions

that are consistently accepted as the starting point for **NEPA** studies. If States and MPOs find that the decisions made in the planning process are actually being accepted in the NEPA process, this optional process will become more widespread and eventually will become the norm. On the other hand, if the same old pattern (study it in the MIS, study it again in the EIS) afflicts the new optional process, then State DOTs and MPOs will properly abandon it and seek out other ways to improve the linkage between planning and project development.

Recommendations: To address the concerns raised in these comments, it is necessary to make the following changes to the planning regulations (23 C.F.R. 1410) and to these NEPA regulations:

1) Make Planning-Level Studies Optional. The planning regulations should make the planning-level studies (the MIS replacement) a completely optional procedure, By making it optional, the regulations would give all agencies - including the resource agencies and the USDOT agencies themselves - a **strong** incentive to make the process work. (See AASHTO Planning Comments, Section I.B., and Appendix to Planning Comments, # **143-144,** USDOT Docket # 5933.)

2) Require **USDOT** Agency to Participate in Planning, If Requested by the MPO and project sponsor. The planning regulations should require the USDOT agency to participate in the planning process, to the extent that such involvement is requested by the MPO and the project sponsor. (See AASHTO Planning Comments, Section I.B., and Appendix to Planning Comments, # **146,** USDOT Docket # 5933.) The regulations should:

   a. Require USDOT agencies to participate, if requested by the MPO and project sponsor, in developing the scope for the planning-level study;

   b. Require the USDOT agency, if requested by the MPO and project sponsor, to identify any additional elements that should be added to the scope of work to ensure that the USDOT agency will be able to approve the results of the planning-level study as the starting point **for** the NEPA process; and

   c. Require the USDOT agency, if requested by the MPO and project sponsor, to enter into a Memorandum of Understanding documenting the agencies' agreement that, if the planning-level study is executed in accordance with the approved scope of work, the results of that study will be accepted by the USDOT agency as the starting point for the **NEPA** study.

   d. Require the USDOT agency, if requested by the MPO and project sponsor, to take the lead role in negotiating a Memorandum of

Understanding with other federal agencies to ensure their active participation in the planning-level study.

3) Establish Certification Process Through Which Planning-Level Decisions Can Be Used to Establish Scope of Project-Level NEPA Study. The NEPA regulations should establish a certification process though which the project sponsor can certify decisions to the USDOT agency for approval, asking the **USDOT** agency to adopt those decisions as the starting point for the NEPA process. (See Appendix, # 18.)

a. The process would be initiated if the project sponsor certified to the USDOT agency that certain decisions reached in the planning process were adequately supported and therefore should **be** incorporated into the NEPA process.

b. If the project sponsor certifies conclusions to the USDOT agency, the USDOT agency would have three options: **(1)** unconditionally approving the certification, in which case they would be incorporated into the NEPA process, **(2)** conditionally approving the certification, specifying additional steps that would need to be taken before the conclusions could be accepted, or **(3)** disapproving the certification, in which case the certified conclusions would not be incorporated into the NEPA process.

c. The USDOT would be required to make its approval, conditional approval, or disapproval in writing, based upon the four criteria in **Section** 1420.201(c). The USDOT would be required to transmit all such findings to the project sponsor.

d. If the USDOT agency disapproves a certification, rather than approving or conditionally approving it, its decision would have to be issued by the **FHWA** or **FTA** headquarters office.

4) Establish Certification Process Through Which Planning-Level Decisions Can Be Used to Establish Applicability of CE for R-O-W Acquisition. In addition to the certification process described in paragraph (2), the NEPA regulations should provide an alternative process through which the project sponsor may obtain the approval of the USDOT agency to proceed with federally funded right-of-way acquisition. This alternative certification process would enable the project sponsor to proceed with federally funded right-of-way acquisition, even if the project sponsor is not yet prepared to initiate the NEPA process for the project itself. This process would be identical to the process described in paragraph (2), except that its sole purpose would be to support a **finding** by the USDOT agency, based on the planning-level studies, that the conditions for the categorical exclusion described in 1420.311(d)(16) have **been** satisfied –

namely, that **(1)** the proposed project has been included in the applicable transportation plan and **(2)** the proposed right-of-way acquisition for that project will not limit the consideration of alternatives in a future NEPA study for that project. (See Appendix, # 18.)

5) If MIS-Type Studies Are Not Completelv Optional, Limit Requirement to "Major Projects." If the MIS-replacement studies are not converted into completely optional procedures, the planning regulations still should limit their applicability to "major projects," while allowing them to be used (at the discretion of MPOs) as optional procedures for all other projects. (See AASHTO Planning Comments, Section I.B, USDOT Docket # **5933.)** Major projects should be defined to include only those that meet *all* of the following criteria:

a. Federal share of project is $100 million or more,[1] and/or length is 5 miles or more;

b. Project type is fixed-guideway transit or limited-access highway;

c. Project adds new capacity; and

d. USDOT and resource agencies have entered into a Memorandum of Understanding (MOU) for the project, documenting the agencies' agreement that, if the planning-level study is executed in accordance with the approved scope of **work,** the results of that study will be accepted by the USDOT agency as the starting point for any NEPA study for the project.

B. "Coordinated Review Process," As Proposed, Is Not Adequate to Expedite NEPA Process for Large Projects.

In Section 1309 of **TEA-21,** Congress directed the USDOT and other federal agencies to develop a "coordinated review process" that integrates all of the federal environmental review requirements for transportation projects. **AASHTO** strongly supports the effort to improve coordination with federal resource agencies during the preparation of an EIS, in order to improve the flow of information, reduce misunderstandings, and resolve conflicts. In addition, AASHTO supports the approach of improving coordination primarily through guidance, memoranda of understanding, and the development of strong relationships with agency staff at the local level. However, in order to provide a strong foundation for these efforts, the proposed regulations must establish the basic groundrules under which these coordination efforts will take place. In this respect, the proposed regulations raise three concerns:

---

1 The $100 million threshold is taken from 49 C.F.R. § 633.11.

1. Concurrence Requirement.

Section 1420.203(a)(4) requires the USDOT agency to "distribute to the appropriate Federal agencies *for their concurrence*" a document that identifies, among other things, the "issues to be addressed in the NEPA process and those that need no further evaluation" (i.e., which alternatives can be dropped from further study) and "methodologies to be employed in the conduct of the NEPA process." This language requires USDOT agency to *request* concurrence, and, in practice, it could be interpreted to require them to *obtain* concurrence. If interpreted in this way, this regulation would give federal resource agencies – **U.S.** EPA, the *Corps* of Engineers, and the U.S. Fish and Wildlife Service, in particular – enormous control over the scope and methodology of every EIS prepared by a USDOT agency. By itself, this concurrence requirement would create a major new obstacle to streamlining the **NEPA** process, particularly for large-scale, complex projects.

If the regulation were revised to require an opportunity for "comment" rather than "concurrence," agencies with jurisdiction by law over a project still would have the opportunity to identify any issues that would (or could) prevent them from granting approval for **the** project. However, the U.S. DOT agency and **the** applicant would not have to obtain a formal "concurrence" letter from each resource at each decision point before proceeding further with a study.

Recommendation.

1) Revise Section 1420.203 to require that the NEPA scoping document be distributed to resource agencies for "comment," not for "concurrence." (See Appendix, # 19.)

2. Comment Deadlines and "Closing the Record."

Section 1309(b)(2) of **TEA-21** specifically requires USDOT and the head of each participating Federal resource agency to set mutually agreed-upon deadlines for submission of the resource agency' comments during the **NEPA** process.[2] Rather **than** implementing this requirement, Section 1420.203(a) of the proposed regulations simply requires the "USDOT agency" to "discuss . . . time frames" with other federal agencies that may be involved in the process and "document the results" of such consultation, including a "process schedule." This watered-down language fails to implement two clear statutory mandates: (1) it requires the development of a "process schedule," rather than requiring *specific time frames* within wluch reviews must be completed, and (2) it places the obligation to establish the schedule on the ***USDOT*** *agency* alone, when the statute imposes it on Federal resource agencies as well.

---

[2] TEA-21, § 1309(b)(2) (requiring the **USDOT** and the other federal agencies involved in a project to "jointly establish time periods for review . . . whereby each **such** Federal agency's **review shall** be undertaken and completed within such established time periods for review" or "enter into an agreement to establish such time periods for review with respect to **a class** of project").

Section 1309(c) of **TEA-21** establishes the consequences for failing to submit comments with the time-frames established under Section 1309(b)(2): it gives the USDOT agency the right to "close the record" on a particular issue if the relevant resource agencies have been given an opportunity to submit comments but have failed to do so by the established deadline, and the USDOT has consulted with them regarding the missed deadline. Despite this provision in the statute, the proposed regulation *does not even mention* the use of this procedure to enforce agencies' compliance with agreed-upon deadlines. This omission raises a concern that this statutory authority will not be vigorously exercised.

Because the regulation cannot override the statute, the basic requirements in Section 1309(b) and (c) will apply regardless of whether they are specifically incorporated into the regulation. Nonetheless, in order to function effectively, as Congress intended, the coordinated review process must have some "teeth" - it must be based on enforceable deadlines, with real consequences. Without firm deadlines, the lengthy interagency disputes that currently plague the environmental process are likely to continue.

Recommendations.

1) Revise Section 1420.203 to require USDOT agencies and other federal agencies with project-level responsibilities to agree upon specific time frames for reviewing documents and providing comments. (See Appendix, # 19-20.)

2) Specifically recognize in the regulations that USDOT agencies have the authority to "close the record" with respect to a resource agency's comments, as long as the USDOT agency follows the notice-and-consultation procedures outlined in Section 1309(c) of TEA-21. (See Appendix, # 21.)

3. Deadline for Dispute Resolution.

Section 1309 of **TEA-21** requires the USDOT agency and other Federal agencies to resolve any disputes within 30 days after the USDOT agency formally finds that a dispute exists. This 30-day period is binding, not only on the USDOT agency but also on other Federal agencies, and the statute provides no opportunity for an extension. The 'clear intent of this requirement is to establish rigid constraints that force Federal agencies to resolve their differences quickly. This 30-day deadline is *never mentioned* in the proposed regulations. Instead, the regulation merely states that if interagency dispute resolution procedures "are not successful in a reasonable time," then the USDOT agency "shall initiate a dispute resolution process" in accordance with Section 1309.

Recommendation.

1) Revise Section 1420.203 to incorporate the statutory requirement that inter-agency disputes involving the U.S. DOT and other federal agencies be resolved within 30 days. (See Appendix, # 22.)

C. The Regulations Could Increase the Size and Complexity of Every EIS.

The proposed regulations also undermine the goal of streamlining by opening the door to changes that could vastly increase the size and complexity of every EIS, by increasing both the number of alternatives that need to be studied and the level of detail required for each of those alternatives. While this issue has not received the same attention as the issues of MIS replacement or the coordinated review process, it parallels those issues in importance - because no matter how much progress is made in improving interagency coordination, the time needed to complete an EIS will escalate dramatically if every EIS is required to consider a larger range of alternatives and to develop each of those alternatives to a higher level of detail than is required under current practice.

1. Number of Alternatives.

The basic rule recognized by the courts is that, in deciding which alternatives to carry forward for detailed study in an EIS, the agencies preparing the EIS may eliminate alternatives that do not satisfy the project's purpose and need. As a result, the purpose-and-need statement has become the basic measuring stick for determining which alternatives warrant detailed study in an EIS. While the proposed regulations themselves would not change this practice, they raise concerns in two areas: (1) developing the purpose and need statement, and (2) using the purpose and need statement to screen alternatives.

a. Defining the Purpose-and-Need.

The preamble to the proposed regulations explains that "[o]ptions to provide clearer direction regarding what constitutes an acceptable statement of purpose and need are being explored and we invite specific comments on this issue." The preamble goes on to describe several options for changing the way purpose-and-need is defined, which would require the purpose and need to be defined more broadly - potentially even to include non-transportation goals. If adopted, these options would require purpose-and-need statements to be watered-down to the point that they become virtually useless as tools for screening alternatives. In essence, a purpose-and-need statement would become a list of meaningless platitudes, rather than a clear and focused statement of a project's objectives.

Recommendations: If additional guidance is issued regarding purpose and need statements, it should expressly retain the following principles from existing USDOT practice (as stated in FHWA's Sept. 18,1990 Purpose and Need Policy Paper):

1) The purpose and need statement should be as comprehensive and specific as possible.

2) The purpose and need statement should identify elements of the purpose and need that are critical to the project, as opposed to those that may be desirable or simply support it.

3) Policy decisions, not just technical considerations, can provide the basis for identifying critical elements of the purpose and need.

4) The purpose and need for a project should evolve during the preparation of an EIS, as information is developed and more is learned about the project.

b. Using the Purpose and Need to Screen Alternatives

The preamble to the proposed regulation states that, in addition to providing guidance on what a purpose-and-need statement should contain, USDOT also is considering issuing guidance that would change the way a purpose-and-need statement is used in the screening of alternatives. The preamble states that:

> We propose to provide more detailed treatment on the subjects of purpose and need, and the development, analysis, and evaluation of alternatives in the comprehensive package of informational materials. *This would include how to address alternatives which in the past have been rejected for not fully meeting traditional concepts of purpose and need* Further, we plan to showcase examples of successful practices which demonstrate how effective integration of planning and project development can protect communities and environmental resources and save time in providing needed transportation improvements.
>
> Examples of issues that might be covered include: *the further consideration of alternatives that may not fully meeting traditional concepts of purpose and need;* more broadly defined purpose and need statements during the planning stage so that a full range of modal alternatives are considered; *an alternative analysis that examines non-construction alternatives that use transportation demand strategies; and flexibility to encourage the consideration of alternatives which may have lower than originally desired levels of transportation service if there are cost, time, and*

impact savings that justify the lower levels of transportation service.

The options being considered raise strong concerns, because they could vastly increase the number of alternatives that need to be considered in an EIS. In effect, if these **options** were adopted in regulation or guidance, *every* **EIS** could be required to include detailed analyses of numerous additional alternatives, exponentially increasing the time needed to complete **an EIS.**

Recommendation: If additional guidance is issued regarding the screening of alternatives, it should expressly retain the following principle from existing USDOT practice (as stated in FHWA's Sept. 18,1990 Purpose and Need Policy Paper):

1) If an alternative does not satisfy the purpose and need for the project, as a rule, it should not be included in the analysis as an apparent reasonable alternative.

2. Level of Detail in Alternatives Analysis.

In addition to increasing the number of alternatives that would need to be considered in an EIS, the proposed regulations also could increase the level of detail required for each of those alternatives. **This** change would be caused by the regulations themselves, not just guidance: Section 1420.317(c) contains a new sentence that requires alternatives analyzed in the Draft **EIS** to "be sufficiently well-defined to allow full evaluation of the *specific alignment* ***and*** *design variations* that would avoid or minimize adverse impacts." Existing FHWA guidance requires the evaluation of all reasonable alternatives to a comparable level of detail, and good practice – as well as the requirements of NEPA – often require the analysis of a considerable number of distinct alternatives at the Draft EIS stage. Taken together, these requirements could sigruficantly increase the cost and complexity of *every* Draft EIS – by significantly increasing the level of engineering detail needed not only for the preferred alternative, but for every reasonable alternative examined in the document.

Recommendation.

1) Clarify that the Draft EIS need only contain a level of detail sufficient to allow **an** informed comparison of the alternatives under consideration, which does *nof* necessarily require the *same* level of detail for all alternatives. (See Appendix, # 75 and 81.)

3. New "Enhancements" Requirements.

The proposed regulations contain *many* new requirements that refer in various ways to the consideration and selection of "environmental enhancements" as part of the NEPA process. These new requirements fall into **two** basic categories: **(1)** provisions that require enhancements to be *studied* in a NEPA document or in a NEPA process, and

(2) provisions that require enhancements to be *selected* in a NEPA document or in a NEPA process.[3]

AASHTO agrees that States should have the *option* to include enhancements, with federal funding, as part of a federally funded project. AASHTO also agrees that, if an enhancement measure is included in a project, it should be included as a binding commitment in the ROD. However, AASHTO strongly opposes requiring the analysis, much less the selection, of enhancements in the ROD. Enhancements always have been, and should remain, a matter within the discretion of the project applicant.

Recommendations:

1) Separate "enhancements" from "avoidance, minimization, and mitigation." (See Appendix, # 13.)

2) Specifically note in the regulations that enhancements are discretionary. (See Appendix, # 6, 13, 38, 59, 61, 74, 75, 85, 87.)

3) Retain proposed language stating that enhancements are eligible for federal funding. (See Appendix, # **14.)**

4) Retain proposed language stating that, **if** enhancements are incorporated into a project as a condition of project approval, they are enforceable. (See Appendix, # 15.)

D. The Regulations Reduce Procedural Flexibility in Preparing an EIS.

The process of preparing **an** EIS, particularly for a large project, is inevitably complex. However, while a degree of complexity is unavoidable, the regulations include several provisions – some new, some existing – that unnecessarily complicate the preparation of an EIS. These include:

1. Announcement of Scoping Hearings.

Section 1420.317(b) states that "If a public scoping meeting is to be held, it *must* be announced in the **U.S.** DOT agency's Notice **of** Intent and by an appropriate means

---

[3] See Proposed **23 C.F.R.** §§ 1420.109(a) (referring to enhancements as one of the "key characteristics" of a proposed action"); id. § 1420.113 (heading refers to enhancement "responsibilities"); id. (establishing policy that enhancement be incorporated "to the fullest extent practicable"); id. (making enhancements eligible for federal funding); id. (requiring applicant to carry out enhancements stated as commitments in the **ROD)**; id. 1420.303(a) (requiring interagency consultation to determine appropriate "opportunities for environmental enhancement, and related environmental requirements"); id. § **1420.311(d)(21) (allowing** CE for transportation enhancement activities and transit enhancements); § id. § 1420.313(b) (requiring **EA** to evaluate enhancements); id. § 1420.313(d) (requiring interagency consultation during an **EA** to "identify environmental enhancements . . . and identify other environmental review and coordination requirements"); id. § 1420.317(b) (requiring consideration of enhancements in scoping phase for EIS); id. § 1420.317(c) (requiring consideration of economic development in Draft **EIS);** id. §1420.319(a) (requiring discussion of enhancements in Final EIS); id. § 1420.321 (requiring **any** "commitments" to enhancements to be made in the ROD).

at the local level." (emphasis added) In practice, the exact dates for scoping meetings, and possibly even the need for scoping meetings, have not been determined at the time when a Notice of Intent is to be issued. As a result, this requirement could have the unintended effect of **(1)** delaying the issuance of Notice of Intent, until scoping meeting dates have been set, or **(2)** causing agencies not to hold scoping meetings, if the agencies have already issued a Notice of Intent and did not announce the meetings in that notice.

Recommendation:

1) Restore language from existing regulations – i.e., dates and times for scoping meetings "should" (not "must") be announced in a Notice of Intent. (See Appendix, # 74.)

2. Newspaper Notice Requirements.

Section 1420.317(g) and 1420.319(d) require newspaper publication of the notice of availability of the Draft and Final EIS, and Section 1420.321(a) requires newspaper publication of the availability of a Record of Decision (ROD). While newspaper publication may still be the appropriate means of communication for many projects, the regulations should not prescribe the particular method of communication. Instead, the regulation should simply require compliance with the public involvement procedures approved pursuant to § 1420.305.

Recommendation:

1) Eliminate specific references to newspaper publication; replace with requirements for compliance with public involvement procedures adopted pursuant to 1420.305. (See Appendix, # 79, 84 and 85.)

3. Tiering Procedures.

The proposed NEPA regulations (Part 1420) do not contain any reference to the use of tiering. The omission of a tiering provision is surprising, since tiering is specifically allowed under the Council on Environmental Quality's NEPA regulations,[4] the existing FHWA NEPA regulations; the existing FHWA Section 4(f) regulations,[5] and the proposed FHWA/FTA Section 4(f) regulations.[7] The elimination of this regulation would not prevent the use of tiering, because the CEQ regulations continue to allow the procedure. However, the elimination of this provision would unnecessarily create uncertainty about the appropriate application of the tiering procedure to highway projects.

---

4 40 C.F.R. § 1502.20.
5 23 C.F.R. § 771.111(g).
6 23 C.F.R. § 771.135(o).
7 Proposed 23 C.F.R § 1430.119.

Recommendation.

1) Restore the existing language describing the circumstances in which tiering is appropriate for highway and transit projects. (See Appendix, # 97.)

4. Timing of Compliance with Other Laws.

Section 1420.109(a) establishes the policy of coordinating compliance with all applicable laws under the "NEPA umbrella," which calls for the "NEPA process be the means of bringing together all legal responsibilities, issues, and interests ... to a single final decision regarding the key characteristics of a proposed action ...." Taken out of context, the reference to a "single final decision" in this regulation could be construed to impose an absolute requirement that *all* other statutory requirements must always be satisfied prior to completion of the NEPA process. In fact, however, Section 1420.307 makes it clear that **USDOT** intended to preserve some flexibility: it expressly allows the NEPA process to be completed with a "reasonable assurance'' that other statutes will be satisfied (except for the conformity requirement, which must be satisfied before the end of the NEPA process).[8]

Recommendations:

1) More explicitly acknowledge in Section 1420.307(c) that, while concurrent compliance is encouraged for all regulatory requirements, it is mandated only for the conformity requirement. (See Appendix, # 49.)

2) Revise Section 1420.109 to eliminate reference to "final decision" at completion of NEPA process. (See Appendix, # *6.)*

II. Expediting the NEPA Process for Small or Uncontroversial Projects

While the largest and most complex projects receive the most attention, they are only a small fraction of the total number of projects (and total number of dollars) approved by FHWA and FTA each year. The vast majority of federal-aid projects are uncontroversial projects that require limited environmental review – most often, a categorical exclusion (CE) or an environmental assessment (EA). Expediting the approval of these projects has attracted wide support, from transportation agencies and public interest groups alike.

The regulations contain several new provisions that can be used to expedite approval of small and uncontroversial projects. For example, Section 1420.205 allows the use of programmatic approvals, and Section 1420.209 allows States to obtain

---

[8] See Proposed 23 C.F.R. § 1430.109 ("Compliance with the requirements of all applicable environmental laws, regulations, executive orders, and other related requirements as set forth in § 1420.109 should be completed prior to the approval of the final EIS, FONSI, or the CE designation. *If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met.")* (emphasis added).

USDOT approval of alternative procedures, which would substitute for compliance with the USDOT's regulations. AASHTO strongly supports the inclusion of these provisions in the proposed regulations, and looks forward to working with the USDOT agencies to take **full** advantage of the additional flexibility that these provisions allow. However, the effectiveness of these new provisions depends on how they are implemented - they can only expedite the process *if* they are vigorously implemented, by State DOTs and the USDOT agencies.

Unfortunately, while the regulations take a few small steps forward in this area, they take several even larger steps backward. **As** a result, the net effect of these regulations on smaller, uncontroversial projects may actually be to slow the process down, rather than streamlining it. There are three reasons for this concern: **(1)** the coordinated review process established in these regulations is not well-suited for expediting EAs and CEs; (2) the regulations impose new restrictions on the use of CEs, further complicating a process that is intended to be the simplest of all procedures for complying with **NEPA;** and (3) the regulations do nothing to encourage pilot projects, which have great potential to expedite the **NEPA** process for smaller projects.

A. "Coordinated Review Process" for EIS Projects is Not Well-Suited for Expediting Smaller Projects.

The "coordinated review process" established in Section 1420.203 involves a series of consultation and documentation requirements that are most appropriate for larger, more complex projects - primarily EISs, not **EA** and CEs. Applying **this** process to EAs and CEs would in many cases simply create new paperwork burdens, slowing the process down. For this reason, AASHTO would oppose any interpretation of these regulations that would require (or tend to require) the use of the coordination process outlined in Section **1420.203** as a standard practice for non-EIS projects.

Recommendations.

1) Revise Section 1420.203(c) to provide that the coordinated review process will be used for non-EIS projects *only if affirmatively requested by the applicant.* (See Appendix, # 24.)

2) Revise Section 1420.203(a) to conform to the change proposed for Section 1420.203(c). (See Appendix, # 19.)

B. Restrictions on CEs and EAs Will Slow Down the Approval Process for Small Projects.

The proposed regulations include a number of new CEs, which will help to expedite some additional projects. However, overall, the regulations are likely to *slow down* the process for obtaining approval of CEs and EAs. The proposed regulations contain several new requirements that collectively impose substantial new burdens on

the use of CEs, as well as some pre-existing requirements that should have been removed. These include:

1. "Automatic CEs" - Compliance with Other Laws.

Section 1420.311(c) contains the list of actions that automatically qualify for a CE, *without* the need for additional documentation. The actions on this list are truly minor - from personnel actions, to road resurfacing, and so forth. In practice, actions that fit in these categories rarely, if ever, trigger requirements for documentation or consultation under other laws - and if such a circumstance exists, the USDOT agency has authority under the *existing* regulations to require a documented CE.

The proposed regulations would formalize - and needlessly complicate - the process of documenting a CE under paragraph (c) by including the following new requirement:

> "If other environmental laws (i.e., those listed in § 1420.109(c)) do not apply to the action, then it does not require any further NEPA approval by the U.S. DOT agency. If the U.S. DOT agency is not sure of the applicability of one of these CEs or of other environmental laws to a particular proposed action, the applicant will be required to provide supporting documentation in accordance with paragraph (d) of this section."

The problem with this new requirement is that it could easily be interpreted to require exponentially more paperwork than is required under existing regulations, as USDOT agencies request documentation of compliance with the dozens of "other environmental laws" listed in Section 1420.109(c).

Recommendation:

1) Eliminate list of statutory requirements in 1420.109(c). Maintain current listing of applicable statutes in readily updated and easily accessible format, e.g., agency or project web site. (See Appendix, # 8.)

2. "Documented CEs" - Compliance with Other Laws.

Section 1420.311(d) contains the list of actions that may qualify for a CE if additional documentation is prepared. This mechanism - the "documented CE" - provides a valuable tool for expeditiously completing the NEPA process for small-scale projects. In current practice, documented CEs are routinely approved based on a demonstration by the State DOT that it has procedures in place to achieve compliance with all other relevant statutory requirements. This procedure makes sound practical sense, because the CE approval process itself generally does not involve preliminary engineering work, and therefore does not provide a basis for developing the level of design detail that is needed to completely satisfy some regulatory requirements.

The proposed regulations could be interpreted to terminate this practice. Section 1420.311(d) requires that the applicant submit documentation, as part of the CE approval process, showing "that any appropriate interagency coordination has occurred, and that *any other applicable environmental laws (e.g., those listed in § 1420.109(c))*

have been satisfied." On its face, this requirement means that a State DOT must fully comply with every statute listed in § 1420.109(c) before obtaining a CE. If the regulation is interpreted that way, however, it would conflict with other provisions in the regulations, which clearly allow the NEPA process to be completed as long as the applicant provides a "reasonable assurance" that the requirements of others laws will be satisfied.?

Recommendation:

1) Revise Section 1420.311(d) to clarify that **USDOT** agencies may complete the NEPA process for a documented CE as long as the applicant provides a "reasonable assurance" that compliance with other laws will be achieved. (See Appendix, ## 57.) Conforming change also should be made to Section 1420.307(c). (See Appendix, # 49.)

3. Notices of Availability for CEs and EAs.

Section 1420.303(c) requires a notice of a notice of availability to be distributed to affected units of federal, state, and local government for *every* CE, EA, and Section 4(f) evaluation. This requirement vastly increases the paperwork burden on State DOTs, while providing little if **any** benefit to the public. For example, in many states, there are literally hundreds of CEs approved every year. Requiring each of these CEs to be mailed to several – perhaps many – local officials is a classic example of bureaucratic overkill.

Recommendation:

1) Maintain existing procedures, which require notices to affected units of government for EA/FONSIs, but not for separate Section 4(f) approvals or CEs. (See Appendix, # 40.)

4. Newspaper Notice of EAs.

Sections 1420.313(f)(2) and (g)(1) continue to require certain notices – of availability of **an EA,** and **of a** public hearing on **an EA** – to be published in **local** newspapers. While newspaper publication may still be the appropriate means of communication for many projects, the regulations should not prescribe the particular method of communication.

---

2 See Proposed 23 **C.F.R.** § 1420.313(f) ("reasonable assurance" requirement for EAs); id. § 1420.317(a)(3) ("reasonable assurance" requirement for FEISs); see also id. § 1420.307(c) ("Compliance with the requirements of all applicable environmental laws, regulations, executive orders, and other related requirements as set forth in § 1420.109 *should* be completed prior to the approval of the final EIS, FONSI, or the **CE** designation. *If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met.")* (emphasis added).

Recommendation:

1) Revise the regulation to require compliance with the public involvement procedures approved pursuant to § 1420.305, without mandating the method of communicating with the public. (See Appendix, # 63 and ***64.)***

C. The Regulations Do Not Establish a Pilot Projects Program.

The notice accompanying the proposed regulation states that FHWA **and** FTA "are not proposing to establish a formal process for pilots at this time" but instead will "participate in pilot projects on a case-by-case basis." This approach easily could be interpreted by FHWA and ETA officials in the field as discouraging pilot efforts. As a result, while it may not be intended to have that result, the absence of any formal pilot program in the regulations or in guidance could make it difficult for AASHTO members to secure the necessary support for their pilot project efforts.

Recommendations. Establish a formal process, in the regulations, for approving pilot projects, focusing particularly on the use of pilot projects to expedite EAs and CEs. Elements **of** this program **should** include:

1) Establish a policy explicitly favoring pilot projects as a means of improving the project development process. (See Appendix, # 98).

2) Allow **USDOT,** when approving a pilot project, to waive procedural requirements that have been imposed solely under these regulations (i.e., requirements mandated by other laws or regulations could not be waived). (See Appendix, # 98.)

111. Reducing NEPA Litigation Risks

One of the major contributors to delay in the NEPA process is litigation. Clearly, when lawsuits are filed, they can delay projects for many years. But even in cases where a lawsuit is never filed, the *potential* for litigation can have an enormous impact on the timing of project delivery - because the specter of litigation increases exponentially the scrutiny that a project receives from the USDOT agency itself and from other Federal agencies, which in **turn** ratchets up the level of documentation required. Therefore, while the number of lawsuits filed is small in relation to the total number of projects, the effect of litigation on the program as a whole is pervasive.

It **is** impossible, of course, to prevent Iitigation over the meaning of the new regulations. After all, *any* significant change in the wording of **the** regulations will create some uncertainty about what the regulations require, and the courts play an important role in resolving that uncertainty. But because a certain amount of litigation is inevitable whenever new regulations are issued, and because litigation is such a major contributor to project delays, it is imperative that the regulations avoid creating *unnecessary* litigation risks.

A. The Proposed Regulations Unnecessarily Create New Litigation Risks.

The proposed regulations contain four new provisions that virtually invite litigation. These include: **(1)** a new commitment to "maximize attainment" of seven goals, (2) a revised "public interest" requirement, **(3)** new environmental justice ("EJ") standards, and **(4)** a revised requirement for adopting all "practicable" avoidance, minimization, and mitigation enhancement measures. AASHTO supports many of the underlying objectives associated with each of these provisions, but is greatly concerned that the wording of the regulations will unnecessarily expose USDOT and, by extension, the State DOTs to litigation risks. Therefore, as further explained below, AASHTO recommends that the regulations be revised to incorporate modified language that will provide sufficient guidance to program staff but is less prone to becoming the focal point for future lawsuits.

1. "Maximizing Attainment" of Seven Goals.

Section 1420.107 states that "the USDOT agencies will manage the NEPA process to maximize attainment" of seven goals.[10] This regulation could be viewed by the courts as restrictions imposed by the U.S. DOT agencies on their legal authority to approve transportation projects. If interpreted in this way, the seven goals would become seven new grounds for courts to overturn FHWA/FTA decisions – or, to put it another way, they would provide seven new grounds for lawsuits to be filed challenging FHWA's decisions in ***court.*** Key issues of concern:

- *"Environmental ethic"* – litigation over whether the selected alternative "maximizes" the goal of reflecting "concern for, and responsible choices that preserve, communities and the natural environment."
- *"Environmental justice"* – litigation over whether the selected alternative "maximizes" the goal of avoiding "disproportionate impacts" on minority or low-income communities.
- *"Collaboration"* – litigation over whether the selected alternative was chosen through decision-making process *that* "maximizes" the goal of achieving "a *collaborative partnership* involving Federal, State, local, and tribal agencies, communities, interest groups, private businesses, and interested individuals."
- *"Financial stewardship"* – litigation over whether the selected alternative achieves "maximizes" the goal of achieving the "maximum benefit" for the public funds expended, when compared to other available alternatives.

Recommendations:

1) Revise Section 1420.107 to eliminate the phrase "maximize attainment" and to eliminate the list of seven goals. (See Appendix, # 5.)

---

[10] **Proposed 23** C.F.R. **1420.107.**

2) If the list of goals is retained, in some form, in the final regulation, make the following key changes: **(1)** delete the phrase "maximize attainment," (2) replace the word "goals" with the word "factors," and (3) include a specific statement that no additional documentation, findings, or consultation is required to establish compliance with these principles.

2. "Public Interest" Requirement.

Section 1420.109 states that the final decision, at the conclusion of the NEPA process, "shall be made in the best overall public interest." By contrast, the existing regulation simply says that "it is the policy of the Administration that ... decisions be made in the best overall public interest."[11] The existing and proposed language in the regulations appears intended to implement Section 109(h) of Title 23, which requires USDOT to "promulgate guidelines designed to assure that ... the final decisions on the project are made in the best overall public interest."[12]

While the proposed revision might seem minor, it could have significant practical and legal consequences. The addition of the word "shall" could be interpreted to transform a broad statement of policy into a specific, judicially enforceable requirement that limits the types of projects that **FHWA** and **FTA** can approve.

In addition, it should be noted that the underlying statutory requirement for a public-interest analysis applies only to projects for which "the Secretary" – meaning a USDOT agency – approves the plans, specifications, **and** estimates (PS&E) for a project. Under current law, the authority to approve PS&E rests with the individual State DOTs, not FHWA, for the vast majority of federally funded projects.[13] Therefore, the legal basis for requiring a public-interest analysis is limited to that small sub-set **of** projects (mainly, Interstate projects) for which PS&E approval authority still rests with FHWA.

Recommendations:

1) Require a public-interest analysis only to the extent that the analysis is required under the statute – i.e., it should be required for a project, if at all, **only** if the PS&E for the project will **be** approved by a **USDOT agency. Thus,** the public-interest analysis should not be required in any form for **a** project if the State DOT has properly assumed responsibility for PS&E approval for that project. (See Appendix, # 6.)

2) If the public interest requirement is retained for all projects, delete the word "shall" and revert to the current wording of **23** C.F.R. § 771.105(b), which simply establishes a "policy that... decisions be made in the best overall

---

11 23 C.F.R. § 771.105(a)-(b).

12 23 U.S.C. § 109(h).

13 See **23** U.S.C. § 106(c) (amended by Section 1305(a) of **TEA-21).** Under this statute, State DOTs can be allowed to assume responsibility for PS&E approval for all non-Interstate projects on the National Highway System, and for all projects that are not on the National Highway System.

public interest based upon a balanced consideration" of the factors listed in the regulation. (See Appendix, # 6.)

3. "EJ" Compliance.

Section 1420.107(a)(2) and Section 1420.111 establish new requirements concerning environmental justice ("EJ") and Title VI of the Civil Rights Act ("Title VI"). These new requirements raise many of the same concerns discussed in detail in AASHTO's comments on the proposed planning regulations, which are hereby incorporated by reference in these comments. Key concerns include:

- *Weaving Together Title VI and EJ.* The proposed regulations "weave together" Title VI requirements and EJ policies. **As** a result, it is impossible to determine which requirements in the regulations are judicially enforceable (under Title VI or other laws) and which are notjudicially enforceable (given the ban on judicial review of compliance with the EJ executive order.)
- *Contradicting NEPA Balancing Principles.* The proposed regulations could be interpreted to prevent the approval of actions that would cause unavoidable or unmitigatable disproportionate impacts on minorities or low-income populations. There is no basis in **NEPA** or Title VI for imposing such an absolute requirement; in fact, it would contradict the **NEPA** principle of balancing all relevant factors when making project decisions.
- *Re-Defining "Adverse Effects" to Include "Denial or Reduction of Benefits."* The proposed regulations expand the concept of **EJ,** beyond the bounds **of** the EJ executive order (E.O.12898), by defining "adverse effects" to include the "denial of or reduction in benefits." There is no basis in E.O. 12898 for this re-definition of the concept of an "adverse effect."
- *More Costly and Complex NEPA Process.* The proposed regulation could be interpreted to require significantly increased levels of data gathering and analysis in the project development process, thus increasing the cost and complexity of **NEPA** studies **and** further delaying project delivery.

If included in the final rule, these requirements will provide fertile territory for future litigation challenging **NEPA** documents. Clearly, the intent of the EJ executive order was to preclude such litigation: the order specifically states that there shall be no judicial review of compliance with the order's requirements[14] But by blurring the line between Title VI requirements and **EJ** policies, and by reinterpreting and expanding the very concept of EJ, the regulations create many layers of uncertainty that can and will only be resolved through years of lawsuits. The impact - both in the short term **and** the longer term - will be more process, more cost, and slower project delivery.

---

14 See E.O. 12898, ¶ 6-603.

Recommendations:

1) Maintain Existing Legal Requirements. The regulations should preserve the existing framework for assuring compliance with Title VI and the other non-discrimination statutes, rather than imposing on that framework an entirely new EJ overlay, which is not justified under any law, will create massive new compliance burdens, and will expose USDOT agencies and project applicants to major new legal risks. Accordingly, the proposed NEPA regulations should be revised as follows:

   a. Replace Section 1420.111(a) with a re-statement of the basic Title VI non-discrimination requirements, using *the* same language from Section 771.105(f) of the existing regulations. (See Appendix, # 9.)

   b. Delete Sections 1420.111(b) through **(d).** (See Appendix, # 10-12.)

2) If EJ Provisions Are Retained: If any reference to EJ is retained in the regulations, extensive changes must be made in order to clearly distinguish between statutory requirements (under Title VI and other laws) and EJ policies. These changes should include:

   a. Revise Section 1420.111(a) as follows:

      i. Focus solely on EJ policies, without implying that those policies must be satisfied in order to meet the requirements of Title VI or other statutes,

      ii. Clarify that the EJ policies do *not* preclude approval of actions that would have disproportionate impacts on low-income and minority populations – i.e., the decision about whether to approve such an action depends on a balance consideration of all relevant factors.

      iii. Focus on "adverse effects'' as defined in E.O. 12898; do not expand this concept to include "denial of or reduction in benefits."

   b. Revise Section 1420.111(b) as follows:

      i. Focus on information-gathering and public-involvement requirements, not "findings" or "justifications."

      ii. If any findings are required, specify that such findings will be made by the FHWA/FTA, not the project applicant, and will be made only for the selected alternative, at the end of the NEPA process (e.g., in the ROD).

   c. Revise Section 1420.111(c) to clarify that the level of detail in the EJ documentation should be determined on a case-by-case basis, in

proportion to the magnitude and complexity of the issues under analysis and other relevant factors – e.g., input from the public.

d. Revise Section 1420.111(d) to clarify that this section – i.e., 1420.111 – is solely intended to implement the EJ orders, and therefore FHWA/FTA does not intend for its compliance with this section to be subject to judicial review.

e. Include a separate section containing the Title VI language from existing Section 771.111(f) – i.e., "It is the policy of FHWA/FTA that no person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation."

4. "Practicability" Finding.

Section 1420.113 states that "it is the policy of the FHWA and FTA that proposed actions be developed as described in this section *to the fullest extent practicable.*" (emphasis added). The section goes on to state that proposed actions "should" be developed to avoid, minimize, and mitigate "adverse social, economic, and environmental impacts to the affected human communities and the natural environment" and to incorporate environmental enhancements into the proposed action "as appropriate." By contrast, the existing regulations (23 C.F.R. 771.105(d)) simply establish the criteria for determining the eligibility of mitigation measures for federal reimbursement; they do not require that mitigation (or avoidance, or minimization, or enhancement) measures actually be adopted.

In an apparent effort to minimize the risks associated with creating a new substantive requirement, Section 1420.113 defines "practicable" as "a common sense balancing of environmental values with safety, transportation need, costs, and other relevant factors in decisionmaking" and specifically states that "[n]o additional findings or paperwork are required." These caveats provide some protection against the risk of inadvertently creating a major new litigation risk in the NEPA process. However, the fact remains that Section 1420.113 establishes a "practicability" standard, which does not exist today, for determining whether to adopt avoidance, minimization, or mitigation measures. While seemingly innocuous, this new standard could become the focus of future lawsuits, like the "prudence" standard in the Section 4(f) context.

In addition to the overall concern about the "practicability" requirement, AASHTO also is concerned about the inclusion of "enhancements" – along with avoidance, minimization, and mitigation – in Section 1420.113. As written, the proposed regulation could be interpreted to impose an obligation on States to implement "enhancements" on *every* project, as matter of routine, to the same extent that mitigation measures are required. AASHTO opposes this expansion of the

enhancements concept from an option into a mandate. This, too, could become an additional focus for future litigation. (See Section I.C.3., above.)

Recommendations:

1) Delete any requirement for a "practicability" finding (or any other finding), and return to the language contained in existing Section 771.105(d), which states that it is the "policy" of FHWA that "measures necessary to mitigate adverse impacts be incorporated into the action" and sets criteria for determining when such measures are eligible for federal funding. (AASHTO does not object to adding "minimization" and "avoidance" to the list of activities covered by this section.) (See Appendix, # 13.)

2) Clarify that the decision about whether to incorporate enhancements into a project lies within the sole discretion of the applicant.) (See Appendix, # 13.)

3) Retain proposed language stating that enhancements are eligible for federal funding. (See Appendix, # 14.)

4) Retain proposed language stating that, if enhancements are incorporated into a project as a condition of project approval, they are as enforceable. (See Appendix, # 15.)

B. The Proposed Regulations Miss the Opportunity to Reduce Existing, Unnecessary NEPA Litigation Risks.

In addition to creating new litigation risks, the proposed regulations also leave essentially unchanged some ambiguous existing provisions that have been a frequent focal point for NEPA lawsuits. These include: (1) Section 1420.105(a), which governs the extent of the USDOT agency's NEPA obligations when the agency's approval is needed for only a small part of a larger action, and (2) Section 1420.105(b), which establishes criteria for determining whether a project has logical termini - or, in other words, whether a project has been improperly "segmented." While minor wording changes have been proposed in these areas, more extensive changes are needed to provide greater guidance to the USDOT agencies officials and project applicants.

1. Segmentation/Logical Termini Criteria.

One of the issues most frequently raised in NEPA lawsuits is the argument that a project has been improperly "segmented" for purposes of NEPA review. Section 771.111(f) of the existing regulations lists three factors that need to be considered when selecting project termini for purposes of a NEPA study: (1) whether the project has independent utility, (2) whether the project has logical termini, and (3) whether evaluation of the project would restrict consideration of altemstives for reasonably foreseeable future transportation improvements. Since those regulations were issued, FHWA has issued guidance clarifying the test, "The Development of Logical Project Termini" (March 30, 1993). This guidance establishes a simpler, two-part test: (1)

whether the project termini provide rational end points for a transportation project, which essentially is based on **an** independent-utility analysis, and (2) whether the project termini provide rational end points for an environmental analysis, which involves an analysis of whether the scope of the project allows consideration of a sufficiently broad range of alternatives and impacts. This simpler approach, which is already part of **FHWA'** guidance, should be included in the regulations as well.

Recommendation:

1) Revise Section 1420.105(b) to incorporate the logical-termini criteria contained in FHWA's 1993 guidance. (See Appendix, **# 4.)**

2. Non-Federally Funded Highway Projects.

In recent years, there have been a number of projects in which the FHWA has been asked to grant **an** approval (e.g., for Interstate access) for a non-federally funded highway project. In those cases, the issue often arises whether **FHWA's** approval of a small portion of the overall project requires FHWA to conduct a NEPA study of the entire privately or locally funded project. Section 771.109(a) of the current regulations, and Section 1420.105(a) of the propose regulations, do not squarely address this issue. In a number of recent cases, however, courts have addressed the issue, and have upheld FHWA's decision to focus its **NEPA** review on the specific portion of **the** project for which the agency's approval was needed, because the FHWA's approval of that section did not give it authority over the project as a whole.[15] Incorporating key principles from these cases into the regulations would reduce uncertainty and the risk of lawsuits.

Recommendation:

1) Revise Section 1420.105(a) to clarify that FHWA's approval of a portion of a larger project requires **NEPA** review for the entire project only if the FHWA's approval authority gives it substantial control over the project as a whole. (See Appendix, **# 3.)**

IV. Reforming Section 4(f)

Over time, Section 4(f) has become a major source of unnecessary paperwork and delay in the environmental review process for transportation projects. But there is a deeper problem with Section 4(f): in addition to delaying decisions, it also distorts them. It pushes USDOT agencies, all too often, to adopt an "avoid at all costs" mentality, under which applicants must avoid *any* use of ***any*** Section 4(f) resource – no matter how insignificant the resource, and no matter how insignificant the impact. In short, Section 4(f) does not just slow the process down and increase project costs; in many cases, it stands in the way of making sound, balanced transportation decisions.

---

[15] See, e.g., Southwest Williamson County Community Association v. Slater, 67 F. Supp. 2d 875 (M.D. Tenn. 1999) (citing *cases).*

In the face of this problem, **FHWA** and FTA have chosen to issue proposed regulations that do virtually nothing to reform Section 4(f). In fact, some proposed "editorial" changes would actually make the Section 4(f) process *more* burdensome and would unnecessarily *increase* litigation risks.[16] AASHTO strongly believes that this is the wrong approach. Reformation of Section 4(f) is urgently needed and should be a *top* USDOT priority - not something that might be addressed at some future date, if ever. Therefore, **AASHTO** strongly recommends that the Section 4(f) regulations be comprehensively revised as an integral part of the overall streamlining effort. If necessary, this process can begin with incremental improvements to the existing 4(f) regulations. However, in the near future, the **USDOT** should begin a comprehensive, inclusive, high-priority effort aimed at fundamentally reforming its Section 4(f) regulations.

A. The Need for Reform: Section 4(f) Has Become a Major Obstacle to Balanced, Common-Sense Transportation Decision-Making.

The basic principles underlying Section 4(f) are, in concept, unobjectionable: (1) land from within certain protected resources - parks, recreation areas, wildlife and waterfowl refuges, and historic sites - should not be used for a transportation project if there is a prudent and feasible way to avoid the use; and (2) if it is necessary to use land from within a protected resource, the project should be developed to minimize harm to that resource.

The problem with Section 4(f) lies in the *interpretation* of these principles. Instead of protecting truly significant **parks** and other important resources, Section 4(f) has been interpreted to protect many properties of questionable significance. Moreover, instead of placing a "thumb on the scale," Section 4(f) has come to be seen, in many cases, as a virtually insurmountable obstacle — one that leaves USDOT agencies with no choice but to elevate the protection of Section 4(f) properties over other environmental, social, and economic goals. Three main factors that have contributed to this gradual re-definition and expansion of Section 4(f)'s requirements: (1) Section 4(f) protects an increasingly broad range of properties; (2) the concept of a "use" has expanded dramatically; and (3) the standard for eliminating an alternative as "imprudent" has been set very high.

1. Section 4(f) Protects an Increasingly Broad Range of Properties.

The category of resources that are protected under Section 4(f) has become increasingly broad. In *Overton Park*, the Supreme Court viewed Section 4(f) as an essential tool for protecting the "few green havens" of parkland remaining in urban areas.[17] Today, Section 4(f) still protects those parks. But it also protects many resources - particularly many historic resources on private land - that may deserve protection, but rarely warrant the same *degree* of protection as treasured urban parks or

---

16 See below at page 30 (discussing the insertion of the word "normally" in Section 1430.111(h)).

17 See below at page 32 (discussing the insertion of the word "normally" in Section 1430.111(h).

historic landmarks. Two main factors have caused the universe of Section 4(f)-protected properties to expand:

- Presumption of Significance for Parks, Recreation Areas, and Refuges. Section 4(f) protects public parks, recreation areas, **and** wildlife **and** waterfowl refuges "of national, state, or local significance." Under **FHWA** regulations, however, all of these resources are *presumed* to be significant, unless the agency with jurisdiction over the resource specifically determines that the entire site (e.g., entire park) is not significant.[18] **As** a result, virtually *every* public park or recreation area, and *every* wildlife of waterfowl refuge, is protected by Section 4(f). There is no longer any realistic opportunity for USDOT agencies to distinguish between "sigruficant" and "insignificant" parks, recreation areas, or refuges. *Everything* is considered to be significant.

- Expanding Definitions of "Historic" Properties. Under FHWA regulations, historic sites are considered "significant" for purposes of Section 4(f) if they are listed in, or eligible for listing in, the National Register of Historic Places.[19] In concept, this approach makes sense. However, in recent years, the eligibility criteria for the National Register have evolved considerably:

  - The National Register now more considers a broader range **of** properties to be historic - including many properties that seem unremarkable, even common, to the average observer. For example, many privatehomes are considered eligible for the National Register as examples of "vernacular" architecture, as long as they are over 50 years old.

  - The National Register now draws much larger boundaries around each historic property, often encompassing dozens of acres within the National Register boundary for a single farmhouse - even though, in m y cases, the lands were sold off long ago.

  - The National Register now increasingly recognizes sweeping "rural historic districts," which can encompass many square miles and include dozens of modem structures.

As a result of these factors, more and more properties are protected by Section 4(f), and many of those properties (particularly historic properties) now include significant areas that have limited value. **As** noted above, these resources still deserve some kind of protection. However, it should be evident that not all of these resources

---

[18] 23 C.F.R. § 771.135(c) ("Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.")

[19] 23 C.F.R. § 771.135(e) ("The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.") Citizens to Preserve Overton Park v. Volpe, 401 **U.S.** 402, 413 (1971).

deserve the same *degree* of protection. To put it simply, not every park is Overton Park, and that fact must be taken into account - somehow - in the application of Section 4(f).

2. The Concept of a "Use" Has Expanded Dramatically.

The concept of a "use" of *Section* 4(f) property also has become defined very broadly, so that it now includes much more than the classic situation in which a highway is constructed directly though a park. Two factors have driven the expansion of the concept of a "use":

- Direct Use - "One Square Inch" Rule. Section 4(f) has been interpreted to apply if a project will directly take even a tiny fraction of an acre from a remote comer of a park of historic site, even if that portion of the property contributes little or nothing to the value of the property as a whole. In other words, *any* direct physical impact, no matter how minor, is considered a use, and therefore triggers the need for a Section 4(f) analysis and approval.

- Judicial Creation of "Constructive Use" Doctrine. Section 4(f) has been interpreted to apply to "constructive" uses - i.e., proximity impacts that "substantially impair" the important features of a resource, even though there is no direct physical taking. *This* interpretation of "use" dramatically expanded the reach of Section 4(f): *instead of protecting lands within the construction limits of a highway, the statute now has the potential to apply to everything within range of the highway's potential noise or visual impact* - a broad swath of land that can stretch for miles in all directions, especially in rural areas. Of course, the existence of a visual or noise impact does not necessarily result in a constructive use. However, the existence of a visual or noise impact creates the *potential* for a constructive use. To determine whether there is actually a constructive use requires analysis, documentation, and coordination -- all of which adds paperwork and delay.

As a result of these factors, more and more impacts are considered (or at least arguably *could* be considered) a "use" of a Section 4(f) property. The range is very broad - from the complete taking of a park or a historic site, to the direct use of a small sliver of land in an obscure location, to the indirect use of a property based on visual or noise impacts. As with different types of properties, common sense suggests that the different types of "uses" should be treated differently. Yet all too often, Section 4(f) is interpreted as a one-size-fits-all statute — each "use" receives the same high level of process and protection, with little regard for the significance of the impact *on* the resource as a whole.

3. The Standard for Eliminating Alternatives as "Imprudent" Has Been Set Very High.

The concept of "prudence" in Section 4(f) has been interpreted to set a veryhigh bar to the use of Section 4(f)-protected resources. The reason for this is familiar: the

Supreme Court held, in *Citizens to Preserve Overton Park v. Volpe,* that an alternative *must* be considered "prudent" unless it involves "truly unusual factors" or impacts of "extraordinary magnitude,'' and presents "unique problems."[20]

Over time, the lower federal courts have interpreted *Overton Park* in a way that actually allows USDOT considerable flexibility. It is now widely accepted, for example, that an alternative can be rejected as imprudent based on a "cumulation of small factors" -- such as traffic, safety, and cost considerations - that are neither "unusual" nor "unique" in the usual senses of those words.[21] In addition, one court has recently held that the *Overton* Park definition of prudence - i.e., unique problems, extraordinary magnitude, unusual factors - applies only when USDOT is evaluating the prudence of total avoidance alternatives, and does not apply when evaluating the prudence of alternatives that simply minimize harm.[22] So, on balance, the current trends in the "prudence" case law are favorable to USDOT.

Despite these favorable court decisions, many USDOT decision-makers remain under the impression that an alternative can be rejected as imprudent **only** if it is exorbitantly expensive or would have devastating social or environmental impacts. Moreover, there remains a great deal of uncertainty about whether it is permissible to take into account factors such as the value of the Section 4(f) resource when evaluating the prudence of an avoidance or minimization alternative. As a result, the USDOT agencies continue to find themselves in the position of applying a one-size-fits-all standard of "prudence" to all Section 4(f) resources, treating minor impacts at the fringes of unimportant properties as the equivalent of the destruction of Overton Park.

---

[20] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402,413 (1971).

[21] See Eagle Foundation v. Dole, 813 F.2d 798,805 (7th *Cir.* 1987). ("A prudent judgment by an agency is one that takes into account everything important that matters. A cumulation of small problems may add up to a sufficient reason to use § 4(f) lands. . . . Even a featherweight drawback may play some role. No feather weighs very much, but a ton of feathers still weighs as much as a 2,000 pound block of lead."); Hickory Neiehborhood Defense League v. Skinner, 910 F.2d 159,163 (4th Cir. 1990) (following Eagle Foundation); Committee to Preserve Boomer Lake Park v. U.S. Department of Transportation, 4 F.3d 1543,1550 (10th Cir. 1993) (following Eagle Foundation).

[22] See Concerned Citizens Alliance v. Slater, 176 F.3d 686,702-703 (3d Cir. 1999) ("We note in this regard that 4(f)(1) sets a very high standard for excluding alternatives that do not use historically sigruficant property. . . . The standard under 4(f)(2) for eliminating alternatives need not be quite so high, since by the time 4(f)(2) is reached, some historically sigruficant property will necessarily be used, as is the case here. We therefore hold that the Secretary must consider every 'feasible and prudent' alternative that uses historically sigruficant land when deciding which alternative will minimize harm, but that the Secretary has slightly greater leeway - compared to a 4(f)(1) inquiry - in using its expertise as a federal agency to decide what the world of feasible and prudent alternatives should be under 4(f)(2). We also look for guidance to caselaw examining what "infeasible or imprudent" means in the 4(f)(1) context.").

4. The Net Effect of Section 4(f) is to Delay and Distort Transportation Decisions.

As Section 4(f) has evolved into a major substantive restriction on USDOT decision-making, it has become the focal point for legal challenges to many projects. As a result, USDOT agencies have developed extremely elaborate internal procedures to ensure that Section 4(f) issues are properly addressed. While understandable, this reaction has *two* major negative impacts on State DOTs' abilities to carry out their mission of providing transportation services in an efficient, environmentally sound manner:

- Delay. The process for obtaining Section 4(f) approval is often extremely lengthy, even for uncontroversial projects. While there are States where this process moves relatively quickly, the vast majority of State DOTs find the Section 4(f) approval process to be a major source of delay.
- Distorted Decisions. The problem with Section 4(f) is not simply one of delay. The "avoid at all costs" mentality also is problematic because it often leads to *bad decisions* – decisions that don't serve the public well, but are seen as the "safe" course of action in terms of Section 4(f) compliance. For example, millions of dollars might be spent to shift a highway away from a privately owned historic property, which itself can be altered or demolished at any time by the property owner.

B. Recommendations for Immediate Action: FHWA and FTA Should Take Steps Now to Clarify the Section 4(f) Regulations and Should Avoid Creating New Problems.

The expansion of Section 4(f) has resulted, to a great extent, from court decisions interpreting Section 4(f), particularly the Supreme Court's decision in *Overton Park*. However, while there is no doubt that court decisions limit USDOT's flexibility to bring about fundamental reforms, there is room within the existing statutes and case law for USDOT to make substantial progress toward reforming Section 4(f). In addition, one "editorial" change in the proposed regulations should be made to avoid making Section 4(f) even more cumbersome and inviting further litigation. In particular, the following actions should be taken:

(1) allow decision-makers to consider the value of a Section 4(f) resource in determining whether it is "prudent" to avoidance or minimize impacts on that resource;

(2) clarify that an "adverse effect" finding under Section 106 does not create a presumption of a "constructive use" under Section 4(f);

(3) remove the newly added word "normally" in Section 1430.111(h), which lists situations in which a constructive use does not occur; and

(4) remove the newly added provision that would extend Section 4(f) protection, at least for constructive uses, to properties that are *not* 50 years old and are *not* historic at the time of the NEPA study, but that *could* be 50 years old and *could* be historic by the time of project construction;

(5) enter national memoranda of understanding to improve coordination between Section 4(f) **and** other statutes – in particular, Section 106 and Section 6(f); and

(6) make better use of programmatic approvals for minor Section 4(f) uses.

1. List Factors that Can be Considered in Determining Whether an Alternative is "Prudent."

A simple but powerful way to restore a degree of common sense to Section 4(f) would be to recognize that there isn't a single, absolute standard of "prudence." Quite simply, there may be *some* situations in which it *is* prudent to spend $10 million, or take 10 homes, or destroy 10 wetlands, to avoid the use of a Section 4(f) resources – but in many other situations, it clearly is *not* prudent to incur those additional costs/impacts in order to avoid a Section 4(f) use.

To enable decision-makers to draw consistent, principled distinctions among these different situations, the regulations should specifically require three factors to be considered in determining whether an avoidance or minimization alternative is "prudent": **(1)** the value of the Section 4(f) resource, **(2)** the nature and extent of the impact on that resource, and **(3)** the likelihood that the resource itself will remain intact over the long term. (See Appendix, # 103.)

Three examples may help to explain how the consideration of these factors would work:

- High Value vs. Low Value. If the resource in question is of great value (e.g., Mount Vernon), then the threshold for rejecting an avoidance alternative as imprudent would be extremely high. By contrast, if the resource in question is an abandoned chicken coop, the threshold for rejecting an avoidance **alternative** would be relatively **low.**
- High Impact vs. Low Impact. If the project would have a devastating impact on the Section 4(f) property (e.g., demolishing a historic house, or making a park completely unusable), the threshold for rejecting an avoidance alternative **would** be extremely high; by contrast, if the project would have a minor impact (e.g., using a small portion of land in a seldom-visited comer of a large farmstead), then the threshold for rejecting an avoidance alternative would be much lower.
- High Protection vs. Low Protection. If the resource in question is legally protected against demolition or alteration (e.g., a publicly owned park, or a historic site owned by a historic trust), then the threshold for rejecting an avoidance alternative would be relatively high; by contrast, if the resource is not protected at all, and there is evidence that in fact it may soon be destroyed

(e.g., a private home that the owner intends to demolish), then the threshold for rejecting an avoidance alternative would be lower.

By itself, this modest regulatory change would not cure all of the problems with Section 4(f). However, by recognizing that Section 4(f) provisions should be governed by basic principles of common sense, this change in the regulations would take a substantial step in the right direction.

2. Specifically Identify Situations Where "Adverse Effect" Does Not Result in "Constructive Use."

Another persistent, but unnecessary, source of uncertainty concerns the relationship between an "adverse effect" under Section 106 and a "constructive use" under Section 4(f). The basic differences between these concepts are already evident in the existing Section 106 and Section 4(f) regulations:

- Definition of Adverse Effect. An "adverse effect" for purposes of Section 106 occurs when a project "*may alter,* directly or indirectly" any of the characteristics of a historic property that qualify it for inclusion in the National Register.[23] This definition sets a relatively low threshold: an adverse effect can be found based on the *possibility* of *any* alteration of a property's historically significant features.

- Definition of Constructive Use. Under Section 4(f), a "constructive use" is defined much more narrowly: it occurs only when a project *will* cause impacts on a property "so severe'' that the property's sigruficant characteristics are "substantially impaired."[24] By its terms, this definition makes it clear that a finding of constructive use requires an impact of much greater *certainty* and *magnitude* than is necessary for a finding of adverse effect.

Recognizing the clear differences in these regulatory defirutions, the USDOT agencies have consistently maintained that a constructive use is "a rarity."[25] Over the past decade, this narrow interpretation of "constructive use" has been repeatedly challenged in court. But since the FHWA issued its Section 4(f) regulations in 1991, the USDOT agencies have *never lost* on the merits of a "constructive use" claim.[26] *Thus, the*

---

23 36 C.F.R. § 800.5(a)(1) (emphasis added).

24 23 C.F.R. 771.135(p)(2).

25 See FHWA, Section 4(f) Policy Paper (Sept. 24, 1987), at 9.

26 See Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 583 (9th Cir. 1998) (upholds FAA's finding of no constructive use of Indian tribal land by noise from aircraft overflights); Laguna Greenbelt, Inc. v. USDOT, 42 F.3d 517, 553 (9th Cir. 1994) (upholds FHWA's finding of no constructive use of bike trails and park by noise and visual impact from adjacent highway); City of Grapevine v. USDOT, 17 F.3d 1502, 1508 (D.C. Cir. 1994) (upholds FAA's finding of no constructive use of historic district by noise from aircraft overflights), cert. denied, 513 U.S. 1043 (1994); Communities, Inc. v. Busey, 956 F.2d 619, 624 (6th Cir. 1992) (upholds FAA's finding of no constructive use of historic district by noise from aircraft

courts have resoundingly approved the USDOT's consisfently strict interpretation of the concept of constructive use. Unfortunately, the USDOT agencies continue to encounter strong opposition – from historic preservation groups, in particular – when making findings of no constructive use. Thus, while the court decisions have been favorable to USDOT, the constructive use issue remains a cause of considerable controversy, litigation risk, and delay.

To address this problem, and to reflect the overwhelming weight of the case law, the USDOT agencies should revise their Section 4(f) regulations to establish more clearly the difference between a constructive use and an adverse effect, as follows: Explicitly find, in the regulations, that an adverse effect does not constitute a constructive use if (i) the section 106 process for the historic resource has resulted in a memorandum of agreement (MOA), containing binding mitigation measures, and (ii) the US. DOT agency determines, and the State Historic Preservation Officer concurs, that the historic resource in question will remain eligible for the National Register following implementation of the project, as long as the mitigation measures in the MOA are carried out. (See Appendix, # 119).

3. Delete "Normally" From Regulation re: When Constructive Use Does *Not* Occur.

Section 1430.111(h) states that a constructive use "normally" does not occur in certain situations, including situations where the Section 106 process has resulted in a finding of "no adverse effect." *The addition of the word "normally" significantly changes the meaning of this provision.* Under the existing regulation, a constructive use *automatically* does not occur in any of the listed situations. Thus, for example, if the Section 106 process results in a finding of no adverse effect, FHWA does not even need to analyze the question of whether there is a constructive use – it can simply rely upon the presumption established in the regulation. By contrast, under the proposed regulation, the decision would not be automatic: FHWA would have to analyze each property for

---

overflights); Sierra Club v. USDOT, 948 F.2d 568, 570 (9th Cir. 1991) (upholds FHWA's finding of no constructive use of park, because park and highway project were jointly planned); Airport Impact Relief v. Wykle, 45 F. Supp. 2d 89,109 (D. Mass. 1999) (upholds FHWA's finding of no constructive use of urban park by noise and visual impacts from highway project); Association Concerned About Tomorrow v. Slater, 40 F. Supp. 2d 823, 835-36 (N.D. Tex. 1998) (upholds FHWA's finding of no constructive use of public park by proposed highway project); Dauphin Borough v. USDOT, 1997 U.S. Dist. LEXIS 15760, at *11 (M.D. Pa. 1997) (upholds FHWA's finding of no constructive use of historic properties by noise and visual impact of proposed highway); Geer v. FHWA, 975 F. Supp. 47, 72 (D. Mass. 1997) (upholds FHWA's finding of no constructive use of urban park by noise and visual impacts from highway project); Northern Crawfish Frog v. FHWA, 858 F. Supp. 1503,1519 (D. Kan. 1994) (upholds FHWA's finding of no constructive use of public park by noise from highway project); Citizens for the Scenic Sevem River Bridge v. Skinner, 802 F. Supp. 1325,1335 (D. Md. 1991) (upholding FHWA's findings of no constructive use of historic properties by visual impacts of new bridge). The only negative outcome in a Section 4(f) constructive use case since 1991 involved the 710 Freeway in Pasadena, where a court ruled that the plaintiffs had raised "serious questions" about the validity of FHWA's finding of no constructive use. See Citv of South Pasadena v. Slater, 56 F. Supp. 2d 1106, 1123 (C.D. Ca. 1999).

which an adverse effect finding was made, and determine whether, in those particular circumstances, a constructive use would occur. Thus, the addition of one word - "normally" - creates significant new paperwork burdens, which in turn cause delay, while also exposing USDOT agencies to additional litigation risks.

Recommendation: AASHTO strongly urges USDOT to delete the word "normally" from Section 1430.111(h). (See Appendix, # 119.)

4. Restore Existing Language re: Properties Approaching 50 Years of Age.

Section 1430.111(h)(4) states that a constructive use may occur, and must be evaluated, if the "property in question is a historic site that would be eligible for the National Register except for its age at the time that the project location is established, and construction of the project would begin after the site became eligible . . . ." By contrast, the current regulation requires a constructive use analysis for properties "close to, but less than" the 50-year age threshold that generally must be met by historic properties. The new language is potentially much broader - rather than covering all properties "close to" 50 years old, it covers *all properties expected to be 50 years old at the time construction begins.* This standard is unworkable, because it makes the scope of the Section 4(f) analysis contingent on the expected timing of construction, which change dramatically over time.

Recommendation: Restore existing language: require constructive use analysis only for properties "close to" the 50-year threshold. (See Appendix, # 119.)

5. Enter Memoranda of Understanding With Other Federal Agencies to Streamline Section 4(f) Compliance.

Outside the current rulemaking process, additional efforts should be made to advance the cause of streamlining Section 4(f) compliance. These efforts should include, as a top priority, the development of memoranda of understanding with other federal agencies to clarify the relationship between Section 4(f) and two other related statutes - Section 106 of the National Historic Preservation Act, and Section 6(f) of the Land and Water Conservation Fund Act.

a. MOU for Section 4(f) and Section 106.

Virtually every historic property protected under Section 4(f) is also protected under Section 106, the federal statute that requires *all* federal agencies to consider the impacts of their actions on historic sites. Given this overlap, AASHTO and others have long advocated that USDOT use the Section 106 process to establish compliance with Section 4(f). Opponents of this approach have argued that Section 106 is merely a procedural statute, and therefore cannot be used to establish Section 4(f) compliance. While it is true that Section 106 is procedural, while Section 4(f) is substantive, this technical legal argument misses the broader point: *if applied properly, the Section 106 process works.* It is not a "paper tiger"; it is a rigorous, balanced process that effectively

achieves the goal of protecting historic properties that could be impacted by a wide range of federal actions. One important means of reforming Section 4(f) is to build on the strengths of the Section 106 process, by developing a national MOU that carefully lays out the relationship between these two statutes. Parties to the MOU should include the USDOT and the Advisory Council on Historic Preservation, the agency responsible for implementing Section 106.

b. MOU for Section 4(f) and Section 6(f).

Like Section 106, Section 6(f) protects some of the resources that also are protected under Section 4(f) — namely, publicly owned parks that were acquired partly or entirely with funds from the federal Land and Water Conservation Fund. Like Section 4(f), Section 6(f) is substantive – it prohibits the use of the protected resource unless certain findings are made, including a finding by the Secretary of the Interior (acting through the National Park Service) that replacement parkland of equivalent value will be provided. The difficulty with coordinating Section 4(f) compliance and Section 6(f) compliance is that project applicants sometimes find themselves in a catch-22: they cannot obtain Section 4(f) approval for the use of parkland until they have obtained Section 6(f) approval, but they cannot obtain Section 6(f) approval until they obtain Section 4(f) approval. This confusing situation could easily be remedied through an MOU that defines common procedures for complying with Section 4(f) and Section 6(f). Parties to the MOU should include the USDOT and the National Park Service, the agency responsible for implementing Section 6(f).

6. Make Better Use of Programmatic Approvals to Streamline Section 4(f) Compliance.

The proposed regulations clarify that the USDOT agencies do, in fact, have authority to grant programmatic Section 4(f) approvals. This expanded provision regarding programmatic Section 4(f) approvals is clearly a step in the right direction, because programmatic approvals hold out significant potential to reduce processing delays for large numbers of projects that have *de minimis* impacts on Section 4(f) resources.

However, in order to realize the benefits of this provision, the USDOT agencies must vigorously exercise their programmatic approval authority. Specifically, USDOT should (1) actively seek out new opportunities, in cooperation with the State DOTs, to streamline the Section 4(f) process by issuing new programmatic approvals, on a national or State level, and (2) ensure that the procedures required in the programmatic approvals are themselves streamlined – it makes no sense to grant a programmatic approval, if that approval requires virtually the same level of "process" for each project that would have been required in the absence of the programmatic agreement.

C. Recommendations for Comprehensive Reform: FHWA and FTA Should Immediately Initiate a High-Priority Section 4(f) Reform Effort.

The incremental changes recommended above can and should be made immediately, if and when the proposed regulations are finalized. However, these incremental changes will not be sufficient by themselves to overcome well-entrenched attitudes and practices regarding Section 4(f), nor will they transform Section 4(f) compliance into a fully integrated component of a balanced, streamlined environmental review process. Therefore, in addition to making these changes, FHWA and FTA also should immediately initiate a high-priority effort to achieve a complete overhaul of the Section 4(f) regulations.

V. Allowing a Transition Period

Section 1420.105(a)(3) of the proposed regulations states that "NEPA documents accepted or prepared by the U.S. DOT agency after the effective date of this part shall be developed in accordance with this part." This means, in essence, that *no* provision has been made for studies already in progress, which could be subject to onerous new requirements under these regulations.

Recommendation.

1) Postpone the effective date of the regulations for two years after the regulations become final, in order to provide sufficient time for State DOTs to become accustomed to the new regulations before they take effect, if the regulations are adopted as proposed. (See Appendix, # 3.)

2) Include a grandfather clause in the regulations, which would cover all projects for which a NEPA study document (Draft or Final EIS, EA) had been released for public comment prior to the effective date. (See Appendix, # 3.)

3) If the changes recommended by AASHTO are adopted, a shorter transition period or different grandfather clause may be appropriate; however, under any circumstances some transition period and grandfather clause should be included in the final rule.

VI. Guidance to Be Issued

One important factor affecting the transition period is the availability of guidance. Broadly speaking, AASHTO supports the use of guidance over the use of prescriptive regulations. However, AASHTO also is concerned that excessively prescriptive guidance can be even worse than regulations - because guidance, unlike regulations, is not required to go through normal notice-and-comment process. AASHTO's concerns are well-expressed in a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, which held that:

> The phenomenon . . . is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards, and the like. Then as years pass, the agency issues circulars, or guidance, or memoranda, explaining, interpreting, defining, and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. . . . An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretive rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." . . . The agency may also think there is another advantage – immunizing its lawmaking from judicial review.[27]

Recommendation.

1) Develop any guidance cooperatively with the State DOTs and MPOs, as well as other stakeholders.

2) Issue any guidance in the form of best practices and informational materials, not prescriptive requirements that have the effect of regulations.

* * * END***

[27] Appalachian Power Co. v. U.S. EPA, 208 F.3d 1015, 1020 (D.C.Cir. 2000).

Introduction

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to comment on the proposed planning regulations issued by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) on May 25, 2000. These comments consist of three parts: (1) an executive summary of AASHTO's position on the proposed regulations, (2) an in-depth explanation of AASHTO's views on six major issues of concern, and (3) detailed section-by-section comments, which are provided in a table attached to this document. For the reasons explained below, work on these proposed regulations should be suspended, the relevant committees of Congress should hold oversight hearings, and the USDOT should comprehensively revise the proposed regulations and issue a revised notice of proposed rulemaking, before proceeding with a final rule.

Separately, AASHTO is also submitting comments on two sets of regulations that were issued by FHWA and FTA concurrently with the proposed planning regulations: (1) the proposed National Environmental Policy Act (NEPA) regulations, Docket No. 99-5989, and (2) the proposed regulations governing the development of a national architecture for Intelligent Transportation Systems (ITS), Docket No. 99-5899. Where appropriate, these comments on the planning regulations contain cross-references to AASHTO's comment on the proposed NEPA and ITS regulations.

Executive Summary

Great progress has been made in recent years, on the State and metropolitan levels, toward balancing the many competing demands on transportation planners - from expanding public involvement, to improving traffic modeling techniques, to addressing increasingly complex air quality requirements. In all of these areas, State DOTs are committed to continuing their efforts to make the transportation planning process more efficient, inclusive, and effective. Because of this commitment, State DOTs have deep concerns about the proposed statewide and metropolitan planning regulations. Instead of providing a catalyst for innovation, the proposed regulations **would make the planning process more** bureaucratic, document-driven, and inflexible. In addition, rather than promoting consideration of the public interest as a whole, the proposed regulations would make the process increasingly beholden to the demands of organized special-interest groups. To encourage continued improvements in the planning process, while promoting transportation decisions that serve the public interest as a whole, major changes are needed in six areas:

1) MIS Replacement. The proposed regulations seek to improve the linkage between the planning process and the project-development (NEPA) process, while complying with Congress' directive to eliminate the major investment study (MIS) as a separate requirement. Unfortunately, the regulations have two fundamental flaws: (1) they replace the MIS with an even broader mandate that applies to *all* metropolitan projects - a direct contradiction of TEA-21, and (2) they do not provide an effective framework for

making planning-level decisions that can actually be accepted in the **NEPA** process. To address these problems, **AASHTO** recommends making the MIS-type studies completely optional, while creating stronger incentives for the MPO and the project sponsor to undertake project-specific studies in the planning process.

2) Statewide Planning Process Changes. The proposed regulations would make several important changes in the statewide planning process, which taken together would make the process more paperwork-driven, more adversarial, and more cumbersome. The regulations should be revised to conform to statutory definitions and to preserve existing institutional relationships in the planning process.

3) Title VI and EJ. The proposed regulations weave together Title VI requirements and the environmental justice ("EJ") executive order. **As** drafted, the regulations present major conceptual, practical, and legal problems that are likely to escalate dramatically over **time.** The regulations should be revised to conform to the existing regulatory framework, **and,** if any change is made, the regulations should be extensively revised to **(1)** maintain a clear distinction between Title VI and EJ and (2) maintain consistency with the terms of the EJ executive order.

4) Conformity. The proposed regulations make the transportation conformity process even less flexible, and more bureaucratic, which is both unnecessary **and** contrary to ***the*** goals of streamlining. Most importantly, the regulations completely eliminate STIP **and** TIP extensions in nonattainment and maintenance areas, which means that States cannot proceed even with exempt projects during a **conformity** lapse unless they first obtain **USDOT** approval of an interim TIP. AASHTO supports preserving the flexibility that exists within the current regulatory framework, and, if any change is made, implementing the new requirements in a way that minimizes disruption of existing practices.

5) Transition Time. The proposed regulations contain no transition time or grandfather clause, despite the fact that (a) the regulations would impose significant new requirements and (b) there are major projects in progress in virtually every State, **which** would have to be delayed - perhaps greatly - in order to achieve **compliance** with **the** new regulations if the regulations took effect immediately. **AASHTO** recommends that the effective date of the proposed regulations be delayed for at least **two** years, if the regulations are adopted as proposed. If the changes recommended by AASHTO ***are*** adopted, a shorter transition period may be appropriate; however, under any circumstances some transition period should be included in the final rule.

6) Guidance to be Issued. The preamble to the proposed regulations indicates that guidance is to be issued in numerous areas. On all issues where guidance is to be issued, AASHTO strongly urges that (1) the USDOT agencies provide an opportunity for State DOT, MPO, and transit operator involvement before the guidance is actually issued, and (2) the guidance be issued in the form of best management practices, rather than prescriptive requirements.

In light of these concerns, AASHTO has concluded that the proposed regulations would significantly impair the States' abilities to continue carrying out their transportation missions. The planning programs would become more complex, more bureaucratic, more conflict-oriented, and more litigious. In short, rather than fixing the problems with the current system, the proposed regulations would make the problems worse. For that reason, AASHTO has concluded that, for now, the goals of **TEA-21** are more likely to be advanced by *temporarily retaining the existing planning regulations* - with all their flaws -- **than** by adopting the new regulations proposed by ***USDOT.*** Of course, **AASHTO** still believes **the** regulations need to be updated to reflect the statutory changes implemented in **TEA-21.** Therefore, AASHTO recommends that:

(1) work be suspended on these proposed regulations, in their current form;

(2) the relevant committees of Congress hold oversight hearings; and

(3) after such hearings have been held, the **USDOT** comprehensively revise the proposed planning regulations and then issue a revised notice of proposed rulemaking, before proceeding with a final rule.

Table of Contents

Analysis of Maior Issues

I. MIS Replacement; Linkage Between Planning Process and NEPA

One of the over-arching objectives of the proposed regulation is to achieve a better linkage between the planning and project-development processes. AASHTO strongly supports this objective, and State DOTs have been working on a variety of innovative initiatives to achieve it. For example, Washington State, Florida, North Carolina, and other States are currently working on "reinventing" the NEPA process, by initiating project-specific studies in the planning process. However, States that have attempted to achieve reforms in this area have all encountered the same problem: even when considerable efforts are devoted to planning level studies, the results of those studies are rarely given any significant weight in the NEPA process. As a result, rather than reducing the total amount of time needed to make a decision, additional efforts in the planning stage make the process *longer*. In effect, the States end up studying the same issues twice. And rather than increasing the public's confidence in the planning process, their efforts can undermine it, by feeding the perception that the planning process is a waste of everyone's time.

Given these experiences, AASHTO's members were hopeful that the planning regulations would genuinely improve the linkage between the planning and project-development processes. Unfortunately, the regulations would make the existing process worse, because: (1) they replace the major investment study (MIS) requirement with an even broader requirement that applies to *all* metropolitan projects, in direct violation of statutory mandate; (2) they do not provide sufficient assurances that planning-level decisions will be accepted in the NEPA process; (3) they employ ambiguous terms that could lead to the expansion of planning-level requirements; and (4) they fail to clarify an important issue concerning the project "phase" that needs to be included in the plan and TIP before NEPA process completion.

A. The MIS Would Be Replaced By an Even Broader Mandatory Requirement, in Direct Violation of TEA-21.

Section 1308 of TEA-21 called for the elimination of the (MIS) as a separate requirement, and the integration of that requirement, "as appropriate," into the analyses required in the transportation planning and project development processes.[1] In requiring this reform, Congress included an important caveat: the last sentence of

[1] **TEA-21,** Section § 1308 ("The Secretary shall eliminate the major investment study set forth in section 450.318 of title 23, Code of Federal Regulations, as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analyses required to be undertaken pursuant to the planning provisions of title 23, United States Code, and chapter 53 of title 49, United States Code, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) for Federal-aid highway and transit projects. The scope of the applicability of such regulations shall be no broader than the scope of such section.")

Section 1308 provides that *"The scope of the applicability of such regulations shall be no broader than the scope of such section."*[2]

Notwithstanding this clear statutory mandate, the proposed replacement for the MIS requirement does exactly what Congress ordered USDOT *not* to do: it imposes a new requirement that applies not only to the "major investments" covered by the former MIS requirement (as contained in **23 U.S.C.** § 450.318), but to *all* metropolitan projects, *regardless* of size, environmental impact, or cost. This approach clearly and directly violates the express directions of Congress, and for that reason the regulations cannot legally be issued in their proposed form.

Recommendation:

1) At a Minimum, Comply with Plain Language of TEA-21. At the very least, the proposed regulation must be revised to conform to the plain language of Section 1308 of **TEA-21,** which requires **USDOT** to ensure that any new requirements shall apply no more broadly than the pre-existing MIS requirement. (See Appendix, # **143.**)

B. The MIS-Replacement Provisions Would Not Provide a Reliable Means for Making Planning-Level Decisions That Will Be Accepted in the NEPA Process.

The decision to impose mandatory requirements on *all* metropolitan projects also reflects a basic misunderstanding of the reasons that the MIS failed. The problem with the MIS requirement was not that the regulations failed to impose sufficiently clear mandates. The problem was more fundamental: all too often, after the conclusion of a lengthy MIS, the federal agencies would decide to "start over" in the NEPA process, treating the MIS as little more than a source of raw data - not as a decision-making tool. This basic shortcoming of the MIS process left the public (not to mention MPOs and the States) frustrated and confused, damaging the credibility of the entire transportation planning and project development process.

The underlying reason that the **MIS** failed was not simply that the regulations were overly prescriptive and inflexible. Rather, the problem was ***that*** the *MIS* ***did not*** *provide a reliable mechanism for making decisions in the* ***planning*** *process that would actually be accepted* ***in*** *the project development (NEPA) process,* The remedy for this flaw in the old MIS requirement is not to impose new mandates on the planning process. New mandates assure only more paperwork, higher costs, and slower project delivery. The way to make real progress toward curing the defects of the MIS is to *provide* ***incentives*** for the development of an *optional* process that actually delivers on the promise of the MIS - that is, a process capable of producing planning-level decisions that are consistently accepted as the starting point for NEPA studies. If States and MPOs find that the decisions made in the planning process are actually being accepted in the

[2] Id.

NEPA process, this optional process will become more widespread and eventually will become the norm. On the other hand, if the same old pattern (study it in the MIS, study it again in the EIS) afflicts the new optional process, then State DOTs and MPOs will properly abandon it and seek out other ways to improve the linkage between planning and project development.

To make progress toward this goal, the regulations must specifically address two key decision points: **(1)** the "front-end" decision, in the planning process, about whether to undertake MIS-type analyses at all, and about the level of detail of those studies; and **(2)** the "back-end" decision, in the **NEPA** process, about whether to accept the results of the planning studies. These **two** decisions are related as follows:

- Front-End Decision. In the planning process, MPOs and the project sponsor (i.e., the State DOT or transit operator) must make a decision about whether to undertake MIS-type analyses of particular corridors or projects - i.e., whether to begin developing a purpose and need statement, identifying alternatives, and then evaluating those alternatives. In deciding how much time and money to invest in this effort, the MPO **and** project sponsor need to make a judgment about whether the effort will pay off - that is, whether the effort will result in a decision that is actually accepted in the NEPA process. Unfortunately, in most cases, *the MPO and project sponsor are asked to make this decision without receiving any reciprocal commitment from the agencies that will be making the back-end decision in the NEPA process - namely, USDOT and the federal resource agencies.* Without **such** a commitment, it is difficult to justify making any significant investment in the planning-level studies.
- Back-End Decision. In the NEPA process, the USDOT agencies - and, on some issues, federal resource agencies with permitting authority - decide whether any of the decisions made in the planning process will be accepted as the starting point for the NEPA study. Because their involvement in the planning process is generally minimal, the USDOT agencies **and** federal resource agencies **often** decide to "start **over**" in the **NEPA** process, rather than accepting decisions made in the planning process. The rejection of the planning-level decisions in the NEPA process makes MPOs and project sponsors even more reluctant to undertake extensive analysis **of** particular projects or corridors in future planning-level studies.

As this discussion indicates, the problem with the MIS can be traced to the lack of a connection between the front-end decision made by the MPO and project sponsor, and the back-end decision made by the USDOT and federal resource agencies. Until this basic disconnect is fixed, efforts to improve the linkage between the planning and NEPA processes will **only** reproduce the dysfunctional results of the MIS.

Recommendations: AASHTO recommends that the requirements in Section 1420.318(c) be converted into entirely optional procedures, which provide *incentives* for

MPOs and project sponsors to undertake extensive analyses at the planning-level. To be effective, these incentives must address both the "front-end" decision point and the "back-end" decision point, as follows:

1) Using Discretion Allowed by **TEA-21,** Make Planning-Level Studies Completely Optional. Section 1308 of **TEA-21** directs USDOT to integrate MIS requirements "as appropriate" into the planning and NEPA processes. This language leaves the USDOT with the flexibility to make planning-level studies optional procedures. The USDOT **should** take advantage of this flexibility, because *only by making the planning-level studies completely optional will the USDOT give all participants - including the resource agencies and the USDOT agencies themselves - sufficient incentives to make those studies effective.* (See Appendix, # **143-144.)**

2) Require USDOT Agency to Participate in *Planning,* If Requested by the MPO and Proiect Sponsor. The regulations should require the USDOT agency to participate in the planning process, to the extent that such involvement is requested by the MPO and the project sponsor. (See Appendix, # **146.)** The regulations should:

a. Require **USDOT** agencies to participate, if requested by the MPO and project sponsor, in developing the scope for the planning-level study;

b. Require the USDOT agency, if requested by the MPO and project sponsor, to identify any additional elements that should be added to the scope of work to ensure that the USDOT agency will be able to approve the results of the planning-level study as the starting point for the NEPA process; and

c. Require the USDOT agency, if requested by the MPO and project sponsor, to enter into a Memorandum of Understanding documenting the agencies' agreement that, if the planning-level study is executed in accordance with the approved scope of **work,** the results of that study will be accepted by the USDOT agency as the starting point for the NEPA study.

d. Require the USDOT agency, if requested by the MPO and project sponsor, to the lead role in negotiating a Memorandum of Understanding with other federal agencies to ensure their active participation in the planning-level study.

3) Establish Certification Process Through Which Planning-Level Decisions Can Be Used to Establish Scope of Proiect-Level **NEPA** Study. The **NEPA** regulations should establish a certification process though **which** the project sponsor can certify decisions to the USDOT agency for approval,

asking the USDOT agency to adopt those decisions as the starting point for the NEPA process. (See AASHTO NEPA Comments, Section **I.A.,** and Appendix to **NEPA** Comments, # 18.)

a. The process would be initiated if the project sponsor certified to the USDOT agency that certain decisions reached in the planning process were adequately supported and therefore should be incorporated into the **NEPA** process.

b. If the project sponsor certifies conclusions to the USDOT agency, the **USDOT** agency would have three options: **(1)** unconditionally approving the certification, in **which** case they would be incorporated into the NEPA process, **(2)** conditionally approving the certification, specifying additional steps that would need to be taken before the conclusions could be accepted, or **(3)** disapproving the certification, in which case the certified conclusions would not be incorporated into the NEPA process.

C The USDOT would be required to make its approval, conditional approval, or disapproval in writing, based upon the four criteria in Section 1420.201(c). The **USDOT** would be required to transmit all such findings to the project sponsor.

d. If the **USDOT** agency disapproves a certification, rather than approving or conditionally approving it, its decision would have to be issued by the FHWA or FTA headquarters office.3

4) Establish Certification Process Through Which Planning-Level Decisions Can Be Used to Establish Applicability of CE for R-O-W Acquisition. In addition to the certification process described in paragraph (2), the **NEPA** regulations **should** provide an alternative process through which the project sponsor may obtain the approval of the **USDOT** agency to proceed **with federally funded right-of-way** acquisition. This alternative certification process would enable the project sponsor to proceed with federally funded right-of-way acquisition, even if the project sponsor is not yet prepared to initiate the **NEPA** process for the project itself. This process would be identical to the process described in paragraph (2), except that its sole purpose would be to support a finding by the USDOT agency, based on the planning-level studies, that the conditions for the categorical exclusion described in 1420.311(d)(16) have been satisfied - namely, that **(1)** the proposed project has been included in the applicable transportation plan and (2) the proposed right-of-way acquisition for that project will not limit the consideration of alternatives in a future NEPA

3 See AASHTO Comments on proposed **NEPA** regulations, **USDOT** Docket No. 5989, **for** specific proposed language for inclusion in those regulations, consistent with the recommendations in these comments.

study for that project.[4] (See AASHTO **NEPA** Comments, Section **I.A.,** and Appendix to NEPA Comments, # 18.)

5) If MIS-Type Studies Are Not Completely Optional, Limit Requirement to "Maior Projects." If the requirements in Section 1410.318(c) are not converted into optional procedures, the regulations still should limit their applicability to "major projects," while allowing them to be used (at the discretion of MPOs) as optional procedures for all other projects. Major projects should be defined to include only those that meet *all* of the following criteria:

   a. Federal share of project is $100 million or more,[5] and/or length is 5 miles or more;

   b. Project type is fixed-guideway transit or limited-access highway;

   c. Project adds new capacity; and

   d. USDOT and resource agencies have entered into Memorandum of Understanding **(MOU)** for the project, documenting the agencies' agreement that, if the planning-level study is executed in accordance with the approved scope of work, the results of that study will be accepted by the **USDOT** agency as the starting point for any **NEPA** study **for** the project.

C. The Proposed Regulations Could Be Interpreted to Require Increasingly Complex Planning-Level Studies, Like the MIS.

Section 1410.318(a) lists four products that the planning process "shall" provide to the **NEPA** process: **(1)** "[a]n identification of an initial statement of purpose and need for transportation investments," **(2)** "[f]indings and conclusions regarding purpose and need, identification and evaluation of alternatives studied in planning activities (including but not limited to the relevant design concepts and scope of the proposed **action), and identification of the** alternative included in the plan;" (3) "[a]n identification of the planning documents that provide the basis for paragraphs (a)(1) and (a)(2) of this section;" and (4) "[f]ormal expressions of policy support or comment by the planning process participants on paragraphs (a)(1) **and** (a)(2) of this section."

Section 1410.318(b) then goes on to list the "sources of information" that "shall be utilized" to satisfy the requirements of paragraph (a), and allows these sources of information to be developed "at a level of detail agreed to by the MPO, the State DOT, and the transit operator." These sources of information include: **(1)** "[i]nventories of social, economic and environmental resources and conditions;" **(2)** "[a]nalyses of

---

[4] **See AASHTO Comments on proposed NEPA regulations, USDOT Docket No. 5989, for specific proposed language for inclusion in those regulations, consistent with the recommendations in these comments.**

[5] **The** $100 **million threshold is taken from 49** C.F.R. **§ 633.11.**

economic, social and environmental consequences;" **(3)** "[e]valuation(s) of transportation benefits, other benefits, costs, and consequences, at a geographic scale agreed to by the planning participants, of alternatives, including but not limited to the relevant design concepts and scope of the proposed action;" and (4) "[d]ata and supporting analyses to facilitate funding related decisions by Federal agencies where appropriate or required, including but not limited to 49 **CFR** part 611."

These requirements are relatively broadly defined and thus, on the surface, might appear to leave State DOTs with substantial discretion to decide how to proceed – as the **USDOT** agencies apparently intended.[6] However, in attempting *to* assess how these requirements might be interpreted, the experience with the MIS is instructive: there, too, the initial regulations contained broadly-worded provisions that eventually came to be interpreted as requiring an onerous, lengthy study.

The overall problem with Sections 1410.318(a)-(b) is that they are **so** open-ended that they easily could end up re-creating the burdens of the **MIS,** which would then be imposed on all metropolitan projects. However, two specific provisions raise particular concerns: **(1)** references to "purpose and need," and (2) decisions to **be** made by "planning participants" about the level of detail.

1. "Purpose and Need" in Planning Process.

Section 1410.318(a) requires the planning process to provide the **NEPA** process with an "initial statement of purpose and need" and "findings and conclusions regarding purpose and need."[7] The proposed regulations define "purpose and need," for purposes of the planning regulations, as "the intended outcome and sustaining rationale for a proposed transportation improvement, including, but not limited, to mobility deficiencies for identified populations and geographic areas." The preamble to the proposed regulations allow two types of flexibility in developing this purpose-and-need statement: **(1)** developing a single purpose-and-need statement "for transportation improvements normally grouped (not specified individually) in a plan" and **(2)** developing a "programmatic statement of purpose and need that identifies *the* basis for investing resources in a given transportation area **such** as **safety** *or* pavement resurfacing."

Despite these assurances of flexibility, AASHTO is concerned that the terminology used in the planning regulations – i.e., the use of the phrase "purpose and need statement" – will make it difficult to maintain a distinction in practice between a "planning purpose and need statement" and a **"NEPA** purpose and need statement."

---

[6] Preamble to proposed **23 C.F.R.** § 1410.318(c) ("The ability to streamline the planning and environmental relationship **is** dependent, in part, on appropriate decisions made by the planning participants. They can choose to develop a rigorous basis **for** establishing transportation purpose and need, identifying alternatives **for** evaluation, and assessing these alternatives through the planning process. Alternatively, they can choose to apply minimal analytical techniques.").

[7] Proposed 23 **C.F.R.** § 1410.318(a).

At the very least, the use of the same term to describe two very different things is likely to be confusing to agencies and the public. In addition, the planning process may come under increasing pressure to develop a robust, NEPA-like purpose and need statement, for an ever-wider array of projects.

Recommendation:

1) Use a more general term, such as "project objectives" or "project justification," rather than "purpose and need," as the defined term in Section 1410.104. If the term "purpose and need" is used at all in the planning regulations, it should be used only with the same meaning given to that term in the NEPA process. (See Appendix, # 29 and 76.)

2. "Planning Participants" Deciding Level of Detail.

Section 1410.318(b) would give the "planning participants" a critical role in deciding the level of detail of the study: it would require "[e]valuation(s) of transportation benefits, other benefits, costs, and consequences, *at a geographic scale agreed to by the planning participants,* of alternatives, including but not limited to the relevant design concepts and scope of the proposed action. . . ." This language, like similar provisions in the statewide planning process, is objectionable because it vests substantial decision-making power in an undefined group of "participants," which is likely to lead to confusion and conflict.

Recommendation:

1) Delete the phrase "at a geographic scale agreed to by the planning participants," or replace with "at a geographic scale determined by the MPO and the project sponsor." (See Appendix, # 144.)

D. The Proposed Regulations Should Clarify the Fiscal Constraint Requirements That Must Be Satisfied by the End of the NEPA Process.

Section 1410.318(g) of the metropolitan planning regulations states that the NEPA process may not be completed unless "the proposed project is included in a plan and *the phase of the project for which Federal action is sought* is included in the metropolitan TIP." The metropolitan plan and TIP, in turn, are subject to fiscal constraint requirements. As a result, the obligation to include a project in the conforming TIP means that *the NEPA process cannot be completed for a project unless and until the fiscally constrained TIP includes sufficient finds to pay for the "phase" of the project that is to be included in the TIP.*

For many projects, this requirement will be met by including the entire project studied in the NEPA document in the plan and in the TIP prior to completion of the NEPA process. However, there are a few projects for which it is impossible to include the entire construction project in a fiscally constrained metropolitan plan and TIP. For example, some NEPA studies address large-scale, corridor-level projects. Completing a

NEPA study on this scale is consistent with NEPA's objectives of ensuring **an** analysis of a broad range of alternatives at an early stage of project development. However, if a USDOT agency and **a** State DOT choose to prepare an EIS on this broad scope (or are required to do so by NEPA), it should be possible to complete that **NEPA** process without demonstrating the availability of full funding in the **TIP** to complete construction of the entire project.

The proposed metropolitan planning regulations appear intended to allow this flexibility, because they require only that plan and TIP include the *"phase of the project* for which Federal approval is sought." However, the regulations do not define "phase of the project," nor are these words explained in the preamble. As a result, there could be some confusion about what needs to be included in the conforming plan **and TIP** in order to complete the NEPA process.

On a related point, Section 1410.218(e) of the statewide planning regulations states that the NEPA process may not be completed "unless the proposed *project action* is included in a STIP." This provisions seems to require that the entire action – not just the "phase" included in the **TIP** – must be included in the **STIP** prior to **NEPA** process completion. If interpreted in this way, the statewide planning regulations would provide even less flexibility than the metropolitan planning regulations, making it even more difficult to reconcile NEPA requirements and fiscal constraint requirements for large-scale projects.

Finally, it is unclear **why** the planning regulation requires inclusion of **a** project in a **STIP** or TIP **prior** to the end of the NEPA process in ***attainment*** areas. Clearly, for non-attainment and maintenance areas, this requirement has its basis in the conformity regulations.[8] Also, as a matter of good planning practice, it generally is preferable to include a project in the **STIP** or TIP before completing the NEPA process. However, there is no apparent statutory basis or policy reason for *requiring* that **all** projects in an attainment area be included in a STIP/TIP prior to NEPA process completion. By imposing this requirement, the regulations needlessly create additional rigidity in the planning process, particularly for rural **States** with **few air** quality problems.

Recommendation:

1) Revise Section 1410.104to include a definition of "phase of the project" (or "project phase"). (See Appendix, # 30). The regulations should define this term to include:

    a. project development studies, in accordance with NEPA and related statutes;

[8] *See* 40 C.F.R.. § 93.107 ("Should the **NEPA** process result in a project with design concept and scope significantly different **from that** in the transportation plan or **TIP,** the project **must** meet the criteria in Secs. 93.109 through 93.119 for projects not from a TIP before NEPA process completion.")

b. project corridor or mode selection, following the first tier of a tiered NEPA process;

c. right-of-way acquisition, for the entire project or for a discrete project section or sections;

d. final design, for the entire project or for a discrete project section or sections;

e. construction, for the entire project or for a discrete project **section** or sections.

2) Revise Section 1410.218(e) of the statewide planning regulations to conform to Section 1410.318(g) of the metropolitan planning regulations, so that both provisions allow the NEPA process to be completed as long as the STIP/TIP, respectively, includes the *"phase of the project* for which Federal approval is sought." (See Appendix, # 80 and 149.)

3) Revise Section 1410.218(e) and 1410.318(g) to apply **only** to projects in nonattainment and maintenance areas, not to projects located in attainment areas. (See Appendix, # 80 and 149.)

II. Statewide Planning Process Changes

The proposed regulations include numerous changes to the procedures used in the statewide planning process. Individually, these changes might **seem** minor - after all, most of them involve just a few words. But taken together, they would significantly alter well-established institutional relationships among States and other governmental entities in the statewide planning process. This disruption **of** the statewide planning process would be contrary to the intent of Congress, which deliberately decided in **TEA-21** to *preserve* existing institutional relationships *in* the planning process. Moreover, rather than improving the planning process, the changes would tend to make it more bureaucratic and conflict-ridden, **and** less responsive to the needs of the communities it is intended to serve.

There are three main areas of concern: **(1)** changes in "consultation" requirements, (2) new "coordination" requirements, and **(3)** new provisions vesting decision-making authority in an undefined group of "planning process participants."

A. New "Consultation" Requirements Are Inconsistent with TEA-21 and Undermine Effective Planning.

As defined in the current planning regulations, "consultation" means "that one party confers with another identified party **and,** prior to taking action(s), considers that party's views."[2] Working against the backdrop of this definition, Congress decided in **TEA-21** to make some modest adjustments to the statewide planning process: it

[2] 23 **U.S.C§** 450.104.

established a specific statutory requirement for "consultation" with Indian tribes, federal land managing agencies, and non-metropolitan local officials.[10] In doing so, Congress deliberately left each State with the discretion to decide *how* to consult with their political subdivisions and other governmental entities. In fact, Congress specifically provided that USDOT agencies shall have no role in approving or disapproving the States' method for consulting with specified non-metropolitan local officials.[11]

Despite this clear direction from Congress, the **USDOT** agencies have proposed regulations that **would** significantly disrupt existing consultation procedures. First, the regulations would re-define the concept of consultation, inserting new requirements that were not contemplated by Congress when it passed TEA-21.[12] By itself, the re-definition of consultation might be unobjectionable. However, in conjunction with this change, the proposed regulations make three other significant changes: they would **(1)** give USDOT agencies the power to review **and** veto States' consultation procedures for non-metropolitan local officials; (2) sigruficantly expand the categories of local officials who must be consulted; **and (3)** give local governments, Indian tribes, and federal lands agencies the power to hold up the planning process - and thus gain leverage over project decisions - simply by refusing to approve the State's procedures for consulting with those entities.

1. USDOT's Ability to Veto consultation Procedures.

Section 1204 of TEA-21 provides that the USDOT *"shall not review or approve"* the States' processes for consultation with non-metropolitan local officials. Despite this clear statutory direction, Section 1410.212(a)(2) of the proposed regulations states that "local official participation will be among the issues considered by the FHWA and the **FTA** in making the transportation planning finding called for in § 1410.222(b)." Because Section 1410.222 allows USDOT agencies to deny approval of the **STIP** if the State's planning process is found to be inadequate, this provision effectively allows USDOT

---

[10] It is important to note that these "consultation" requirements were largely intended to require a continuation of existing practices, not to establish new requirements. Prior to TEA-21, States were required to consult with non-metropolitan local elected officials by regulation; Congress simply made the requirement statutory. See 23 **C.F.R.** § 450.208(a)(5). In addition, prior to TEA-21, States were required to "cooperate" with Indian tribes; Congress downgraded this requirement to "consultation" to make the relationship between States and tribes reciprocal. See ISTEA, § 1025. Finally, with regard to land management agencies, consultation **was** required with many if not all of them by regulation prior to TEA-21; Congress formalized and incrementally expanded this practice by requiring consultation with federal land management agencies. See 23 C.F.R. § 450.210(a).

[11] See Section 1204(d) of TEA-21.

[12] Under the proposed new definition, consultation now means "that one party confers with another party, ***in accordance with an established process,*** about an anticipated action and then ***keeps that party informed about actions taken."*** In concept, this new definition appears to simply recognize what States are already doing in their consultation procedures. However, as with all new language, the potential exists **for a** much more sweeping interpretation. **If** the new language **is** interpreted broadly, to require frequent, extensive contacts with local officials, it could further complicate State DOTs' efforts to obtain the consent of local governments and others to specify consultation procedures, as § 1410.212(a) and (c) appear to require. Therefore, AASHTO recommends preserving the existing definition of "consultation." (See Appendix, # **7.**)

agencies to do precisely what Congress intended to prohibit - exercising direct legal control over each State's procedures for consulting with local governments.

Recommendations:

1) Revise Section 1410.212(a) so that FHWA and **FTA** are specifically *prohibited* from considering consultation procedures for non-metropolitan local officials as part of the certification review process. (See Appendix, # 58.)

2. Additional Local Officials Who Must be Consulted.

Section 1204 of TEA-21 carefully defines the types of non-metropolitan local officials who must be consulted by States during the statewide planning process. Section 1204(d) requires States to consult with "local elected officials representing units of *general purpose local government."*[13] The proposed regulations expand this requirement so that it also includes "elected officials *for special transportation and planning agencies, such as economic development districts and land use planning agencies."* Section 1204(e) and 1204(f) of **TEA-21** require States to consult, when developing transportation plans and programs, with "affected local officials *with responsibility for transportation."*[14] The proposed regulations expand this requirement, so that it also includes local officials with "jurisdiction/responsibility for . . . *other community development actions that impact transportation."* Thus, in each instances where Congress required consultation with local officials, the proposed regulations essentially re-write the requirement to include *additional* officials not mentioned by Congress.

Recommendation:

1) **Conform to** statutory definitions of "non-metropolitan local officials," by eliminating references to local officials not referenced in the statute. (See Appendix, # 27.)

2) Clarify that "officials with responsibility for transportation" include **only those** officials responsible for providing transportation services or facilities. (See Appendix, # 27.)

3. Need to Negotiate Over Consultation Procedures.

Section 1204 of **TEA-21** requires "consultation" with non-metropolitan local officials, federal lands agencies, and Indian tribes as part of the statewide planning process. To implement this requirement, Section 1410.212(a) of the proposed regulations requires each State to have a "documented and cooperatively developed" process for consultation with non-metropolitan local officials. Similarly, Section

---

13 TEA-21, § 1204(d), codified at 23 U.S.C. § 135(d)(1).

14 TEA-21, § 1204(e) (requiring consultation in development of long-range transportation plan), codified at 23 U.S.C. § 135(e)(2)(B); TEA-21, § 1204(f) (requiring consultation in development of STIP), codified at 23 U.S.C. § 135(f)(1)(B)(ii)(I).

1410.212(c) requires each State to have a "documented and cooperatively developed" process for consultation with federal lands agencies and Indian tribes.

If interpreted in a manner consistent with existing practice, the new requirement for a "documented and cooperatively" developed consultation process would be unobjectionable. But as written, this language could be interpreted to require State DOTs to obtain the *consent* of each unit of local, federal, and tribal government before establishing consultation procedures. If interpreted in this way, the regulation would require each State to enter into separate negotiations with each of its consultation partners over the terms of future consultation procedures.

To understand the practical impact of this requirement, it is important to recognize the complexity and variability of the local, tribal, and federal governmental structures within the States. For example, 23 States have more than 400 separate units of local government - i.e., counties, municipalities, and townships. A few additional statistics help to illustrate the diversity among the 50 States and the inherent complexity of the institutional relationships involved in the statewide planning process:

- Number of transportation districts: ranges from 0 to 312
- Number of Tribes: ranges from 1 to 231
- Number of Regional Councils: ranges from 0 to 24
- Number of Counties, Municipalities and Townships: ranges from 1 to 1,704
- Population density: ranges from 1 per square mile to 1064 per square mile
- Non-urban population: ranges from 15% to 84%
- Rural public roads administered by State Highway Agency: ranges from 0% to 97%
- Percent of State acreage in Federal ownership: ranges from 0% to 83%[15]

Given these factors, it is clear that the statewide planning process can work only if it allows State DOTs considerable flexibility to tailor their consultation to the needs of each consultation partner. Bureaucratizing this process by requiring individually negotiated consultation agreements with each consultation partner will not help to achieve this goal – it will undermine it.

Recommendations: The statewide planning regulations should give the State DOTs the authority to establish consultation procedures, ***without*** having to obtain the consent of each consultation partner to those procedures. To achieve this objective, the following changes are needed:

---

[15] National Academy of Public Administration, Rural Transportation Consultation Procedures, May 2000.

1) Revise Section 1410.212(a) to provide that consultation procedures should be "established by the State, after taking into consideration the views of non-metropolitan local officials." (See Appendix, # 58.)

2) Revise Section 1410.212(c) to provide that consultation procedures should be "established by the State, after taking into consideration the views of the Indian tribes and the Federal lands managing agencies, respectively." (See Appendix, # ***60.)***

B. New "Coordination" Requirements Should be Revised or Removed.

In common usage, the terms "consultation" and "coordination" are virtually interchangeable. But in the planning regulations, they have very different meanings: as described above, "consultation" refers to an exchange of information, but "coordination" requires much more – it requires the *"adjustment of plans, programs and schedules to achieve general consistency."*[16] Because the term "coordination" has this special meaning, the existing regulations use it sparingly: under existing 23 C.F.R. Part 450, the *only* entity with which States are required to "coordinate" are MPOs. By contrast, the proposed planning regulations would require "coordination" with three additional entities - non-metropolitan areas, adjacent States, and adjacent countries. Clearly, good planning requires close working relationships with each of these entities. However, as explained below, *coordination* with these entities should not be required.

1. "Coordination" with Non-Metropolitan Areas.

Section 1410.210(c) of the proposed regulations provides that statewide planning *"shall be coordinated* with related planning activities being carried out outside of metropolitan planning areas." This language is inconsistent with Section 1204 of TEA-21, which simply requires States to *"consider. . . coordination* . . . with related planning activities being carried out outside of metropolitan planning areas."[17] By imposing an absolute mandate, when Congress clearly intended to preserve discretion for States, the regulations contradict the intent of Congress. This requirement also could create confusion and unnecessary conflict, by imposing a new obligation to "achieve general consistency" between the State DOT's planning documents and the "related plans – in whatever form they may be maintained – of the local governments.

Recommendation:

1) Conform to language of TEA-21, by requiring that States "consider" coordination of transportation plans, programs, and planning activities with related planning activities carried out outside metropolitan areas. (See Appendix, # 55.)

---

16 *See* 23 C.F.R. § 450.104 (definition of "coordination").

17 23 U.S.C. § 135(d)(3) (emphasis added).

2. "Coordination" with Adjacent States.

Section 1410.210(a) of the proposed regulations requires that the statewide planning process be "carried out *in coordination with adjacent States . . . .*" The State DOTs are strongly committed to working closely with one another in developing transportation plans and programs; strong relationships are the foundation for sound planning. But the States oppose any requirement for "coordination" among States, because that term carries a legal obligation to "achieve general consistency." There is no statutory basis for imposing this legal obligation on the States. Moreover, experience suggests that such a requirement would create further rigidity and conflict in the planning process, particularly in situations where adjacent States have divergent views about how to address transportation needs.

Recommendation:

1) Conform to existing practice, which involves "consultation" - not "coordination" - with adjacent States. (See Appendix, # 53 and 60.)

3. "Coordination" with Adjacent Countries.

Section 1410.210(a) of the proposed regulations requires that *the* statewide planning process be "carried out *in coordination with . . . adjacent countries . . . .*" This requirement is objectionable for the same reasons as the requirement for coordination with adjacent States: it is not required under **TEA-21,** and in practice it would lead to unnecessary confusion and conflict.

This requirement also suffers from a more fundamental problem: *because "coordination" requires an effort to "achieve general consistency," requiring coordination with adjacent countries would effectively require State DOTs to negotiate with foreign governments, which is prohibited under the Logan Act, 18 U.S.C. § 953.*[18] To avoid requiring actions that would expose States to criminal prosecution, the regulation must be revised to eliminate the requirement for coordination with foreign countries.

Recommendation:

1) Require "communication," not "coordination," with adjacent countries. (See Appendix, # 53, 60, and 119.)

---

[18] 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both. This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.").

C. Decision-Making Responsibility Would be Shifted from States to "Planning Process Participants."

The planning regulations contain numerous provisions, primarily in the context of statewide planning, that vest decision-making authority in the "planning process participants." Taken together, these repeated references to the "planning process participants" have the potential to reduce State DOTs to just one more voice among many in the planning process. By reducing the States' authority to make critical decisions, the regulations would also reduce their accountability for developing transportation plans that effectively address future transportation needs. As a result, this shift of decision-making authority would ultimately reduce the public's confidence in the statewide planning process, and reduce the effectiveness of that process as a tool for making sound transportation decisions. Therefore, as explained below, each reference to "planning process participants" should be eliminated and should be replaced, if at all, with a reference to the State or other relevant decisionmaker.

1. "Participants" Deciding Additional Planning Factors to Be Considered.

Section 1410.208(b) requires States to consider, in addition to the seven planning factors mandated by statute, "other factors and issues that *the planning process participants might identify* which are important considerations within the statewide transportation planning process." This language gives the "participants" in the planning process the right to require States to consider factors beyond the seven factors listed in TEA-21 – directly contradicting the effort to *reduce* and *simplify* the range of factors to be considered in statewide planning.

Recommendation:

1) Section 1410.208(b) should be revised so that the only additional factors *required* to be considered are those listed in paragraphs (b)(1) and (b)(2) of § 1410.208. (See Appendix, # 51.)

2) A new section, 1410.208(c), should be added to clarify that "the State" may choose to consider additional factors. (See Appendix, ## 51.)

2. "Participants" Deciding Role of *State Air* Quality and Other Agencies.

Section 1410.212(d) requires States to allow for participation of State air quality agencies and other state agencies *"as determined appropriate by the planning process participants."* This requirement gives "participants" in the planning process the ability to override States' decisions about the role that State agencies will play in the transportation planning process.

Recommendation:

1) Section 1410.212(d) should be revised to clarify that "the State" is responsible for determining the level of involvement of State agencies in the planning process. (See Appendix, # 61.)

3. "Participants" Deciding Level of Detail in Statewide Planning.

Section 1410.218(a) states that the products of statewide planning can be used in later project-development studies depending on the "character and level of detail desired [in statewide planning] *as determined by the planning process participants.*" This provision implies that the "participants," not the State, will make the critically important judgment call about how best to integrate the planning process and project-development process.

Recommendation:

1) Section 1410.218(a) should be revised to eliminate the implication that "planning process participants" are responsible for deciding the level of detail of the statewide planning process in non-metropolitan areas. (See Appendix, # 76.)

4. "Participants" Deciding Whether to Use MIS-Type Process Outside Metro Areas.

Section 1410.218(a) states that "the process described in § 1410.318 relating planning and project development may be utilized *at the discretion of the statewide transportation planning process participants* in non-metropolitan areas." Section 1410.318 describes a process that replaces (and expands) the **pre-existing** major investment study (MIS) requirement in metropolitan areas. Thus, Section 1410.218(a) effectively gives the "participants," not the State, the authority to decide whether MIS-type studies will be required in non-metropolitan areas. (As described above, the "participants" also have the authority to decide the *level of detail* of these MIS-type studies.)

Recommendation:

1) Section 1410.218(a) should be revised to designate the State as the entity responsible for deciding whether to conduct MIS-type studies, pursuant to 1410.318, outside metropolitan areas. (See Appendix, # 76.)

5. "Participants" Deciding How to Use and Document Results of Planning Process.

Section 1410.218(b) states that "[t]he results of analyses conducted under paragraph (a) of this section, *at the option of the planning participants,* may (1) Be documented as part of the plan development record for consideration in subsequent project development actions; (2) Serve as input to the NEPA process required under 23 CFR 1420; (3) Provide a basis, in part, for project level decision making; and (4) Be proposed for consideration as support for actions and decisions by federal agencies

other than US DOT." Thus, Section 1410.218(b) gives the participants the power to decide whether to document and how to use the products of the statewide planning process in the NEPA process.

Recommendation:

Section 1410.218(b) should be revised to designate the "State" as the entity responsible for deciding how to document and use the products of the statewide planning process. (See Appendix, # 77.)

III. Title VI and EJ

AASHTO members strongly support efforts to prevent discrimination and to promote fairness in transportation decision-making. In particular, AASHTO members recognize the value of strengthening the public involvement element of the transportation planning process, with a particular emphasis on providing opportunities for involvement by low-income groups, minorities, and others that have traditionally been under-represented in the planning process. For this reason, AASHTO members are already working on a variety of initiatives to increase opportunities for public involvement in the planning process. Moreover, they fully intend to continue these efforts *regardless* of what happens with these proposed regulations.

Despite this commitment to preventing discrimination and promoting fairness, AASHTO has strong objections to the Title VI provisions in the proposed regulations. The basic problem is that - contrary to USDOT's description in the preamble - the proposed regulations would establish a new legal standard for demonstrating compliance with Title VI. Under this standard, *States and MPOs could certify compliance with Title VI only by certifying that they are in compliance with E.O. 12898, as it has been interpreted by USDOT and FHWA.* In effect, the regulations would convert compliance with the executive order into a requirement for demonstrating compliance with Title VI.

The practical effect of this change will be to create more paperwork, severely stretch the limited resources of State DOTs and MPOs, create new conflict points in the planning process, and delay project delivery. As interpreted by the USDOT, the EJ executive order (E.O. 12898) requires efforts to identify and address not only disproportionate impacts, but also the disproportionate distribution of *benefits*. As a result, the incorporation of E.O. 12898 into Title VI means that State DOTs and MPOs could be found in violation of Title VI unless they could show that the impacts and benefits of the transportation system were distributed proportionately across the entire State or metropolitan area. AASHTO objects to this new "proportionality test" for Title VI compliance because (1) it is conceptually unworkable; (2) it would impose enormous new data collection and analysis requirements on State DOTs and MPOs; (3) it would expose States and MPOs to major new legal risks; (4) it would distort the transportation planning process, making it harder to serve the broad public interest; and (5) it cannot be justified on the basis of Title VI or even on the basis of E.O. 12898.

Because of these concerns, AASHTO strongly urges FHWA and FTA to maintain the existing regulations relating to Title VI compliance, as reflected in **23 C.F.R.** 450, while addressing EJ issues (if at all) through guidance materials. If this recommendation is not followed, AASHTO urges that the regulations be revised to establish clear, reasonable, consistent standards for data gathering **and** analysis, and to clarify that the regulations in no way expand the States' or MPOs' legal obligations, nor do they undermine in any way any existing legal protections for States and MPOs. These recommendations are more fully explained in Part E, below, and in the attached table.

A. The Proposed Regulations Would Re-Define and Expand Title VI Requirements.

The proposed regulations establish significant new requirements that must be satisfied in order to establish compliance with Title **VI** and other statutory non-discrimination requirements. These requirements are contained in two nearly identical sections - Section 1410.206(a), which governs statewide planning, and Section 1410.316(c), which ***governs*** metropolitan planning.

Section 1410.206(a)(6) requires States to adopt "a process to assure" that the statewide planning process is consistent with Title VI and other non-discrimination statutes. The regulation then provides that this assurance *"**shall be** demonstrated through"* a series of actions, which are listed in the regulation. Similarly, Section 1410.316(c) requires metropolitan transportation plans and plan development to be "consistent with Title VI" and other non-discrimination statutes. That section then states that *"[c]onsistency shall **be** demonstrated **through**"* a series of actions, which are essentially identical to those required under Section 1420.206(a)(6). The list of actions required to demonstrate compliance with Title VI, for both statewide and metropolitan planning, includes the following:

- Preparing **a** "geographic **and** demographic profile" of the State and each metropolitan area, identifying low-income and minority populations, and "where appropriate," the elderly and persons with disabilities;
- Preparing an analysis of the "transportation services available to or planned for" minorities, low-income populations, the disabled, and the elderly within the State **and** each metropolitan area;
- Preparing an analysis sufficient to determine whether there are any "disproportionately high and adverse environmental effects, including interrelated social and economic effects" on minorities, low-income populations, the disabled, and the elderly, within the State and each metropolitan area;

- Preparing an analysis sufficient to determine whether there has been any "denial of or reduction in benefits" to minorities, low-income populations, the disabled, and the elderly, within the State and each metropolitan area; and
- Preparing an analysis of "prior and planned efforts to address" any disproportionately high and adverse effects that are found on minorities, low-income populations, the disabled, and the elderly, within the State and each metropolitan area.

These new requirements clearly contemplate a higher level of data gathering and analysis than was required under the previous planning regulations. The magnitude of the increase depends, of course, on how these regulations are interpreted in practice, both by the USDOT agencies and ultimately by the courts. However, there can be little doubt that these regulations are intended to result in a major change in the way information is gathered, analyzed, and disseminated in the transportation planning process.

In addition to imposing more extensive data collection and analysis obligations, these new requirements incorporate legal standards that are subtly different than those reflected in existing Title VI regulations. Most importantly, the regulations require that the data be analyzed to determine (1) whether there are "disproportionately high and adverse" effects on minority populations, low-income populations, the elderly, and the handicapped, and (2) whether there has been a "denial of or reduction in benefits" to those populations. These new requirements, clearly, are based on E.O. 12898, and the USDOT and **FHWA** orders implementing it. Thus, the proposed regulations not **only** expand the amount of information that must be gathered, but also establish new legal standards for evaluating that data: in effect, the proposed regulations incorporate legal standards from the EJ orders into the analysis of Title VI compliance.

B. The Revised Title VI Requirements Are Conceptually Unworkable.

The "proportionality test" for Title VI compliance requires State DOTs and MPOs to demonstrate that no protected group receives a disproportionate share of the **benefits** or burdens of the transportation system, **and** that no protected group receives a "reduction" in benefits. There are some basic practical difficulties of developing the data necessary to establish compliance with this test, as further described in Part C, below. But before turning to those practical issues, there is an even more fundamental problem to be addressed – namely, the impossibility of even defining the basic concepts of "proportionality," "benefits," "burdens," and "reduction" across large population groups, geographic areas, and time periods, in any meaningful way.

1. "Proportionality" of "Benefits" and "Burdens"

In the context of a specific transportation project, it may well be possible to measure – at least roughly – the distribution of benefits and burdens across different groups. But when the subject under review is the transportation system as a whole, in

an entire State or metropolitan area, any attempt to analyze the proportionality of benefits and burdens quickly becomes untenable.

Definition of "Benefit" and "Burden." The same improvement could be viewed by one member of a protected group as a benefit, and by another member of the same group as a burden. For example, improving a road to improve the flow of traffic through a minority community may be viewed by some residents of a neighborhood as a benefit, because of reduced congestion, and by other members of the same community as a burden, because of increased traffic speeds and noise. Thus, even for a single project, it may be impossible to determine whether the project should be classified as a "benefit" or a "burden" with respect to a particular community or geographic area.

Multiple Measurements. The distribution of benefits and burdens can be measured in many different ways, depending on how broadly or narrowly "benefits" and "burdens" are defined, what factors or criteria are used to measure them, and what time period is considered. As a result, at any given time, it will be possible for some group to develop data showing that it has received a "disproportionate" distribution of some benefit or burden, over some time period. In other words, there will always be *some* measurement that reveals the existence of a disproportionate distribution of *some* benefit or burden to *some* protected group.

- Funding Levels vs. Performance Measures. Benefits can be measured in terms of funding (e.g., total cost of all projects in a specific area, total cost per passenger or user of a particular mode, etc.) or in terms of transportation service quality (e.g., levels of service, average travel times, etc.).
- Absolute vs. Relative. Benefits can be measured in absolute terms (e.g., how much has the funding increased for transit?), or in relative terms (has the funding increase for transit been as large as the funding increase for highways?).
- Varying Time Periods. Benefits - particularly if measured in terms of funding - can be measured over varying periods of time. Large capital projects (highways, transit systems) have a useful life of many decades, so a snapshot of expenditures in the current year (or even the current decade) could provide a highly misleading picture of the distribution of benefits. However, extending the time frame to capture several decades worth of investments - as could be required for an analysis of a 20-year plan - can easily become an exercise in speculation and guesswork.

Aggregation. In the context of a single project, it may be possible to develop a rough approximation of the distribution of benefits and burdens across different groups. In the context of an entire State or metropolitan area, however, the problem of aggregating benefits and burdens becomes overwhelming. There simply is no principled, consistent way to "add up" the total benefits or burdens for each population group or geographic area. As a result, any effort to develop an overall assessment of

impacts and benefits across an entire State or metropolitan area will descend into a war of anecdotes and incomplete analyses.

2. "Reductions" in Benefits

The distribution of transportation investments within a State or metropolitan area can fluctuate greatly over time, simply because it is impossible as a practical matter to give equal attention to all needs at the same time. As a result, it is inevitable that certain geographic areas and demographic groups will experience a "reduction" in transportation funding in some years - and an increase in others. Under the proposed regulations, every instance of a "reduction" in benefits (real or perceived) could be cited by the USDOT agencies as a basis for refusing to approve a State's or MPO's certification of compliance with Title VI and other laws.

C. The Revised Title VI Requirements Would Impose Major New Demands on the Limited Resources of States and MPOs.

The preamble to the proposed regulations states that compliance with the new Title VI/EJ requirements "should not require a major new data collection effort." Unfortunately, this optimistic prediction is almost certainly inaccurate. The reality is that a comprehensive analysis of the distribution of transportation benefits and burdens - across an entire state or metropolitan area, across all protected groups, across a period of many years or even decades – is an enormous undertaking that could easily end up requiring exponential increases in the planning staffs of State DOTs and MPOs. Several factors heighten this concern:

- Initially, the level of detail required in the analysis of benefits and burdens will be determined by the U.S. DOT agencies, as part of the certification review process. unfortunately, the experience in Atlanta thus far, where the U.S. DOT is overseeing an evaluation of transportation benefits and burdens on a metropolitan basis, suggests that the U.S. DOT will require much more than minor changes in existing practice. The Atlanta study has already grown into a highly elaborate, expensive, and time-consuming undertaking. If it becomes the model that all States and MPOs must follow, it is unlikely that any State or MPO will be able to complete the necessary studies without major increases in budgetary and staff resources.
- In the long run, the level of detail required for these studies is likely to increase. The experience with NEPA and Section 4(f) are instructive. An EIS began as a relatively brief document, but today the typical EIS for a large highway project is many hundreds of pages, costs millions of dollars to prepare, and often the better part of a decade to complete. Similarly, Section 4(f) started out as an attempt to place a "thumb on the scale" to protect urban parks from freeway construction; it has produced an "avoid at all costs" mentality for all Section 4(f) impacts, regardless of magnitude. The same

dynamic – toward increasing cost, complexity, and rigidity – could easily occur with the new Title VI/EJ requirements.

In theory, the additional demands on the resources of State DOTs and MPOs could be offset by additional staff and increases in operating budgets. But experience has shown that increased regulatory requirements are not always offset by increases in organizational resources. As a result, State DOTs and MPOs are likely to find themselves diverting their limited resources away from other needs to conduct the new Title VI/EJ studies, thus contributing to increased delays in project delivery.

D. The Revised Title VI Requirements Would Expose States and MPOs to Increased Legal Risks.

The proposed regulations would expose the States and MPOs to serious legal jeopardy, in two directions. On one hand, States and MPOs would face an increased risk that USDOT agencies could withhold funds based on failure to comply with EJ policies, without any of the procedural protections afforded to States when funds are withheld on Title VI grounds. On the other hand, States and *MPOs* would face an increased risk that private groups and individuals would use alleged inadequacies in the State's compliance with EJ policies as the basis for bringing Title VI complaints and lawsuits.

1. Certification Reviews – No Assurance of Due Process for States and *MPOs.*

Under current law, the USDOT agencies can refuse to approve a State's or MPO's certification of compliance with the non-discrimination requirements in Title VI or other laws. If the denial of certification is based on a failure or threatened failure to comply with Title VI, the State or MPO is entitled to extensive procedural protections before federal financial assistance can be suspended. Under the Title VI regulations, the USDOT agency must:

- Advise the recipient of its failure to comply with Title VI and determine that compliance cannot be secured by voluntary means;
- Make an express finding on the record, after an opportunity for a hearing, that the recipient has failed to comply with Title VI;
- Obtain the personal approval of the U.S. Secretary of Transportation;
- Give 30 days notice to the House and Senate committees having jurisdiction over USDOT.[19]

The proposed regulations appear to allow the USDOT agencies to deny certification based solely on *non-compliance with the EJ Orders* (as opposed to Title VI requirements). On its face, this approach is impermissible, because – as discussed above – the EJ Orders themselves impose no obligations whatsoever on any non-federal

[19] 49 C.F.R. § 21.13(c).

entity. However, to the extent that EJ policies themselves are cited as the basis for denying certification, State DOTs and MPOs will face a new problem: the USDOT agencies could deny certification, and withhold federal financial assistance, *without following any of the procedures that would be required if the USDOT were taking action based on a violation of Title VI.* In other words, by basing its findings on EJ grounds, rather than Title VI grounds, the USDOT agency could achieve the same result as a Title VI proceeding *without* holding a hearing, *without* obtaining the personal approval of the Secretary, and *without* notifying the relevant Congressional committees. The potential erosion of the protection afforded by Title VI would further undermine the ability of State DOTs and MPOs to remain in compliance and to continue carrying out effective transportation plans and programs.

2. Title VI Complaints and Lawsuits Against States and MPOs.

As explained above, the proposed regulations would require compliance with the EJ orders as a means of demonstrating compliance with Title VI requirements. This change in the legal framework governing Title VI would produce enormous uncertainty about what recipients of federal assistance must do to comply with Title VI. The response to such uncertainty is predictable: there would be a wave of claims filed against State DOTs and MPOs, alleging that they are in violation of Title VI because a particular group is receiving a "disproportionate" share of the benefits or burdens of the statewide or metropolitan transportation system, or has suffered a "reduction" in benefits. These claims could be filed in two forums: as administrative complaints with the FHWA's (or FTA's) Office of Civil Rights, and as lawsuits filed in federal court.

a. Title VI Administrative Complaints.

If the proposed regulations are adopted, it is virtually certain that Title VI complaints would be filed against State DOTs and MPOs based on alleged non-compliance with EJ policies. In fact, FHWA's EJ Order invites the filing of Title VI complaints on precisely this basis: it states that *"any member of a protected class under Title VI may file a complaint with the FHWA Office of Civil Rights . . . alleging that he or she was subjected to disproportionately high and adverse human health or environmental effects."*[20] Given the explicit endorsement provided in the FHWA's order, the State DOTs and MPOs should have every reason to expect that groups protected under Title VI will seek to convert the Title VI complaint process into a mechanism for enforcing compliance by States and *MPOs* with E.O. 12898 and the USDOT and **FHWA** orders.

b. Title VI Lawsuits.

Under current law, State DOTs and *MPOs* can be sued in federal court based on alleged violations of Title VI and other laws that prohibit discrimination by the recipients of federal financial assistance. However, they *cannot* be sued for violating the

---

20 **FHWA Order *6640.23*, ¶ 6(f), at 7 (emphasis added).**

terms of the EJ orders, which specifically state that they are solely intended to govern internal operations of the executive branch and do not give rise to any right of judicial review." *The proposed rules would radically alter this balance.* By incorporating the EJ policies into the USDOT's interpretation of Title VI requirements, *the regulations could allow plaintiffs to bring Title VI claims based on alleged non-compliance with the EJ requirements listed in the proposed regulation.* The result would be exactly the opposite of the intention expressed in the EJ Orders: rather than precluding legal challenges to compliance with the orders, it would open the floodgates to new lawsuits.

It is true, of course, that the proposed regulations contain several provisions that appear intended to protect FHWA and federal grant recipients from EJ lawsuits. But these provisions simply state that the regulations are not intended to create a right of judicial review of compliance *with the €/orders.* As explained above, the thrust of the regulations is to convert EJ policies into Title VI requirements. Thus, the litigation risk for federal grant recipients is *not* that they will be challenged for violating the EJ orders themselves, but rather that *allegations of non-compliance with EJ policies will now be brought as Title VI claims.*

E. The Revised Title VI Requirements Would Distort Transportation Decision-Making, Turning Title VI into Another Section 4(f).

The revised Title VI requirements would impose substantial new compliance burdens on all States and MPOs, and would almost certainly entangle large numbers of them in contentious certification reviews, Title VI administrative complaint proceedings, and Title VI lawsuits. Taken together, all of these factors will contribute to what might be called the "Section 4(f) effect": as a means of avoiding litigation, controversy, and additional expense, the USDOT agencies and their State and local transportation partners will adopt an "avoid at all costs" position with respect to any decision that could even be characterized as an EJ or Title VI violation. In particular, in the context of the planning process, States and MPOs will have an enormous incentive to adopt simplistic, rigid formulas for distributing transportation resources - not necessarily because they make the most sense, or even because they do the most to help the protected groups, but simply because the simplest and most rigid formulas are seen as the easiest to defend. The adoption of these simplistic formulas will further undermine the States' and MPOs' ability to make sound decisions about how to address pressing transportation needs.

F. The Revised Title VI Regulations *Are* Inconsistent with Well-Settled Interpretations of Title VI and Even Are Inconsistent with E.O. 12898.

For all of the reasons discussed above, the proposed regulations reflect an unsound policy decision about how to interpret and enforce Title VI. But in addition to these policy concerns, there also are serious questions about the underlying legal basis

---

21 E.O. 12898, ¶ *6-609;* USDOT Order 5610.2, ¶ 1(c); FHWA Order 6640.23, ¶ 1(c).

for the Title VI provisions in the proposed regulations. These legal objections rest on two grounds: (1) inconsistency between the EJ orders and Title VI, and (2) inconsistency between the initial EJ order - E.O. 12898 - and the subsequent EJ orders issued by the USDOT and FHWA.

1. Inconsistency Between EJ Orders and Title VI Requirements.

In presenting its EJ policies to the public, the USDOT has frequently taken the position that EJ policies do little more than clarify existing requirements under Title VI and other statutes.[22] The message, in effect, is "There's really nothing new here." In fact, there is something new. The EJ policies established in E.O. 12898 differ significantly from the non-discrimination requirements imposed in Title VI and other federal non-discrimination statutes, in two key areas:[23] (1) the groups protected and (2) the legal standards used to protect those groups.

- Grouus Protected. The EJ orders apply to "minority populations" and "low-income" populations. Minority populations are protected by Title VI, which prohibits discrimination based on "race, color, or national origin." Low-income populations, however, are not protected under Title VI or any other federal non-discrimination statute.

---

[22] See FHWA, *Policy Guidance Concerning Application of Title VI of the Civil Rights Act to Metropolitan and Statewide Planning,* 65 Fed. Reg. 31803 (May 19, 2000) ("The Environmental Justice (EJ) Orders further amplify Title VI . . ."); FHWA, *An Overview of Transportation and Environmental Justice* (May 2000) ("Is Environmental Justice a New Requirement? No."); FHWA Order 6640.23, ¶ 3(b) ("EO 12898, DOT Order 5610.2, and this Order are primarily a reaffirmation of Title VI" and other laws); USDOT, Notice of Final Order on Environmental Justice (Order 5610.2), at 2 ("The DOT Order reinforces considerations already embodied in NEPA and Title VI . . . . The Department does not intend that this Order be the first step in creating a new set of requirements. The objective of this Order is the development of a process that integrates the existing statutory and regulatory requirements . . . .").

[23] In some contexts, the USDOT agencies have referred to NEPA as one of the statutory bases for requiring compliance with EJ policies. While NEPA *does* require an analysis of *socio-economic* impacts, to the extent that they flow from environmental impacts, NEPA does not impose substantive requirements of any kind, and thus provides no statutory basis for requiring actions to *address* (as opposed to disclosing) impacts on particular groups. Moreover, NEPA provides *no* basis for requiring compliance with EJ policies in the *planning* process, because USDOT actions in the planning process are statutorily exempt from the requirements of NEPA. See 23 U.S.C. § 134(o) (NEPA does not apply to metropolitan planning); id. § 135(i) (NEPA does not apply to statewide planning).

It also is possible that the planning provisions of Title 23, Sections 134 and 135, may be cited as the legal basis for EJ requirements. However, while the statewide and metropolitan planning statutes simply require that interested parties be given "a reasonable opportunity to comment." See 23 U.S.C. § 134(g).(4) (opportunity to comment on metropolitan plan); id. § 134(h)(1)(B). (opportunity to comment on TIP); id. § 135(e)(3) (opportunity to comment on statewide plan); id. § 135(f)(1)(C). (opportunity to comment on STIP).. Therefore, at most, the planning statutes provide a basis for regulations requiring that all participants be provided an opportunity to comment. They do not provide any basis for requiring a particular distribution of transportation resources, or for imposing any other constraints on the policy-making authority of States and MPOs.

- Legal Standards. The EJ orders require federal agencies to identify and address "disproportionately high and adverse human health and environmental impacts." Title VI and others laws prohibit "discrimination," which occurs if any protected individual is "excluded from participation in, . . . denied the benefits of, or . . . otherwise subjected to discrimination'' in a federally assisted program.[24] Although a "disparate impact" can constitute discrimination under the USDOT Title VI regulations, the legal standards for establishing a disparate impact are strict: far more than a mere showing of disproportionality is required before a violation of Title VI can be found.

The distinction between the EJ order and Title VI may seem subtle, but in fact federal agencies - including USDOT and **FHWA** themselves - have been careful in the past to draw a bright line between Title VI requirements and EJ policies. For example, the USDOT and FHWA EJ orders both establish *two* levels of protection: one for all those protected by E.O. 12898 (i.e., all minority and low-income populations) and a separate standard for those who also are protected under Title **VI** (i.e., minority, but not low-income). Yet in the these proposed regulations, the **USDOT** and **FHWA** have not made any attempt at all to maintain this distinction between Title VI and EJ.

2. Inconsistency Between E.O. 12898 and USDOT ——A Orders.

Just as E.O. 12898 differs from Title VI, the **USDOT** and **FHWA** EJ orders differ significantly from the original EJ executive order, E.O. 12898. The **USDOT** and FHWA orders deviate **from** E.O. 12898 in **two** areas: **(1)** expanding the types of adverse effects that need to be considered, to include "interrelated social and economic effects," **and** (2) re-defining "adverse effects" to include a "denial of or a *reduction in* benefits."

- Interrelated Social and Economic Benefits. E.O. 12898 establishes a **policy** of achieving EJ by identifying and addressing "disproportionately high **and** adverse ***human health or environmental*** effects" of federal programs, policies, and activities.[25] By contrast, the USDOT and **FHWA** orders each describe E.O. 12898 as requiring federal agencies to address "disproportionately high and adverse human health or environmental effects, *including interrelated social and economic effects"* of federal programs, policies, and activities.[26] This re-definition and expansion of the Administration's EJ policies - has no apparent basis in E.O. 12898.
- Denial or Reduction in Benefits. E.O. 12898 uses the term "adverse effects" to refer to negative impacts on human health and the environment. The USDOT and **FHWA** orders, however, define "adverse effects'' to include "the denial of, *reduction in, or significant delay in the receipt of,* benefits of" USDOT and

---

24 **49** U.S.C. § 21.5(a).
25 **E.O.** 12898, ¶¶ 1-101, 1-103 (emphasis added).
26 **USDOT** Order 5610.2, ¶ 1(b); FHWA Order 6640.23, ¶ 1(b).

FHWA programs, policies, or activities.27 This redefinition and expansion of the concept of "adverse effects" has no apparent basis in E.O. 12898.

Expanding the concept of "adverse effects" in this way means that, in order to comply with the EJ Orders, it is necessary to consider not only the distribution of benefits among minority populations (as is required to comply with Title VI), but also to consider the distribution of benefits among *low-income* populations (which are not covered by Title VI).[28] In addition, it means that a violation of EJ policies could be based not only on the *denial* of benefits (as that term has been interpreted in Title VI regulations and case law), but also on a mere *reduction* or delay *in the receipt of* in benefits.

In sum, the **USDOT** and **FHWA** orders on EJ did more than implement **E.O.** 12898: they *expanded* it, by adopting a significantly broader interpretation of the term "adverse effects.'' The proposed planning regulations incorporate this revised and expanded concept of EJ:

- Interrelated Social and Economic Effects. The planning regulations, like the USDOT **and FHWA** orders, define "adverse effects" to include not only "human health and environmental effects" but also "interrelated social and economic effects."[29]
- Reduction in Benefits. The planning regulations, like the USDOT and **FHWA** orders, define "adverse effects" to include not **only** all of the impact described above, but also to include a "denial of or reduction in benefits."[30]

Finally, the proposed regulations go beyond even the **USDOT** and **FHWA** orders, which focused solely on minority and low-income populations, by requiring the "proportionality" and "reduction in benefits" tests to be applied not only to minority and low-income populations (the groups actually covered in the EJ Orders) but also to the disabled and the elderly. As a result, the concept of EJ embodied in the proposed regulations is even broader than the EJ policies reflected in the USDOT and FHWA policies. The planning regulations, unlike the **USDOT and** FHWA orders, require EJ

---

4 **USDOT** Order 5610.2, ¶ 7(f); FHWA Order 6640.23, ¶ 2(f) (emphasis added).

28 It is important to emphasize that AASHTOs members are committed to the goal of ensuring that the transportation decision-making process effectively serves the interests of all citizens, including low-income populations. AASHTO is not objecting to this goal, but to USDOT's methods for achieving this goal - methods that, in AASHTOs view, are overly bureaucratic and inflexible, and will produce delay and litigation, rather than promoting better transportation decisions.

29 Proposed 23 C.F.R. § 1410.206(a)(6); proposed 23 C.F.R. § 1410.316(c).

30 Proposed 23 C.F.R. § 1410.316(c)(1)(iii); see also proposed 23 C.F.R. § 1410.206(a)(6)(i)(D) (requiring consideration of "any denial of or a reduction in benefits," without equating that term to "adverse effects").

analyses not only for minorities and low-income populations, but also for the elderly and the disabled.[31]

G. Recommendations: Maintain Existing Framework for Enforcing Civil Rights Laws; If Regulations Address EJ, Maintain Clear Distinction Between EJ and Title VI.

1) Maintain Existing Title VI Language. The planning regulations should re-state existing regulatory language regarding compliance with Title VI and other non-discrimination statutes – i.e., they should (1) closely paraphrase the language of the non-discrimination statutes, and (2) they should not include any reference to "EJ" categories, legal standards, procedures, or requirements. (See Appendix, # 48 and 135.)

2) If EJ Issues Are Addressed. If the EJ provisions are retained in the planning regulations, the regulations should be extensively revised, as further described below. (See Appendix, 48 and 135.)

   a. Clearly Distinguish Title VI and EJ. The regulations should clearly and consistently recognize the distinctions between Title VI requirements and EJ policies, by (1) separating Title VI requirements from EJ policies, and (2) specifically acknowledging in the regulations that:

      i. Noncompliance with the data collection requirement does not, by itself, constitute a violation of Title VI.

      ii. Non-compliance with the EJ policies (i.e., the existence of a disproportionately high and adverse impact on minority or low-income populations) does not, by itself, constitute a violation of Title VI.

   b. Follow Original Definition of EJ. If the EJ provisions are retained in the existing regulation, the USDOT agencies should ensure that the regulations return to the original (and still effective) conception of EJ – as defined in E.O. 12898. This definition would still require an analysis of the proportionality of impacts, but would not require an analysis of the distribution of benefits.

   c. Focus on Public Involvement. Specifically recognize, in the regulations, that public involvement efforts – not data collections and analysis -- should be the *primary* means of demonstrating compliance with Title VI and related statutes.

---

31 Proposed 23 C.F.R § 1410.206(a)(6)(i) (requiring statewide demographic analysis to include "elderly and persons with disabilities" and then requiring an analysis, based on that profile, of any disproportionately high and adverse effects and any denial of or reduction in benefits); proposed 23 C.F.R § 1410.316(c)(1)(i) (requiring same for metropolitan planning).

d. Establish Clear Standards for "How Much is Enough?" Establish clear standards in the regulations for determining "how much is enough" data gathering and analysis. These standards should include:

i. Existing Data Sources. States and MPOs may rely upon existing demographic data from the Census and other reliable sources; they are not required to gather original data in order to comply with these regulations.

ii. Standard Methodologies. States and MPOs may establish standard methodologies for calculating costs and benefits and apply those methodologies consistently across all groups.

e. Ensure Due Process for States and MPOs. Clarify that Title VI procedures will apply to any situation in which a USDOT agency denies certification approval or withholds funds based on a finding of an actual or potential violation of any civil rights statute or any EJ order. (See Appendix, # 83 and 194.)

3) Require Specific Statutory Basis for Corrective Actions or Denial of Certification. Specifically require the USDOT agencies to identify, in writing, the statutory basis for any corrective actions required, or for any denial of certification, under Section 1410.222. (See Appendix, # 83, 85, 194.)

IV. Air Quality Conformity Requirements

These regulations cannot correct the underlying problems with the conformity law itself, with the court decisions interpreting it, or with the EPA's regulations. As a result, while conformity requirements remain a major problem, the solution to that problem lies largely outside this rulemaking process. Nonetheless, these regulations should at least attempt to make the existing system more flexible. Instead, they go in the opposite direction, making the system *less* flexible. AASHTO recommends that the USDOT agencies revise the proposed regulations to avoid unnecessarily burdening the planning process and to preserve the maximum degree of flexibility allowed under the statute, the case law, and the EPA regulations.

The proposed regulations contain three new provisions that unnecessarily restrict the flexibility of State DOTs and MPOs in complying with the transportation conformity requirements: (1) in non-attainment and maintenance areas, a complete ban on STIP and TIP extensions, and overly restrictive procedures for obtaining approval of interim plans and TIPs; (2) in attainment areas, an unnecessary 180-day limit on STIP and TIP extensions; and (3) a new, more restrictive interpretation of STIP and TIP amendments, which will necessitate more frequent conformity determinations

A. Conformity Lapse in Non-Attainment and Maintenance Areas.

Under existing regulations, the **USDOT** agencies have the discretion to approve STIP and TIP extensions in non-attainment and maintenance areas during a conformity lapse. The proposed regulations would eliminate this discretion, and put in place a new system. First, in accordance with a recent memorandum of understanding with **EPA** ("DOT-EPA MOU), the regulations would completely eliminate STIP **and** TIP extensions in nonattainment and maintenance areas.[32] Second, the regulations would create a new mechanism - the interim plan and interim TIP - that could **be** used to advance exempt projects, existing TCMs, and (if certain requirements were met) new TCMs during a conformity lapse.

1. Elimination of STIP/TIP Extensions.

Sections 1410.222(c) and 1410.324(b) completely prohibit STIP and TIP extensions in non-attainment and maintenance areas. According to the preamble, this approach "eliminates substantial confusion" regarding the application of the conformity requirements in those areas. The proposed regulation certainly is clear enough. The problem, however, is that in attempting to achieve greater simplicity, the USDOT **has** further reduced the minimal discretion that it now possesses under the conformity program. **As** a result, there is a significant chance that *every* conformity lapse - no matter how minor the cause, no matter how simple the remedy - will cause hundreds of transportation projects to grind to a halt.

Recommendations:

1) Modify the DOT-EPA MOU, to allow STIP and TIP extensions in non-attainment and maintenance areas, and then revise the proposed regulation to make it clear that such extensions are allowed. (See Appendix, # 35, **84,** and .161)

2) If the DOT-EPA MOU is not modified before the regulations are finalized, revise the regulations so that they are silent on the issue of STIP and TIP extensions in nonattainment and maintenance **areas** - so that, when the **MOU** is changed, **STIP** and TIP extensions will be allowed automatically, without the need for any further change in the regulations.

2. Approval of Interim Plans/TIPs.

Sections 1410.322(g) and 1410.324(p) authorize metropolitan areas to develop interim plans and TIPs as the basis for "advancing projects that are eligible to proceed under a conformity lapse." The interim plan/TIP can include all exempt projects, as well as all existing **TCMs.** In addition, the interim plan can include new TCMs, *if* the new TCMs are first included in an approved SIP with identified emission reduction

---

[32] **See** National Memorandum **of** Understanding Between DOT and EPA on Transportation Conformity (April 19, 2000) ("DOT-EPA MOU"), ¶ III-B-2, at 3; see proposed 23 **C.F.R.** § 1410.222(c); 1410.324(b).

benefits. The preamble explains that the process for obtaining approval of **an** interim plan or TIP is the same as the process for obtaining approval of any plan or TIP:

> Interim plans and TIPs must be developed in a manner consistent with **23** U.S.C. 134. They must be based on previous planning assumptions and goals; appropriately adjusted for currently available projections for population growth, economic activity and other relevant data. The public must be involved consistent with the regular transportation plan and program development processes. Financial planning and constraint, **and,** as appropriate, congestion management systems requirements must be satisfied, and interim TIPs must be approved by the MPO and the Governor.

Given this statement in the preamble, the proposed regulations could be interpreted to require additional public involvement and agency consultation procedures, and possibly even updated data analysis, *simply in order to confirm that the exempt projects and existing TCMs can proceed* While such additional measures are warranted for *new* **TCMs,** there is no reason to require them for exempt projects and existing **TCMs.** To do so simply imposes a new paperwork burden, which does nothing to promote efforts to achieve conformity.

In addition, the proposed regulations further complicate the issue of interim plans/TIPs by including an ambiguous, ill-defined provision that discourages the approval of interim plans and TIPs in areas where a conformity lapse is expected to last less than **six** months. Section 1410.322(g) **and** Section 1410.324(p) state that "[i]n areas which expect to return to conformity earlier than six months, the emphasis should be on reestablishing **conformity,** rather than embarking on developing **an** interim **plan** and **TIP."** This provision is objectionable for **two** reasons:

- Six-Month Rule is Unnecessary. The six-month rule unnecessarily complicates the decision about whether to seek approval of an interim TIP. Clearly, there may be cases in which the time needed to obtain approval of **an** interim plan and TIP with new TCMs **would** be better spent attempting to re-establish conformity. However, the choice about how to strike that balance should be made on a case-by-case basis – it should not be artificially restricted based on predictions about how long it will take to re-establish conformity. In fact, placing the six-month standard into the regulation could delay the process by creating unnecessary conflicts over how long it will take to re-establish conformity.
- Six-Month Rule Could be Misconstrued. **As** the preamble makes clear, the basis for the six-month rule is the assumption that it will take at least six

months to *obtain approval for new TCMs.*[33] However, as written, **Sections** 1410.322(g) and 1410.324(p) could be interpreted read to discourage the use of interim TIPs in *all* cases in which the conformity lapse is expected to last less than six months, even if the interim plan/TIP consists solely of exempt projects and existing TCMs. Such an interpretation would effectively preclude the use of ***any*** interim plan/TIP in situations where it is expected to take less than six months to re-establish conformity.

Recommendations: AASHTO recommends elimination of the ban on **STIP** and TIP extensions in non-attainment and maintenance areas, which would make interim plans **and** TIPs unnecessary. However, if the **ban** on extensions is retained, AASHTO recommends that the regulation be revised as follows to provide maximum flexibility and speed in approving interim plans and **TIPs:**

1) Establish procedures for ensuring immediate approval of interim plans and TIPs consisting solely of exempt projects and existing **TCMs** - e.g., allow the interim plan/TIP to be approved as part of the original plan/TIP approval process, so that the interim plan/TIP *automatically* takes effect in the event of a conformity lapse. (See Appendix, # 18 and 19.)

2) Eliminate the provision that discourages the use of interim plans/TIPs for situations in which it is expected to take six months or longer to re-establish **conformity.** Allow judgments about whether to **seek** approval of an interim plan/TIP to be made on case-by-case basis. (See Appendix, # 159 and 175.)

3) If the six-month standard is retained in some way, clarify that this standard applies ***only*** to plans/TIPs that include ***new*** *TCMs;* it is not intended to restrict approval of interim plans/TIPs that consist solely of exempt projects and existing TCMs. (See Appendix, # 159 and 175.)

B. Attainment Areas – STIP and TIP Extensions Limited to 180 Days.

In addition to eliminating **STIP** extensions in non-attainment and maintenances areas, Section 1410.222(c) also restricts **any STIP** extensions in *attainment* areas to a maximum of 180 days. This additional restriction is *not* required under the recent DOT-EPA **MOU.** In addition, this restriction is not required by the conformity law or regulations, because - under TEA-21 - transportation conformity requirements apply **only** to non-attainment and maintenance areas. Therefore, there is no basis in existing statute, regulation, or policy for imposing an across-the-board ban on **STIP** extensions in attainment areas.

---

[33] See Preamble, ***65*** Fed. Reg. 33938 (2000) ("It is the expectation of the US **DOT** that this provision would be utilized for new **TCM** projects where a conformity lapse would persist for **six months** or longer. ***An interim plan may be used for periods of less than six months to advance existing*** *TCM* ***and existing and new exempt projects.")*** (emphasis added).

Recommendation:

1) Maintain existing regulatory provisions, which allow requests for STIP extensions in attainment areas to be reviewed and approved by USDOT on a case-by-case basis. (See Appendix, # 84.)

C. Plan and TIP Amendments - Trigger for New Conformity Determination.

Section 1410.326 states that, "[i]n nonattainment or maintenance areas for transportation related pollutants, if the TIP is modified by adding or deleting non-exempt projects or is replaced with a new TIP, a new conformity determinations by the MPO and the FHWA and the **FTA** shall be made." The preamble to this provision explains that "we intend to make it clear that a new conformity determinations [sic] is necessary unless the changes to TIPs are minor, i.e., addition or deletion of exempt projects." In particular, the preamble explains that "moving a project or a phase of a project from year four, five, or later of a TIP to the first three years would be an amendment and require a new conformity determination."

Clearly, if a project is moved forward in the TIP, so that it crosses an analysis year, then the existing conformity analysis would be affected, and a new conformity requirement would be warranted. However, the fact that a project is moved up to years 1-3 does not necessarily mean that it has crossed an analysis year. Thus, in requiring a new conformity determination in *every* instance where a project is moved up into years 1-3, the proposed regulations would impose overly broad and restrictive requirements, further reducing USDOT's flexibility and making it even more difficult to maintain a smoothly functioning transportation program.

Recommendation: USDOT should revise the preamble to clarify that a project may be moved forward within the TIP, without requiring a new conformity determination, as long as the project is not moved across an analysis year.

V. Transition Period

The proposed regulations take effect as soon as the final regulations are issued, allowing *no* time for a transition period. The lack of any transition period or grandfather clause could significantly delay planning efforts already in progress, which could be subject to onerous new requirements under these regulations.

Recommendation.

1) Postpone the effective date of the regulations for two years after the regulations become final. (See Appendix, # 195.)

2) For plans, STIPs and TIPs, the regulations should not require the State and MPO, respectively, to demonstrate compliance with the new regulations

until the first plan/STIP/TIP update following the end of the two-year period after the final regulations are issued. (See Appendix, # 196.)

3) If a project is grandfathered under the NEPA regulations, any **planning** or programming decisions related to that project also should be grandfathered under the planning regulations. (See Appendix, # 197.)

4) If the changes recommended by AASHTO are adopted, a shorter transition period may be appropriate; however, under any circumstances some transition period should be included in the final rule.

VI. Guidance

One important factor affecting the transition period is the availability of guidance. Broadly speaking, AASHTO supports the use of guidance over the use of prescriptive regulations. However, AASHTO also is concerned that excessively prescriptive guidance can be even worse than regulations - because guidance, **unlike** regulations, is not required to go through normal notice-and-comment process. AASHTO's concerns are well-expressed in a recent court decision, which held that:

> The phenomenon . . . is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards, and the like. Then as years pass, the agency issues circulars, or guidance, or memoranda, explaining, interpreting, defining, and often expanding the commands in the regulations. One guidance document may yield another **and** then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and **more** detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. . . . ***An*** agency operating in this way gains a large advantage. "It can issue or amend its **real rules,** i.e., its **interpretive rules and policy** statements, quickly and inexpensively without following any statutorily prescribed procedures." . . . The agency may also think there is another advantage - immunizing its lawmaking from judicial review.[34]

Recommendation. AASHTO urges the **USDOT** agencies to **(1)** develop any guidance cooperatively with the State DOTs and MPOs, as well as other stakeholders, and **(2)** issue any guidance in the form of best practices and informational materials, rather than prescriptive requirements that have the effect of regulations.

*** END ***

[34] Appalachian **Power Co. v. U.S. EPA,** 208 F.3d 1015, 1020 (D.C. Cir. 2000).

APPENDIX TO AASHTO COMMENTS: SECTION-BY-SECTION RECOMMENDATIONS

Put 1420—NEPA AND RELATED PROCEDURES

Subpart A -- Purpose, Policy, and Mandate
1420.101 Purpose.
1420.103 Relationship of this regulation to the CEQ regulation and other guidance.
1420.105 Applicability of this part.
1420.107 Goals of the NEPA process.
1420.109 The NEPA umbrella.
1420.111 Environmental justice.
1420.113 Avoidance, minimization, mitigation, and enhancement responsibilities.

Subpart B — Program and Project Streamlining
1420.201 Relation of planning and project development processes.
1420.203 Environmental streamlining.
1420.205 Programmatic approvals.
1420.207 Quality assurance process.
1420.209 Alternate procedures.
1420.211 Use of this part by other U.S. DOT agencies.
1420.213 Emergency action procedures.

Subpart C — Process and Documentation Requirements
1420.301 Responsibilities of the participating parties.
1420.303 Interagency coordination.
1420.305 Public involvement.
1420.307 Project development and timing of activities.
1420.309 Classes of actions.
1420.311 Categorical exclusions.
1420.313 Environmental assessments.
1420.315 Findings of no significant impact.
1420.317 Draft environmental impact statements.
1420.319 Final environmental impact statements.
1420.321 Record of decision.
1420.323 Re-evaluations.
1420.325 Supplemental environmental impact statements
1420.327 Tiering [proposed addition to regs]
1420.329 Pilot Projects [proposed addition to regs]

Subpart D --- Definitions
1420.401 Terms defined elsewhere.
1420.403 Terms defined in this part.

PART 1430 - PROTECTION OF PUBLIC PARKS, WILDLIFE AND WATERFOWL REFUGES AND HISTORIC SITES
1430.101 Purpose.
1430.103 Mandate.
1430.105 Applicability.
1430.107 Use of land.
1430.109 Sigrufican ceof the section 4(f) resource.
1430.111 Exceptions.
1430.113 Section 4(f) evaluations and determinations under the NEPA umbrella.
1430.115 Separate section 4(f) evaluations.
1430.117 Programmatic section 4(f) evaluations.
1430.119 Linkage with transportation planning.
1430.121 Definitions.

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	Subpart A – Purpose, Policy, and Mandate		
	1420.101 Purpose	The purpose of this part is to establish policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 (NEPA) as amended, and to supplement the regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508. In concert with 23 CFR 1410 this part sets forth a NEPA process that integrates and streamlines the compliance with all applicable transportation and environmental laws that govern Federal transportation decisionmaking.	
	1420.103 Relationship of This Regulation to the CEQ Regulation and Other Guidance	The CEQ regulation lays out NEPA responsibilities for all Federal agencies. This FHWA/FTA regulation supplements the CEQ regulation with specific provisions regarding the FHWA/FTA approach to implementing NEPA for the Federal surface transportation actions under their jurisdiction. For a full understanding of NEPA responsibilities relative to the FHWA/FTA actions, the reader must refer to both this regulation and the CEQ regulation. In addition, the FHWA/FTA will ~~rely on~~issue ~~nonregulatory~~ non-binding guidance materials, training courses, and documentation of best practices in the management of their NEPA responsibilities. The available materials and training course schedules are posted on the FHWA and the FTA web sites and can be obtained by contacting Planning and Environment Program Manager, Federal Highway Administration, Washington, DC 20590 or Associate Administrator for Planning, Federal Transit Administration, Washington, DC 20590.	1. Replace "rely on" with "issue," and replace "nonregulatory" with "non-binding," to clarify that the guidance will not be used to impose additional requirements on project applicants. *See Section VI, Recommendations 1-2.*
	1420.105 Applicability of This Regulation	a)(1) The provisions of this part and the CEQ regulations apply to an actions if (1) the action requires the approval of a USDOT agency, and (2) the USDOT agency's decision about whether to grant the approval involves the exercise of discretion. ~~where a U.S. DOT agency exercises sufficient control and has the statutory authority to condition the action or approval~~. Actions taken by the applicant or others that do not require any U.S. DOT agency approval or over which a U.S. DOT	1. Clarify the criteria for determining the applicability of these regulations. (Proposed change to first sentence is intended to achieve consistency with criteria in second sentence of the proposed regulation.) 2. Add a new paragraph

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		agency has no discretion, including, but not limited to, projects or maintenance on Federal-aid highways or transit systems not involving Federal-aid funds or approvals, and actions from which the U.S.DOT agency are excluded by law or regulation, are not subject to this part. (2) If an action meets the criteria in paragraph (1), the USDOT agency shall determine the scope of its NEPA review for that action by evaluating the extent of its approval authorihr in relation to the action as a whole. If the USDOT agency's approval authority gives the agency substantialcontrol over the project as a whole, the USDOT agency shall undertake NEPA review for the entire proiect. If the USDOT agency's approval authority is limited to a portion of the overall project (e.g., a non-federally funded highway reauires USDOT approval for an Interstate access point), the USDOT agency's NEPA review may be limited to the portion of the project over which the agency has approval authority (e.g., the interchange). (32) This part does not apply to, or alter approvals by the U.S.DOT agencies made prior to the effective date of this part. (43) NEPA documents accepted or prepared by the U.S. DOT agency after the effective date of this part shall be developed in accordance with this part, except as follows: (i) If a NEPA document was released for public comment prior to the effective date of the regulations in this part, the NEPA process for that document may be completed, at the discretion of the applicant, in accordance with the regulations that were in effect in 23 C.F.R. 771 at the time that NEPA document was released for public comment; and (ii) If a NEPA study has been initiated, but a NEPA document has not vet been released, on the effective date of the regulations in this part, the applicant and the USDOT agency will confer regarding the manner in which compliance with these regulations will bc achieved, with the obiectivc of minimizing disruption to the ongoing NEPA process. '5) The effective date of the regulations in this part shall be *[insert date two years after publication of final rule in Federal Register].*	to clarify the criteria for determining the scope of NEPA studies for non-federally funded projects that require FHWA or other USDOT agency approval. *See Section III.B.2., Recommendation 1.* 3. Addgrandfather clause for projects "in the pipeline" on the effective date of these regulations. *See Section V, Recommendation 2.* 4. Postpone the effective date for two years. *See Section V, Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
4	1420.105	(b) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the actions covered by ~~each~~ an environmental impact statement (EIS) or environmental assessment (EA), or designated a e categorical exclusion (CE) shall have lonical termini. Project termini are logical if they are (1) rational end points for a transportation improvement and (2) rational end points for a review of environmental impacts. (1) In determininp whether a project's termini provide rational end points for a transportation improvement, the **USDOT** agency shall consider the extent to which the proposed proiect would serve a **useful** transportation purpose, even if no additional transportation improvements in the area are made. (2) In determining whether a project's termini provide rational end points for a review of environmental impacts, the **USDOT** agency shall consider the extent to which the uroposed review would (a) allow consideration of environmental issues on a broad scope; and (b) preserve consideration of alternatives for other reasonablv foreseeable transportation improvements.~~:~~ ~~(1) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made;~~ ~~(2) Connect logical termini, if linear in configuration, and be of sufficient length or size to address environmental matters over a sufficiently wide area that all reasonably foreseeable impacts are considered; and~~ ~~(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.~~	1. Clarify the criteria for determining the **scope** of a **NEPA** study, by adopting the concepts contained in existing **FHWA guidance.** See *Section III.B.1., Recommendation 1.*
5	.420.107 'olicy ~~Goals of he NEPA Process~~	[a) It is the intent of the ***U.S.*** DOT agencies that the NEPA principles of environmental stewardship and the Transportation Equity Act for the 21st Century (TEA-21) objective of timely implementation of ransportation facilities and provision of transportation services should guide Federal, State, local, and tribal decisionmaking on all ransportation actions subject to these **laws.** ~~Accordingly, in administering their responsibilities~~	1. Eliminate the reference to "maximiz[ing] attainment." *See Section III.A.1., Recommendations 1-2,* 2. Eliminate the list of seven goals.. *See Section III.A.1., Recommendations 1-2.*

Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	~~under numerous transportation and environmental laws, the U.S. DOT agencies will manage the NEPA process to maximize attainment of the following goals:~~ ~~(1) Environmental ethic. Federal actions reflect concern for, and responsible choices that preserve, communities and the natural environment, in accordance with the purpose and policy direction of NEPA (42 U.S.C. 4321 and 4331), and the specific mandates of statutes, regulations, and executive orders.~~ ~~(2) Environmental justice. Disproportionate adverse effects on minority and low income populations are identified and addressed; no person, because of handicap, age, race, color, sex, or national origin, is excluded from participating in, denied the benefits of, or subject to discrimination under any U.S. DOT agency program or activity conducted in accordance with this regulation.~~ ~~(3) Integrated decisionmaking. Federal transportation approvals are coordinated in a logical fashion with other Federal reviews and approvals, and with State, local, and tribal governmental actions, and actions by private entities, in recognition of interdependencies of decisions by the various parties and the procedural umbrella that the NEPA process provides for facilitating decisionmaking.~~ ~~(4) Environmental streamlining. Federal transportation and environmental reviews and approvals are completed in a timely fashion through a coordinated review process.~~ ~~(5) Collaboration. Transportation decisions are made through a collaborative partnership involving Federal, State, local, and tribal agencies, communities, interest groups, private businesses, and interested individuals.~~ ~~(6) Transportation problem solving. Transportation decisions represent cost effective solutions to current and future problems based on an interdisciplinary evaluation of alternative courses of action.~~ ~~(7) Financial stewardship. Public funds are used to achieve the maximum benefit for the financial investment in accordance with governing statutes and regulations.~~	*Recommendations 1-2.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
6	**1420.109 The NEPA Umbrella**	(a) (1) ~~In keeping with the above goals,~~ It is the policy of the FHWA/FTA that the NEPA process be the means of bringing together all legal responsibilities, issues, and interests relevant to the transportation decision in a logical way to evaluate alternative courses of action, ~~and~~ that it lead to a ~~single final~~ decision regarding the key characteristics of a proposed action (~~such as,~~ location, major design features, & mitigation measures~~,~~ ~~and environmental enhancements). This decision shall be made in the best overall public interest~~ and that the decision be based on a balanced consideration of all relevant factors, including but not limited to: the need for safe and efficient transportation; the social, economic, and environmental benefits and impacts of the proposed action; ~~and~~ the attainment of national, State, tribal, and local environmental protection goals. (2) For projects that require FHWA/FTA approval of plans, specifications, and estimates, it is the policy of FHWA/FTA that the decision be based on the best overall public interest. Balanced consideration of all relevant factors, as provided in paragraph (a)(1) of this section, shall be sufficient to establish that the decision reached at the conclusion of the NEPA process is in the best overall public interest.	AASHTO supports using the NEPA process as the umbrella for bringing together compliance with all applicable laws, and supports "balanced consideration" of the full range of relevant factors. AASHTO recommends the following changes: 1. Eliminate the reference to making a "final" decision" in the NEPA process. While the regulations *encourage* all related statutory requirements to be satisfied by the end of the NEPA process, they do not mandate it. See also 1420.307(c). *See Section I.D.4., Recommendations 1-2.* 2. Apply "public interest" requirement only to projects that require USDOT approval of PS&E. Clarify that balanced consideration of all relevant factors is enough to satisfy public interest. See *Section* IZLA.2, *Recommendations 1-2.*
7	1420.109	(b) Any environmentally related study, review, or consultation required by Federal law should be conducted within the framework of the NEFA process, in accordance with Section 1420.307(c), to assure integrated and efficient decisionmaking. The State is encouraged to conduct its activities during the NEPA process toward the same goal.	1. Include reference to Section 1420.307(c), to clarify that it is possible to complete the NEPA process even if full compliance with other statutes has not yet been achieved.
8	1420.109	~~(c) Federal responsibilities to be addressed in the NEPA process whenever applicable to the decision on the proposed action include, but are not limited to the following protections of:~~	1. Delete this list of applicable legal requirements. Issue the list in the form of

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~to the following protections of:~~ ~~(1) Individual rights:~~ ~~(i) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) and related statutes;~~ ~~(ii) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.), as amended;~~ ~~(iii) Americans with Disabilities Act (42 U.S.C. 12101 et seq.);~~ ~~(iv) 49 U.S.C. 5332, nondiscrimination;~~ ~~(v) 49 U.S.C. 5324(a), relocation requirements;~~ ~~(vi) 23 U.S.C. 128 and 49 U.S.C. 5323(b), public hearing requirements;~~ ~~(2) Communities and community resources:~~ ~~(i) Executive Order 12898 (59 FR 7629, 3 CFR, 1995 comp., p. 859), environmental justice for minority and low-income populations;~~ ~~(ii) 49 U.S.C. 303, protection of public parks and recreation areas;~~ ~~(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;~~ ~~(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;~~ ~~(v) 23 U.S.C. 109(i), highway noise standards;~~ ~~(vi) Clean Air Act (23 U.S.C. 109(j), 42 U.S.C. 7509 and 7521(a) et seq.), as amended;~~ ~~(vii) Safe Drinking Water Act (42 U.S.C. 201 and 300);~~ ~~(viii) Farmland Protection Policy Act of 1981 (7 U.S.C. 4201-4209);~~ ~~(ix) National Flood Insurance Act (42 U.S.C. 1401, 2414, 4001 to 4127);~~ ~~(x) Solid Waste Disposal Act (Public Law 89-272; 42 U.S.C. 6901 et. seq.);~~ ~~(xi) Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.);~~ ~~(xii) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);~~ ~~(xiii) Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. 11001 to 11050);~~ ~~(3) Cultural resources and aesthetics:~~	guidance, which should be **regularly** updated. **See** *Section* **I** *B.1., Recommendation 2.*

Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	~~(i) 49 U.S.C. 303, protection of historic sites;~~ ~~(ii) National Historic Preservation Act (16 U.S.C. 470 et seq.);~~ ~~(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;~~ ~~(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;~~ ~~(v) Archeological and Historic Preservation Act (16 U.S.C. 469);~~ ~~(vi) Archeological Resources Protection Act (16 U.S.C. 470aa to 47011);~~ ~~(vii) Act for the Preservation of American Antiquities (16 U.S.C. 431 to 433);~~ ~~(viii) American Indian Religious Freedom Act (42 U.S.C. 1996 et seq.);~~ ~~(ix) Native American Grave Protection and Repatriation Act (25 U.S.C. 3001 to 3013);~~ ~~(x) 23 U.S.C. 144(o), historic bridges;~~ ~~(xi) 23 U.S.C. 530, wildflowers;~~ ~~(xii) 23 U.S.C. 131, 136, 319, highway beautification;~~ ~~(4) Waters and water-related resources:~~ ~~(i) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;~~ ~~(ii) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;~~ ~~(iii) Federal Water Pollution Act, as amended (33 U.S.C. 1251 to 1376);~~ ~~(iv) Wild and Scenic Rivers Act (16 U.S.C. 1271 to 1287);~~ ~~(v) Land and Water Conservation Fund Act of 1965 (16 U.S.C. 460);~~ ~~(vi) Water Bank Act (16 U.S.C. 1301 to 1311);~~ ~~(vii) Executive Order 11990 (42 FR 26961; 3 CFR, 1977 comp., p. 121), protection of wetlands;~~ ~~(viii) Emergency Wetlands Resources Act of 1986 (16 U.S.C. 3921 to 3931);~~ ~~(ix) Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.);~~ ~~(x) Executive Orders 11988 (42 FR 2695[illegible] comp., p. 1171) and 12148 (44 FR 43239; 3 CFR, 1979 comp., p. 412), floodplain management;~~ ~~(5) Wildlife, plants and natural areas:~~	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~(i) Endangered Species Act of 1973 (7 U.S.C. 136, 16 U.S.C. 1531 to 1543);~~ ~~(ii) 49 U.S.C. 303, protection of wildlife and waterfowl refuges;~~ ~~(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;~~ ~~(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;~~ ~~(v) Marine Protection Research and Sanctuaries Act of 1972 (16 U.S.C. 1431 to 1445, 33 U.S.C. 1401 to 1445);~~ ~~(vi) Fish and Wildlife Coordination Act (16 U.S.C. 661 to 666);~~ ~~(vii) Wilderness Act (16 U.S.C. 1131 to 1136);~~ ~~(viii) Wild and Scenic Rivers Act (16 U.S.C. 1271 to 1287);~~ ~~(ix) Coastal Zone Management Act of 1972 (16 U.S.C. 1451 to 1464);~~ ~~(x) Coastal Barrier Resources Act (16 U.S.C. 3501 to 3510, 42 U.S.C. 4028);~~ ~~(xi) National Trails System Act (16 U.S.C. 1241 to 1249);~~ ~~(xii) Executive Order 13112 (64 FR 6183), Invasive Species.~~	
9	**1420.111** ~~Title VI Environmental Justice~~	(a) .It is the policy of FHWA/FTA that no person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation. ~~in Executive Order 12898, as implemented by DOT Order 5610.2 and the FHWA Order 6640.23, and the requirements of the Civil Rights Act of 1964, Title VI, and its implementing regulations, proposed actions shall be developed in a manner to avoid or mitigate disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, on low income populations and minority populations. Adverse effects can include a denial of or reduction in benefits.~~	1. Preserve existing statement of Title VI non-discrimination requirements; remove statement of EJ policies. See *Section III.A.3., Recommendation 1(a).* 2. If EJ requirements are retained, revise this section to: • Focus solely on EJ policies. ▪ Clarify that project can be approved even if it has EJ impacts. • Donotdefine "adverse effects" to include "denial of or

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
			reduction in benefits." *See Section III.A.3., Recommendation 2(a).*
10	1420.111	~~(b) In performing an environmental analysis of proposed actions, applicants must analyze data necessary to determine whether the actions will have disproportionately high and adverse effects on low income and minority communities. When disproportionately high and adverse effects are found, the applicant must identify measures to address these disproportionate effects, including actions to avoid or mitigate them, or it must explain and justify why such measures cannot be taken.~~	1. Delete this section; regulation should focus on Title VI compliance, not EJ issues. *See Section III.A.3., Recommendation 1(b).* 2. If EJ requirements are retained, revise as follows: • Focus on information gathering, not findings. • Any findings should be made by FHWA/FTA at end of NEPA process. *See Section III.A.3., Recommendation 2(b)*
11	1420.111	~~(c) The findings and determinations made pursuant to paragraphs (a) and (b) of this section must be documented as part of the NEPA document prepared for the proposed action, or in a supplemental document if the NEPA process has been completed.~~	1. Delete this section; regulation should focus on Title VI compliance, not EJ issues. *See Section III.A.3., Recommendation 1(b).* 2. If EJ requirements are retained, revise to clarify that level of detail **should** be determined on case-by-case basis. *See Section III.A.3., Recommendation 2(c).*
12	.420.111	~~(d) In accordance with Executive Order 12898, DOT Order 5610.2, and the FHWA Order 6640.23, nothing in this section is intended to, nor shall create, any right to judicial review of any action taken by the agency, its officers or its recipients taken under this section to comply with such Orders.~~	1. Delete thissection; regulation should focus on Title VI compliance, not EJ issues. *See Section III.A.3., Recommendation 1(b).* 2. If EJ requirements are retained, revise to clarify that FHWA/FTA do not

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
			intend for any of the requirements in this section (1420.111) to be subject to judicial review. *See Sechon III.A.3., Recommendation 2(d).*
13	1420.113 **Avoidance, Minimization, Mitigation, and Enhancement ~~Responsibilities~~**	(a) In accordance with ~~the goals established in~~ § 1420.107, it is the policy of the FHWA and the FTA that: ~~proposed actions be developed as described in this section; to the fullest extent practicable. For the purposes of this section, "practicable" means a common sense balancing of environmental values with safety, transportation need, costs, and other relevant factors in decisionmaking. No additional findings or paperwork are required~~. (1) ~~A~~adverse social, economic, and environmental impacts to the affected human communities and the natural environment ~~should be~~ avoided;: (2) ~~W~~where adverse impacts cannot be avoided, proposed measures ~~should be~~ developed to minimize adverse impacts; and, (3) ~~M~~measures necessary to mitigate unavoidable adverse impacts be incorporated into the action, ~~or should be~~ part of a mitigation program completed in advance of the action, or be part of a mitigated program to be completed on a defined schedule Following implementation of the action. (b4) Environmental enhancements should be evaluated and incorporated into the action, at the discretion of the applicant. ~~as appropriate~~.	1. Delete "practicability" requirement. Preserve language from existing regulations, which sets "policy" favoring mitigation. *See Section III.A.4., Recommendation 1.* 2. Create new paragraph (b) for policies re: enhancements. Clarify that that enhancements are purely discretionary, unlike avoidance, minimization, and mitigation. *See Section III.A.4., Recommendation 2; see also Section I.C.3., Recommendations 1-2.*
14	1420.113	(b) Mitigation measures and environmental enhancements shall be eligible for Federal funding to the fullest extent authorized by law.	Retain this language. If an applicant chooses to include enhancements, the enhancements should be eligible for federal funding. *See Section I.C.3., Recommendation 3.*
15	1420.113	(c) NEPA commitments. (1) It shall be the responsibility of the applicant in cooperation with the U.S. DOT agency to implement hose mitigation measures ~~and environmental enhancements,~~ stated as commitments in the final EIS/ROD, EA/FONSI, or CE prepared or supplemented pursuant to this regulation, as well as	Clarify that enhancements are discretionary. *See Section I.C.3., Recommendations 1-2, and Section III.A.4., Recommendations 1-2.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		any environmental enhancements stated as commitments in those documents, unless the commitment is modified or eliminated in a supplemental final EIS/ROD, EA/FONSI or CE, or re-evaluation approved by the U.S. DOT agency. (2) If a final EIS/ROD, EA/FONSI, CE, or other U.S. DOT agency approval commits to coordination with another agency during the final design and construction phase, or during the operational phase of the action, the applicant is responsible for such coordination, unless the commitment is removed in a supplemental final EIS/ROD, EA/FONSI or CE, or re-evaluation approved by the U.S. DOT agency.	
	Subpart B — Program and Project Streamlining		
16	**1420.201 Relation of Planning and Project Development Processes**	(a) The planning process products ~~described in § 1410.318 shall~~ be considered early in the NEPA process. The FTA and the FHWA may encourage all Federal, State and local agencies with project level responsibilities for investments included in a transportation plan to participate in the planning process so as to maximize the usefulness of the planning products for the NEPA process and eliminate duplication.	1. Clarify that all relevant planning process products shall be considered – not just MIS type studies.
17	1420.201	(b) Applicants preparing documents under this part shall, to the maximum extent useful and practicable, incorporate and utilize analyses, studies, documents, and other sources of information developed during the transportation planning processes of 23 CFR part 1410 and other planning processes in satisfying the requirements of the NEPA process. The provisions of 40 CFR 1502.21 (incorporation by reference) will be used as appropriate.	
18	1420.201	(c) (1) During scoping for an EIS or early coordination for an environmental assessment, the U.S. DOT agency and the applicant shall, in consultation with the transportation planning agencies responsible for inclusion of the project in the metropolitan (if applicable) and statewide plan and program, review the record of previously completed planning activities to determine the extent to which the products of the planning process	1. Create certification process that allows project applicant to request that certain planning decisions be incorporated into the NEPA process. *See Section I.A., Recommendation 3.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		may be incorporated into the NEPA process. The planning process record also may be used by the applicant, at its discretion, to support the applicability of a categorical exclusion for advance acquisition of right-of-way under Section 1420.311(d)(16)~~, including any existing statement of purpose and need and evaluation of alternatives~~ (2) Based on the review of previously completed planning activities, the applicant may certify to the U.S. DOT agency that certain decisions reached in the planning process were adequately supported and therefore should be incorporated into the NEPA process. Decisions that may be certified through this procedure include, but are not limited to, the following (i) decisions regarding the scope of an EIS or EA for a proposed project, including decisions regarding the need for the project, the purpose of the project, and the range of alternatives requiring further consideration; and (ii) decisions regarding the applicability of a categorical exclusion for advance land acquisition, under § 1420.311(d)(16). (3) If the applicant certifies one or more planning decisions to the U.S. DOT agency for approval, pursuant to paragraph the U.S. DOT agency shall: (i) unconditionally approve the certification, in which case the certified decision or decisions would be incorporated into the NEPA process; (ii) conditionally approve the certification, specifying additional steps that would need to be taken before the certified decision or decisions could be accepted; or (iii) disapprove the certification, in which case the certified decision or decisions would not be incorporated into the NEPA process. ~~Where the U.S. DOT agency, in cooperation with the applicant, determines that planning decisions are adequately supported, the detailed evaluation of alternatives required under § 1420.313(b) or § 1420.317(c) may be limited to the no-action and reasonable alternatives requiring further consideration. In deciding which of the evaluations and conclusions of the planning process are adequately supported and may be incorporated during the NEPA process, the U.S. DOT agency and~~	2. Create certification process that allows project applicant to request that certain planning decisions be incorporated into EIS or EA for NEPA purposes. *See Section I..., Recommendation 4.*

	Section	*Text* of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~the applicant~~ (4) In deciding whether to approve, conditionally approve, or disapprove the incorporation of a certified decision or decisions into the NEPA process, the U.S. DOT agency shall take into account the following (~~1~~i) The validity and completeness of the ~~supporting~~ analyses supporting the certified decision or decisions, (~~2~~ii) The public involvement process associated with ~~those planning products~~ certified decision or decisions, (~~3~~iii) The degree of coordination with Federal, State, and local resource agencies with interest in or authority over the ultimate action(s); and (~~4~~iv) Any comments submitted and any positions taken regarding the certified decision or decisions by the MPO (in a metropolitan area), by transit operators, by Federal, State, or local resource agencies, and by other interested parties. ~~The level of formal endorsement of the analyses and conclusions by participants in the planning process~~ (5) The **U.S.** DOT shall communicate its approval, conditional approval, or disapproval to the project applicant in **writing,** explaining the basis for its decision in accordance with the four criteria in paragraph (c)(4) of this section. If the USDOT agency disapproves a certification, rather than approving or conditionally approving it, its decision shall **be** issued by the **FHWA** or **FTA** headquarters office.	
19	**1420.203 Environmental Streamlining**	(a) For highway and mass transit projects requiring an environmental impact statement, ~~an environmental assessment,~~ or ***an*** environmental review, analysis, opinion, or environmental permit, license, or approval by operation of Federal law, as lead Federal agency, the U.S. DOT agency, in cooperation with the applicant, shall perform the following: (1) Consult with the applicant regarding the issues involved, the likely Federal involvement, and project timing. **(2)** Early in the NEPA process, contact Federal agencies likely to be involved in the proposed action to verify the nature of their involvement and to	1. **Clarify that this** review process is only for EIS projects, not for **EA** or CE projects. *See Section II.A., Recommendation 2.* 2. Substitute "comment" for "concurrence." *See Section I.B.I, Recommendation 1.* **4.** Incorporate statutory requirement that resource agencies **and USDOT** agency agree in advance

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		discuss issues, methodologies, information requirements, time frames and constraints associated with their involvement, and to establish jointly the time periods within which each agency must undertake and complete its reviews of study documents during the course of the study;? **(3)** Identify and use the appropriate means listed in **40 CFR 1500.4** and **1500.5** for reducing paperwork and reducing delay. **(4)** Document the results of such consultation and distribute to the appropriate Federal agencies for their ~~concurrence~~comment, identifying at a minimum the following: (i) Federal reviews and approvals needed for the action, (ii) Those issues to be addressed in the NEPA process and those that need no further evaluation, (iii) Methodologies to be employed in the conduct of the **NEPA** process, (iv) Proposed agency and public involvement processes, and (v) A process schedule, including the agreed-upon time frames for each Federal agency's review of study documents. (5)- The documentation urepared in accordance with paramauh (4) may take the form of a memorandum of understanding among the **U.S.** DOT agency, the project applicant, and one or more Federal aaencies. However, a memorandum of understanding is not required. ~~Identify, during the course of completing the NEPA process, points of interagency disagreement causing delay and immediately take informal measures to resolve or reduce delay. If these measures are not successful in a reasonable time, the U.S. DOT agency shall initiate a dispute resolution process pursuant to section 1309 of the TEA-21.~~	project documents. *See Section I.B.2., Recommendation 1.* **3.** Clarify that **an MOU**
20	.420.203	Anv Federal agency involved in the coordinated cnvironmcntal review process may request an extension of the time periods established under paragraph (a). If such a request **is** made, the time period will be extended if the U.S. DOT agency and the Federal agency requesting the extension agree that: (1) good **cause** has been shown for extending the	Incorporate the statutory standards for deciding whether ***to*** **grant** extensions of time period for review by other Federal agencies. See TEA-21, § 1309(b)(4).

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		time period; and (2) additional time for analysis and review is needed as a result of new information that has been discovered that could not reasonably have been anticipated when the Federal agency's time periods for review were established. If a memorandum of understanding has been executed pursuant to paragraph (a)(5), it shall be modified to incorporate any mutually agreed-upon extensions. If a memorandum of understanding has not been executed, the **U.S.DOT** agency shall document the agreed-upon extension and distribute such documentation to all agencies participating in the coordinated review process.	Incorporate the statutory requirement that the **MOU**, if any, be modified to reflect the change in the review periods. See TEA-21, § 1309(b)(4). Add the requirement (which is not in **TEA-21**) that the extension be documented, if no **MOU** has been executed.
21	1420.203	(c) If the **U.S.**DOT agency determines that another Federal agency which is subject to a time period for its environmental review or analysis under this section has failed to complete such review within the established time period or within any agreed-upon extension to such time period, the **U.S. DOT** agency may, after notice and consultation with such agency, close the record on the issue under review.	*Recommendation 2.*
22	.420.203	(d) If the U.S. **DOT** agency finds, after timely compliance with this section, that an environmental issue related to the project over which an affected Federal agency has jurisdiction by operation of Federal law has not been resolved, the Secretary of Transportation and the head **of the** other Federal agency shall resolve the matter not later than **30** days after the date of the finding by the **U.S.**DOT agency.	Require that disputes among Federal agencies in the coordinated review process be resolved within 30 **days** after a finding that the dispute exists. See **TEA-21**, § 1309(c). *See Section I.B.3., Recommendation 1.*
23	420.203	~~(b)~~ (e) A State may request that all State agencies with environmental review or approval responsibilities be included in the coordinated environmental review process and, with the consent of the **U.S.**DOT agency, establish an appropriate means to assure that Federal and State environmental reviews and approvals are fully coordinated. If a State agrees to participate in the coordinated review process, it shall be considered a 'Federal agency" for purposes of this section of	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		these regulations.	
24	1420.203	~~(c)~~ (f) At the request of the applicant, the coordinated environmental review process ~~need not~~ may be applied to an action not requiring an environmental impact statement.	Clarify that the coordinated review process will only be used for EA or CE projects if affirmatively requested by the applicant. *See Section II.A., Recommendation 1.*
25	1420.203	~~(d)~~ (g) In accordance with the CEQ regulations on reducing paperwork (40 CFR 1500.4), NEPA documents prepared by **DOT** agencies need not devote paper to impact areas and issues that are not implicated in the proposed action and need not make explicit findings on such issues.	
26	1420.205 **Programmatic Approvals**	(a) **Nothing** in this part shall prohibit the U.S. **DOT** agency from making approvals which apply to future actions consistent with the conditions established for **such** programmatic approvals.	AASHTO supports the explicit recognition that US **DOT** agencies can comply with NEPA by **issuing** programmatic approvals. **AASHTO** encourages **the** broad application of **this** authority as a means of streamlining the NEPA process for small and uncontroversial projects.
27	.420.205	(b) Applicants shall cooperate with the **U.S.** DOT agency in conducting program evaluations to ensure **that such programmatic approvals are being** properly applied.	
28	.420.207 **)uality \ssurance 'rocess**	(a) The FHWA and the **FTA** shall institute a process to assure that actions subject to **this** part meet or exceed legal requirements and **are** processed in a timely manner.	
29	420.207	~~(b) For actions processed with an environmental impact statement, this process shall include a legal sufficiency review and may require the prior concurrence of the Headquarters office in accordance with procedures established by the FTA and the FHWA..~~	**This** section is duplicative of paragraph (a), which mandates a "process to assure" that all legal requirements are met. AASHTO recommends that the specific procedures for assuring

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
			legal sufficiencybe developed **through** guidance, **with** the goal of reducing **the** delays currently associated with legal **sufficiency** reviews.
30	**1420.209 Alternate Procedures**	(a) An applicant may propose to the U.S. **DOT** agency alternative procedures for complying with the intent of this part with respect to its actions.	
31	1420.209	(b) The US. **DOT** agency shall publish such alternative procedures in the Federal Register for notice and comment and shall consult with the CEQ pursuant *to* 40 CFR 1507.3.	
32	1420.209	(c) After taking into account comments received, and negotiating with the applicant appropriate changes to such alternative procedures, the U.S. **DOT** agency shall approve such alternative procedures **only** after making a finding that the alternative procedures **will** be fully effective at complying with NEPA and related responsibilities.	
33	**1420.211 Use of This Part by Other U.S. DOT Agencies**	As authorized by the Secretary, other U.S. **DOT** agencies may use this part for specific actions or categories of actions under their jurisdiction.	
34	**1420.213 Emergency Action Procedures**	Requests for deviations from the procedures in this part because of emergency circumstances shall be referred to the U.S. DOT agency for evaluation and decision in consultation with the CEQ in accordance with 40 CFR 1506.11.	
	Subpart C – Process and Documentation Requirements		
35	1420.301 Responsibilities of the Participating Parties	(a) The CEQ regulation establishes rules for lead agencies (40 CFR 1501.5) and cooperating agencies (40 CFR 1501.6). It also encourages Federal agencies to cooperate with State and local agencies to eliminate duplication (40 CFR 1506.2) and defines the relationship between Federal agencies, applicants, and contractors (40 CFR 1506.5).	
36	1420.301	(b) For actions on Federal lands that are developed directly **by** the **U.S.** DOT agency in cooperation with the Federal land management agency,	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		responsibilities for management of the NEPA process shall be as established by interagency agreement or procedure.	
37	1420.301	(c) Use of contractors. (1) The U.S. DOT agency or an applicant may select and use contractors, in accordance with applicable contracting procedures, and the provisions of 40 CFR 1506.5(c), in support of their respective roles in the NEPA process. An applicant which is a State agency with statewide jurisdiction may select a contractor to assist in the preparation of an EIS. Where the applicant is not a State agency with statewide jurisdiction, the applicant may select a contractor, after coordination with the U.S. DOT agency to assure compliance with 40 CFR 1506.5(c) relative to conflict of interest. Contractors that have a role in the actual writing of a NEPA document shall execute a disclosure statement in accordance with 40 CFR 1506.5(c), specifying that such contractor has no financial or other interest in the outcome of the action (other than engineering with the exception allowed by paragraph (c) (2) of this section, if applicable), and will not acquire such an interest prior to the approval of the final NEPA document by the U.S. DOT agency or the termination of the contractor's involvement in writing the NEPA document, whichever occurs first. (2) A State may procure the services of a consultant, under a single contract, for environmental impact assessment and subsequent engineering and design work, provided that the State conducts a review that assesses the objectivity of the NEPA work in accordance with the provisions of 23 U.S.C 112(g).	AASHTO strongly supports the addition of paragraph (2), which allows States to procure, under a single contract, the services of a consultant to prepare a NEPA document and conduct subsequent engineering and design work, as required by Section 1205(b) of TEA-21.
38	1420.303 Interagency Coordination	(a) Interagency coordination during the NEPA process involves the early and continuing exchange of information with interested Federal, State, local public agencies, and tribal governments. Interagency coordination should begin early as part of the planning process and continue through project development, and the preparation of an appropriate NEPA document, ~~and, by agreement~~ At the discretion of the U.S. DOT agency and the applicant, interagency coordination also may continue, into the implementation stage of the action. Interested agencies include any agency that (1) ~~those that expresses~~ a continuing interest in any	1. Clarify that continuing interagency coordination after the NEPA process ends is optional. 2. Re-define interested agencies to include those that express an interest and have some information, expertise, jurisdiction, etc. 3. Clarify that enhancements are discretionary.

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		aspect of the actions during the planning process and project development processes, and (2) ~~. They include those agencies whose~~has jurisdiction, responsibilities, ~~or~~ expertise, or information that ~~may~~ involves any aspect of the action or its alternatives. The purpose of interagency coordination is to aid in determining the class of action, the scope of the NEPA document, the identification of key issues, the appropriate level of analysis, methods of avoidance, minimization, and mitigation of adverse impact, ~~opportunities for environmental enhancement, and~~ related environmental requirements. At the discretion of the applicant, environmental enhancements also may be considered as part of interagency coordination. Coordination early in the NEPA process must ~~extend beyond~~ include agencies consulted during the planning process ~~to~~ as well as any additional ~~those agencies~~ whose interest begins only when preliminary designs of alternative actions are being developed. The appropriate frequency and timing of coordination with a particular agency will depend on the interests of the agency consulted.	*See Section I.C.3. Recommendations 2-2.* 4. Recognize that, in some instances, all agencies with project-level responsibilities will already have been involved in the planning process.
39	1420.303	(b) Federal land management entities, neighboring Rates, and tribal governments, that may be significantly affected by the action or by any of the alternatives shall be notified early in the NEPA process and their views solicited by the applicant in cooperation with the U.S. DOT agency.	
40	1420.303	(c) Upon U.S. DOT agency written approval of an EA, FONSI, or separate section 4(f) determination — ~~CE designation,~~ the applicant shall send a notice of availability of the approved document, or a copy of the approved document itself, to the affected units of Federal, State, and local government. The notice shall briefly describe the action and its location and impacts. Cooperating agencies shall be provided a copy of the approved document.	1. Preserve existing practice of requiring notice to affected local officials for EA/FONSIs, but not for CEs or separate Section 4(f) approvals. *See Sechon II.B.3., Recommendation 2.*
41	1420.305 Public Involvement	a) The applicant must have a continuing program of public involvement which actively encourages and facilitates the participation of transportation and environmental interest groups, citizens groups, private businesses, and the general public including minority and low income populations through a	

	Section	Text of Proposed Regalation (with AASHTO's recommended changes)	AASHTO Comments
		wide range of techniques for communicating and exchanging information. The applicant shall use the products of the public involvement process developed during planning pursuant to 23 CFR 1410.212 and 1410.316, whenever such information is reasonably available and relevant, to provide continuity between the public involvement programs.	
42	1420.305	(b) Each applicant developing projects under this part must adopt written procedures to carry out the public involvement requirements of this section and 40 CFR 1506.6, and, as appropriate, 23 U.S.C. 128, and 49 U.S.C. 5323(b) and 5324(b). The applicant's public involvement procedures shall apply to all classes of action as described in § 1420.309, but should provide for varying levels of public involvement depending on the nature of the action under consideration. The public involvement procedures ~~and~~ shall be developed in cooperation with other transportation agencies with jurisdiction in the same area, so that, to the maximum extent practicable, the public is presented with a consistent set of procedures that do not vary with the transportation mode of the proposed action or with the phase of project development. Where two or more involved parties have separate established procedures, a cooperative process for determining the appropriate public involvement activities and their consistency with the separate agency's procedures will be cooperatively established .	1. Clarify that, while the public involvement procedures apply to all classes of action, the procedures for each class of action will differ, as provided in Section 1420.305(c)(8).
43	1420.305	(c) Public involvement procedures must provide for the following: (1) Coordination of public involvement activities with the entire NEPA process and, when appropriate, with the planning process. The procedures also must provide for coordination and information required to comply with public involvement requirements of other related laws, executive orders, and regulations; (2) Early and continuing opportunities for the public to be informed about, and involved in the identification of social, economic, and environmental impacts and impacts associated with relocation of individuals, groups, or institutions; (3) The use of an appropriate variety of public involvement activities, techniques, meeting and	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		hearing formats, and notification media; (4) A scoping process that satisfies the requirements of 40 CFR 1501.7; 5) One or more public hearings or the opportunity or hearing(s) to be held at a convenient time and place that encourage public participation, for any project which requires the relocation of substantial numbers of people, substantially changes the layout or functions of connecting transportation facilities or of the facility being improved, has a substantial adverse impact on abutting property, substantially affects a community or its mass transportation service, otherwise has a substantial social, economic, environmental or other effect, or for which the U.S. DOT agency determines that a public hearing is in the public interest; (6) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing where a hearing is determined appropriate. Such notice shall indicate the availability of explanatory information; (7) Where appropriate, the submission to the U.S. DOT agency of a transcript of each public hearing and a certification (pursuant to 23 U.S.C.128 or 49 U.S.C.5324(b)(2)) that a required hearing or hearing opportunity was offered. The transcript should be accompanied by copies of all written statements from the public, submitted either at the public hearing or during an announced period after the public hearing; (8) Specific procedures for complying with the public and agency involvement and notification requirements for the following: EAs, Findings of no significant impact (FONSI), Draft EISs, Final EISs, and Records of decision (ROD); (9) Reasonable accommodations for participation by persons with disabilities, including, upon request, the provision of auxiliary aids and services for understanding speakers at meetings and environmental documents.	
44	1420.305	(d) Where a reevaluation of NEPA documents is required pursuant to § 1420.323, the U.S. DOT agency and the applicant will determine whether changes in the project or new information warrant additional public involvement.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
45	1420.305	(e) A minimum public comment period of 45 days shall be provided prior to the initial adoption or substantial revision of public involvement procedures.	
46	1420.305	(f) Public involvement procedures in effect as of the date of this part remain valid, but will be reviewed periodically for effectiveness.	
47	**1420.307 Project Development and Timing of Activities**	(a) The FHWA and/or the FTA will not approve the initiation and will not authorize federal funding for final design activities, property acquisition (except the types of advance land acquisitions described in § 1420.311(d)(16)), purchase of construction materials or transit vehicles, or construction, until the following have been completed: (1)(i) The action has been classified as a categorical exclusion (CE), or (ii) A FONSI has been approved, or (iii) A final EIS has been approved, made available for the prescribed period of time, and a record of decision has been signed; (2) The U.S.DOT agency has received transcripts of public hearings held, and any required certifications that a hearing or opportunity for a hearing was provided; and (3) The ~~planning and~~ programming requirements of 23 CFR part 1410 have been met. (b) The applicant may proceed with any of the activities described in uaraerauh (a), prior to the completion of the NEPA process, if the applicant uses non-federal funds for those activities. If the applicant chooses to proceed with such activities with non-federal funds, the applicant does so at its own risk.	1. AASHTO strongly supports allowing States the ability to proceed with at-risk activities prior to completion of the NEPA process. *However,* AASHTO recommends adding a new paragraph (b) to clarify that the regulations is intended to achieve this result. 2. Delete the reference to requiring compliance with "planning" requirements prior to the end of the NEPA process • Revisions is needed to clarify that *only* issue in NEPA process is whether relevant phase of project is included in relevant program. • Compliance with this NEPA regulation does *not* require reassessment of adequacy of planning process.
48	1420.307	(~~b~~c) For projects in non-attainment and maintenance areas, the project evaluated in the NEPA document must be included in a conforming plan and TIP prior to NEPA process completion. Before completion of the NEPA document for such projects, if it becomes apparent that the preferred alternative will not be consistent with the design concept and scope of the action identified in the relevant plan and TIP, the applicant shall	1. Limit this requirement to project in non-attainment and maintenance areas. See ***AASHTO Planning Comments, Section I.D., Recommendation 3 (USDOT Docket # 5933).***

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		immediately notify the State agency responsible for the State TIP, and, in metropolitan areas, the MPO, so that the planning and programming requirements of 23 CFR part 1410 can be satisfied prior to the approval of a final **EIS,** Record of Decision, FONSI or CE.	
49	1420.307	~~(c)~~ (d) Compliance with the requirements of all applicable environmental laws, regulations, executive orders, and other related requirements as set forth in § 1420.109 normally should be completed prior to ~~the approval of the final EIS, FONSI, or the CE designation~~completion of the NEPA process. If full compliance is not possible by the time the ~~final EIS or FONSI is prepared~~NEPA process is completed, the ~~final EIS~~ROD, ~~or~~ FONSI, or CE designation should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. However, full compliance with the **U.S.** EPA's conformity regulation at 40 CFR parts 51 and 93 is required prior to the approval of the **ROD,** FONSI or CE designation. Approval of the final NEPA document (ROD, FONSI, or CE designation) constitutes adoption of DOT agency findings and determinations that are contained therein **unless** otherwise specified. The FHWA approval of the ~~appropriate~~ final **NEPA** document, as described above, will constitute its finding of compliance with the report requirements of 23 **U.S.C.**128. The **FTA** approval of the ~~appropriate~~ final **NEPA** document indicates compliance with 49 **U.S.C.**5324(b) **and** fulfillment of the grant application requirements of 49 **U.S.C.**5323(b), if **such** requirements **are** applicable to the action.	1. Clarify that compliance with other laws by the end of the NEPA process is desired, but **not** required. This change is needed for consistency with regulations governing EAs, § 1420.313(h) and FEISs, § **1420.317(a)(3).** *See Section I.D.4., Recommendation 1; see also Section II.B.1, Recommendation 1.* 2. Clarify that the completion of the **NEPA** process refers to the point at which the **USDOT** agency approves the ***ROD,*** not the FEIS.
50	.420.307	(d) The completion of the requirements set forth in **this** section is considered the **U.S.** DOT agency 's acceptance of the location of the action and design concepts described in the NEPA document **unless** otherwise specified by the approving official. However, such acceptance does not commit the U.S. **DOT** agency to approve any future grant request to fund the preferred alternative.	
51	**.420.309 Classes of Actions**	(a) Class I (EISs). Actions that significantly affect the environment require **an** EIS (40 CFR 1508.27). The following are examples of **actions** normally requiring an EIS:	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		(1) A new controlled access freeway. (2) A highway project of four or more lanes on a new location. (3) New construction or major extension of fixed rail transit facilities (e.g., rapid rail, light rail, automated guideway transit). (4) New construction or major extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility. (5) New construction or major extension of an intercity railroad not located within existing railroad right-of-way. (6) A multimodal or intermodal facility that includes or requires any of the other Class I actions.	
52	1420.309	(b) Class II (Categorical Exclusions). Actions that do not individually or cumulatively have a significant environmental impact are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 1420.311(c). Additional actions not listed may be designated as CEs pursuant to § 1420.311(d), if documented environmental studies demonstrate that the action would not, either individually or cumulatively, have a significant environmental impact.	
53	1420.309	(c) Class III (EAs). Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate, subsequent NEPA document (i.e., Findings of no significant impact or EIS).	
54	1420.311 Categorical Exclusions	(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and are known, on the basis of past experience with similar actions, not to involve significant environmental impacts. They are actions which Do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve sigruficant air, noise, or water quality impacts; do not have significant impacts on travel	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.	
55	1420.311	(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the U.S.DOT agency, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include: (1) Unique environmental impacts; (2) Substantial controversy on environmental grounds; (3) Significant impact on properties protected by 49 U.S.C.303 (section 4(f)) or section 106 of the National Historic Preservation Act; or (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.	
56	1420.311	[c) The following actions meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and § 1420.311(a) of this regulation. If other environmental laws ~~(i.e., those listed in §~~ do not apply to the action, then it does not require any further NEPA approval by the U.S. DOT agency. If the U.S. DOT agency is not sure of the applicability of one of these CEs or of other environmental laws to a particular proposed action, the applicant will be required to provide supporting documentation in accordance with paragraph (d) of this section. The following are CEs: (1) Activities which do not involve or lead directly to construction, such as program administration (e.g., personnel actions, procurement of consulting services or office supplies); the promulgation of rules, regulations, directives, and legislative proposals; planning and technical studies; technical assistance activities; training and research programs; technology transfer activities; research activities as defined in 23 U.S.C. 501-507; archaeological planning and research; approval of a unified planning work program; development and establishment of management systems under 23 U.S.C.303; approval of project concepts under 23	1. Remove cross-reference to list of statutes, which will quickly become outdated. *See Section II.B.1., Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		CFR part 476; preliminary engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; Federal-aid system revisions which establish classes of highways; and designation of highways to the National Highway System. (2) Modernization of a highway by resurfacing. (3) Routine maintenance or minor rehabilitation of existing transportation facilities, including pavements, tracks, railbeds, bridges, structures, stations, terminals, maintenance shops, storage yards, and buildings, that occurs entirely on or within the facility, where there is no change in the character and use of the facility, and no substantial disruption of service or traffic; purchase of associated capital maintenance items; preventive maintenance of transit facilities, vehicles, and other equipment (4) Incorporation of an Intelligent Transportation Systems (ITS) element into an existing transportation facility or service, including the development, purchase, installation, maintenance, improvement, and operation of a traveler information system, incident management and emergency response system, traffic management and control system, security system, or MAYDAY system that enables public agencies to detect and respond to emergency situations. (5) Activities included in the State's highway safety program under 23 U.S.C. 402; enforcement of railroad safety regulations, including the issuance of emergency orders. (6) Improvement of existing rest areas, toll collection facilities, truck weigh stations, traffic management and control centers, and vehicle emissions testing centers where no substantial land acquisition or traffic disruption will occur. (7) Carpool and vanpool projects, as defined in 23 U.S.C. 146, if no substantial land acquisition or traffic disruption will occur. (8) Emergency repairs of highways, roads and trails under 23 U.S.C. 125; emergency repair of transit or railroad facilities after a natural disaster or catastrophic failure. (9) Operating assistance to transit agencies. (10) Acquisition of buses, rail vehicles,	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		paratransit vehicles, and transit-support vehicles, where the use of these vehicles can be accommodated by existing facilities or by new facilities which are themselves CEs. (11) Purchase or installation of operating or maintenance equipment to be located within an existing transportation facility with no significant impacts off the site; lease of existing facilities, vehicles, or other equipment for use in providing transit services; capital cost of contracting for transit services. (12) Bus and rail car rehabilitation, including the retrofit or replacement of vehicles for alternative fuels, where the use of these vehicles can be accommodated by existing facilities or new facilities which are themselves CEs. (13) Improvement of existing tracks, railbeds, communications systems, signal systems, security systems, and electrical power systems when carried out within the existing right-of-way without substantial service disruption. (14) Construction of bicycle and pedestrian lanes, paths, and facilities within existing transportation facilities or right-of-ways; installation of equipment for transporting bicycles on transit vehicles. (15) Alterations to transportation facilities or vehicles in order to make them accessible by persons with disabilities. (16) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, lighting, and railroad warning devices where no substantial land acquisition or traffic disruption will occur. (17) Transfer of Federal lands pursuant to 23 U.S.C 317 when the subsequent action is not an FHWA action; approvals of disposals of excess right-of-way; transfer of surplus assets, in accordance with 49 U.S.C. 5334(g); approval of utility installations along or across a transportation facility. (18) Landscaping, streetscaping, public art and other scenic beautification; control and removal of outdoor advertising; acquisition of scenic easements and scenic or historic sites for the purpose of preserving the site.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		(19) Installation of noise barriers or other alterations to existing facilities to provide for noise reduction; alterations to existing non-historic buildings to provide for noise reduction. (20) Contributions to statewide or regional efforts to conserve, restore, enhance, and create wetlands or wildlife habitats.	
57	1420.311	(d) Additionally, for individual proposed actions to be categorically excluded under this section, the applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied, that significant environmental effects will not result, that the applicant's public involvement process is consistent with the procedures adopted pursuant to § 1420.305, that ~~any~~ appropriate interagency coordination has occurred, and that any other applicable environmental ~~laws~~requirements ~~(e.g., those listed in § 1420.109(c))~~ have been satisfied or provide reasonable assurance that the requirements will be met.~~.~~ This demonstration may require investigations of specific areas of impact to determine whether the CE criteria are satisfied. If the DOT agency is not certain that the appropriateness of the CE has been demonstrated, additional documentation or an EA or EIS will be required of the applicant. Examples of actions for which a CE demonstration may be possible include, but are not limited to: (1)Modernization of a highway through restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing lanes), or travel lanes in the median of an existing facility, including any such action necessary to accommodate other transportation modes on an existing facility. (2) Transportation operational improvements, including those that use ITS, such as, freeway surveillance and control systems, traffic signal monitoring and control systems, transit management systems, electronic fare payment systems, and electronic toll collection systems. (3) Transportation safety improvements and programs; hazard eliminations, including construction of grade separation to replace existing highway-railway grade crossings; projects to	1. Clarify that compliance with other laws can be demonstrated with a "reasonable assurance" that such requirements will be met. See *Section II.B.2., Recommendation 1.* 2. Clarify that the CE for right-of-way acquisition can be exercised as long as the USDOT agency can still consider all reasonable alternatives (i.e., comply with NEPA).

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		mitigate hazards caused by wildlife; and seismic retrofit of existing transportation facilities or structures. (4) Rehabilitation or reconstruction of tunnels, bridges, and other structures, and the approaches thereto. (5) Modification or replacement of an existing bridge on essentially the same alignment or location. (6) Construction of parking facilities or carpool and vanpool projects that involve land acquisition and construction. (7) Construction of new buildings to house transportation management and control centers, carpool and vanpool operations centers, or vehicle emissions testing centers. (8) Construction of new rest areas, toll collection facilities, truck weigh stations or auto emissions testing or safety testing facilities. (9) Approvals for changes in highway access control. (10) Improvement of existing tracks, railbeds, communications systems, signal systems, security systems, and electrical power systems, including construction of sidings or passing tracks; extension or expansion of rail electrification on existing, operating rail lines. (11) Construction of new bus or rail storage and maintenance facilities in undeveloped areas or areas used predominantly for industrial or transportation purposes, where such facility is compatible with existing zoning, the site is located on or near a street with adequate capacity to handle anticipated traffic, and there is no significant air or noise impact on the surrounding community. (12) Renovation, reconstruction, or improvement of existing rail, bus, and intermodal buildings and facilities, including conversion to use by alternative-fuel vehicles. (13) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) or intermodal transfer facilities, when located in a commercial area or other high activity center in which there is adequate street capacity for projected traffic.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		(14) Rehabilitation, renovation, or improvement of existing ferry terminals, piers, and facilities. (15) Short-term demonstrations of rail service on existing tracks. **(16)** An acquisition of land or property interests that meets the criteria of paragraph (d)(16)(i), (ii) or (iii) of this section may be evaluated against the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section separately from any planned action that would use the land or property interests. Any subsequent action that would use the acquired right-of-way or property interests and would require a DOT agency action must be separately reviewed in accordance with this part prior to any construction on, or change in the land. The following types of acquisitions may qualify as CEs: (i) Acquisition of an existing transportation right-of-way which is linear in its general configuration and is not publicly owned, such as a railroad or a private road, for the purpose of either maintaining preexisting levels of transportation service on the facility or of preserving the right-of-way for a future transportation action or transportation enhancement activity. (ii) Acquisition of land, easements, or other property interests with the intent of preserving alternatives for a future transportation action, where the following conditions are met: The transportation action that would use the land or property interests has been specifically included in a transportation plan for the area adopted pursuant to 23 CFR part 1410 and such plan has been found by the U.S. DOT agency to conform to air quality plans in accordance with 40 CFR parts 51 and 93, if applicable; and the acquisition will not ~~limit~~ prevent the evaluation of all reasonable alternatives to the planned action that would use the land or property interests, including shifts in alignment that may be required. *(iii)* Acquisition of land or property interests for hardship or protective purposes where the following conditions are met: The transportation action that would use the land or property interests has been specifically included in a transportation plan for the area adopted pursuant to 23 CFR part 1410 and	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		such plan has been found by the U.S. DOT agency to conform to air quality plans in accordance with 40 CFR parts 51 and 93, if applicable; the hardship and protective buying will be limited to a particular parcel or a small number of parcels related to the planned transportation action; and the acquisition will not ~~limit~~ prevent the evaluation of all reasonable alternatives to the planned action that would use the land or property interests, including shifts in alignment that may be required. (21) Transportation enhancement activities and transit enhancements defined in 23 U.S.C. 101 and 49 U.S.C. 5302.	
58	1420.313 Environmental Assessments	(a) An EA shall be prepared by the applicant in consultation with the U.S. DOT agency for each action(s) that is not a CE and does not clearly require the preparation of an EIS, or where the U.S. DOT agency believes an EA would assist in determining the need for an EIS.	
59	1420.313	(b) The EA shall evaluate the social, economic, and environmental impacts of the proposed action, reasonable alternatives that would avoid or reduce adverse impacts, and measures which would mitigate adverse impacts. ~~At the discretion of the~~ applicant, the EA may evaluate ~~and~~ environmental enhancements if any that would aid in harmonizing the action with the surrounding community. The EA shall discuss compliance with other related environmental laws, regulations, and executive orders.	Clarify that consideration of enhancements is discretionary. See *Section I.C.3., Recommendations 1-2.*
60	1420.313	(c) The EA is subject to U.S. DOT agency approval before it is made available to the public as a U.S. DOT agency document.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
61	1420.313	(d) For actions that require an EA, the applicant, in consultation with the U.S.DOT agency, shall do the following: (1) Conduct interagency coordination in accordance with § 1420.303, beginning at the earliest appropriate time, to advise agencies of the proposed action and to achieve the following objectives: Determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might avoid or mitigate adverse impacts; ~~identify environmental enhancements that might aid in harmonizing the action with the surrounding community; and~~ identify other environmental review and coordination requirements which should be performed concurrently with the EA. In addition, at the discretion of the applicant, interagency coordination also may address environmental enhancements that might aid in harmonizing the action with the surrounding community. The results of interagency coordination to the time of EA approval by the U.S. DOT agency shall be included in the EA. (2) Provide for public involvement in accordance with the procedures established pursuant to § 1420.305. Public involvement to the time of EA approval by the U.S. DOT agency shall be summarized in the EA.	Clarify that consideration of enhancements is discretionary. *See Section I.C.3., Recommendations 1-2.*
62	420.313	[e) The EA need not be circulated for comment but the document must be made available for inspection in public places readily accessible to the affected community in accordance with paragraphs (f) and (g) of this section. Notice of availability of the EA, briefly describing the action(s) and its impacts, or a copy of the EA, shall be sent by the applicant to the affected units of Federal, State and local government.	
63	420.313	f) When, in accordance with the public involvement procedures established pursuant to § 1420.305, a public hearing on an action evaluated in an EA is held, the following shall occur: (1) The EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. (2) ~~The~~ A notice of the public hearing shall be published in accordance with procedures adopted	. Cross-reference public involvement procedures; do not specifically require newspaper notice. *See Section II.B.4., Recommendation 1.* . Clarify that the regulation requires that a 30-day comment period

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		published in accordance with procedures adopted pursuant to Section 1420.305, ~~in local newspapers~~ and shall announce the availability of the **EA** and where it may be obtained or reviewed. (3) Pursuant to **40** CFR 1501.4(c) **,** the applicant shall establish a 30-day period for ~~an~~ comments ~~shall~~ to be submitted in writing to the applicant or the **U.S.** DOT agency ~~within 30 days of~~ following publication of the notice of availability of the EA, unless **the U.S.** DOT agency determines, for **good** cause, that a different period is warranted.	be provided; it **does** not require that comments actually be submitted.
64	1420.313	**(g) When,** in accordance with the public involvement procedures established pursuant to **§** 1420.305, a public hearing on an action evaluated in an **EA** is not held, the following shall occur: (1) The applicant shall ~~place~~ publish a notice in accordance with procedures adopted pursuant to Section 1420.305, ~~a newspaper(s) similar to a public hearing notice at~~ an appropriate stage of development of the action. **(2) The** notice shall advise the public of the availability of the EA, state where information concerning the action may be obtained, and invite comments **from** all parties with **an** interest in the social, economic, **or** environmental aspects of the action. (3) Pursuant to 40 **CFR** 1501.4(c) **,** the applicant shall establish a 30-day period for comments ~~shall~~ to be submitted in writing to the applicant or the U.S. DOT agency ~~within 30 days of~~ following the publication of the notice, unless the **U.S.** ***DOT*** **agency determines, for good cause, that a different** period is warranted.	1. Cross-reference public. involvement procedures; do not specifically require newspaper notice. **See** *Section II.B.4., Recommendation* **I.** 2. Clarify that the regulation *requires* that **a** 30-day comment period be provided; it **does** not require that comments actually be submitted.
65	420.313	(h) If no significant impacts are identified, the applicant shall consider the public and agency comments received; revise the **EA** as appropriate; **furnish** the U.S. **DOT** agency a copy of the revised **EA,** the public hearing transcript, where applicable, and copies of any comments received and responses thereto; and recommend a **FONSI.** The revised **EA** shall also document compliance, to the fullest extent possible, with other related environmental laws, regulations, and executive orders applicable to the action, **or** provide reasonable assurance that the requirements will be met. Full compliance with the transportation conformity rule (40 CFR parts 51 and	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		93) and the planning regulation (23 CFR part 1410) is required before completion of the FONSI.	
66	1420.313	(i) If, at any point in the EA process, the U.S.DOT agency determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.	
67	1420.313	(j) Any action which normally would be classified as an EA but could involve unusual circumstances, such as, substantial controversy on community impact and/or environmental grounds, will require the U.S.DOT agency, in cooperation with the applicant, to determine if the EA is the appropriate level of documentation.	
68	1120.315 **Findings of No Significant Impact**	(a) The U.S.DOT agency will review the EA and other documents submitted pursuant to §1420.313 (e.g., copies of any hearing transcript and written comments, and the applicant's responses). If the U.S.DOT agency agrees with the applicant's recommendation of a FONSI, it will make such finding in writing and incorporate by reference the EA and any other related documentation.	
69	1420.315	(b) Pursuant to 40 C.F.R. 1501.4(e)(2), for proposed actions which are either similar to ones normally requiring an EIS or are without precedent and the U.S. DOT agency is processing the action with an EA and expects to issue a FONSI, copies of the EA and proposed FONSI shall be made available for review by the public and affected units of government for a minimum of 30 days before the U.S.DOT agency makes its final decision. This public availability shall be announced by a notice similar to a public hearing notice.	
70	1420.315	(c) After a FONSI has been made by the U.S. DOT agency, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government, and the document shall be available from the applicant and the U.S.DOT agency upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.	
71	1420.315	(d) Where substantial changes are made to the project and/or its potential impacts after the public review period for the EA, the applicant, pursuant to § 1420.323(c), shall make copies of the revised EA and the FONSI available for review by the public	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		and affected units of government for a minimum of 30 days before the U.S. DOT agency makes its final decision, unless the U.S. DOT agency determines, for good cause, that a different period is warranted.	
72	1420.315	(e) If another Federal agency has issued a FONSI on an action which includes an element proposed for U.S. DOT agency action, the U.S. DOT agency will evaluate the other agency's EA/FONSI. If the U.S. DOT agency determines that this element of the action and its environmental impacts have been adequately identified and assessed, the U.S. DOT agency will issue its own FONSI in accordance with paragraphs (a), (b), (c) and (d) of this section, incorporating the other agency's FONSI and any other related documentation. If environmental issues have not been adequately identified and assessed, the U.S. DOT agency will require appropriate environmental studies to complete the assessment.	
73	1420.317 **Draft Environmental Impact Statements**	(a) A draft EIS shall be prepared when the U.S. DOT agency determines that the action(s) is likely to cause significant impacts on the environment or if the preparation of an EIS is otherwise appropriate. When the decision has been made by the U.S. DOT agency to prepare an EIS, the U.S. DOT agency will publish a Notice of Intent (40 CFR 1508.22) in the Federal Register. Applicants must announce the intent to prepare an EIS by appropriate means at the local level in accordance with the public involvement procedures established pursuant to § 1420.305.	
74	1420.317	(b) The U.S. DOT agency, in cooperation with the applicant, will publish the Notice of Intent and begin a scoping process to establish the scope of the draft EIS and the work necessary for its preparation. The documented results of the planning process relevant to the action, including the public involvement and interagency coordination that has occurred, must be considered in scoping. Scoping is normally achieved through the actions taken to comply with the public involvement procedures and interagency coordination required by §§ 1420.303 and 1420.305. The scoping process will: Review the range of alternatives and impacts and the major issues to be addressed in the EIS; aid in determining which aspects of the proposed action have potential	1. Clarify that consideration of enhancements is discretionary. See Section I.C.3., *Recommendations 1-2.* 2. Encourage, but do not require, announcement of scoping meetings in Notice of Intent. See Section I.D.1., *Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		for social, economic, or environmental impact; help identify measures which might mitigate adverse environmental impacts; ~~identify environmental enhancements that might aid in harmonizing the action with the surrounding community;~~ identify other environmental review and coordination requirements that must be performed concurrently with the EIS preparation; and achieve the other objectives of 40 CFR 1501.7 and environmental streamlining (§ 1420.203). In addition, at the discretion of the applicant, the scoping process also may be used to address environmental enhancements that might aid in harmonizing the action with the surrounding community. If a public scoping meeting is to be held, it ~~must~~ normally should be announced in the U.S.DOT agency's Notice of Intent and by an appropriate means at the local level.	
75	1420.317	(c) The draft EIS shall be prepared by the U.S.DOT agency in cooperation with the applicant or, where permitted by 40 CFR 1506.5, by the applicant with appropriate guidance and participation by the U.S. DOT agency. The draft EIS shall evaluate all reasonable alternatives and may rely on information developed in accordance with 23 CFR part 1410. The draft EIS shall discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall evaluate the social, economic, and environmental impacts of the proposed action, reasonable alternatives that would avoid or reduce adverse impacts, and measures which would mitigate adverse impacts. At the discretion of the applicant, the draft EIS also may consider ~~and~~ environmental enhancements that would aid in harmonizing the action with the surrounding community. Alternatives must be developed to a sufficient level of detail to allow an informed choice among the altcrnatives under consideration; it is not necessary, nor is it expected, that all alternatives will warrant the same level of analysis. ~~Alternatives must be sufficiently well-defined to allow full evaluation of the specific alignment and design variations that would avoid or minimize adverse impacts.~~ The draft EIS shall summarize the public involvement and interagency coordination to the time of its approval. The draft EIS shall also summarize the	1. Clarify that consideration of enhancements is discretionary. *See Section I.C.3., Recommendations 1-2.* 2. Clarify that different alternatives may be studied to differentlevels of detail; some alternatives can be eliminated without developing the level of design detail necessary to evaluate "alignment and design variations to mitigate impacts." *See Section I:C.2., Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		studies, reviews, consultations, and coordination required by other related environmental laws, regulations, and executive orders to the extent appropriate at this stage in the environmental process.	
76	1420.317	(d) The U.S.DOT agency, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.	
77	1420.317	(e) A lead, joint lead, or a cooperating agency shall be responsible for printing and distributing the draft EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requests for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, ~~with U.S. DOT agency concurrence,~~ the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy and also must be informed of the nearest location where the draft EIS may be reviewed without charge.	1. Eliminate the requirement for US DOT concurrence in the copying cost of an EIS. General US DOT oversight is sufficient.
78	1420.317	(f) The draft EIS shall be circulated for comment by the applicant on behalf of the U.S.DOT agency. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to the following: (1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or alternatives; (2) Federal, State and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action, and to the State intergovernmental review contacts established under Executive Order 12372; and (3) Neighboring States and Federal land management entities which may be affected by any of the alternatives.	
79	1420.317	(g) Public hearing requirements are to be carried out in accordance with the provisions of § 1420.305 and this section. Whenever a public hearing is held, the draft EIS shall be available at the public hearing and	1. Cross-reference public involvement procedures; do not specifically require newspaper notice.

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing is not held, a notice shall be published in accordance with procedures adopted pursuant to Section 1420.305 ~~placed in a newspaper similar to a public hearing notice~~ advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.	*See Section I.D.2., Recommendation 1.*
80	1420.317	(h) Through the U.S. Environmental Protection Agency's notice of availability (40 CFR 1506.10), the U.S. DOT agency shall establish a period of not less than 45 days for the receipt of comments on the draft EIS. The draft EIS or a transmittal letter sent with each copy of the draft EIS shall identify where comments are to be sent and when the comment period ends.	
81	1420.319 **Final Environmental Impact Statements**	(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the U.S. DOT agency in cooperation with the applicant or, where permitted by 40 CFR 1506.5, by the applicant with appropriate guidance and participation by the U.S. DOT agency. Preparation of the final EIS will involve such additional public involvement, interagency coordination, and engineering or environmental studies as are necessary to consider the appropriateness of refinements in one or more of the alternatives and the incorporation of mitigation measures ~~and environmental enhancements~~ in response to comments received on the draft EIS. 2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If major issues remain inresolved, the final EIS shall idenhfy those issues and the coordination and other efforts made to resolve them. 3) The final EIS shall evaluate all reasonable alternatives considered and idenhfy the preferred alternative. It shall also discuss substantive comments received on the draft EIS and responses hereto, summarize public involvement and interagency coordination, and describe the environmental design features, including mitigation	1. Clanfy that a refinements may be made in "one or more" alternatives, so that a refinement in *one* alternative does not automatically necessitate that additional refinements be made to every other alternative. *See Section I.C.2., Recommendation 1.* 2. Clarify that consideration of enhancements is discretionary. *See Section I.C.3., Recommendations 1-2.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		measures ~~and environmental enhancements~~, that are incorporated into the proposed action. In addition, the Final EIS also may discuss any environmental enhancements that have been included in the proiect at the discretion of the applicant Environmental design features or other mitigation measures presented as commitments in the final EIS shall be incorporated into the action. ?'he final EIS shall also document compliance with other related environmental laws, regulations, and executive orders applicable to the action, and, if full compliance is not possible, provide reasonable assurance that the requirements will be met.	
82	1420.319	(b) The U.S.DOT agency will indicate approval of the final EIS by signing and dating the cover page. Approval of the final EIS does not commit the U.S. DOT agency to approve any future grant request.	
83	1420.319	(c) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, ~~with U.S. DOT agency concurrence, the~~ party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy and also must be informed of the nearest location where the final EIS may be reviewed without charge.	1. Eliminatethe requirement for US DOT concurrence in the copying cost of an EIS. General US DOT oversight is sufficient.
a4	1420.319	(d) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS and to anyone requesting a copy, no later than the time the document is filed with the U.S.EPA. In the case of lengthy documents, the U.S.DOT agency may allow alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall publish a notice of availability in accordance with procedures adopted pursuant to Section 1420.305, ~~in local newspapers~~ and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. The final EIS shall be available for public review at the applicant's offices and at appropriate DOT agency offices for at least 30 days after the U.S. EPA publication of the Federal Register notice of availability. Copies should also be made available for public review at institutions such	1. Cross-reference public-involvement procedures; do not specifically require newspaper notice. See *Section I.D.2., Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		as local government offices, libraries, and schools, as appropriate.	
85	**1420.321 Record of Decision**	(a) The **U.S. DOT** agency will complete and sign a record of decision **(ROD)** no sooner than 30 days after the **U.S.** EPA publication in the Federal Register of the notice of availability for the final **EIS** or 90 days after the U.S. EPA publication of the notice for the draft **EIS,** whichever is later. The ROD **will** present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures and any environmental enhancements that have been incorporated into the action, and document any required section **4(f)** approval in accordance with 23 CFR part 1430. Until the **ROD has** been signed, no further approvals relative to the action may be given except those for administrative activities taken to secure further project funding and for other activities consistent with the limitation on actions in 40 CFR 1506.1. The applicant, in coordination with the U.S. **DOT** agency shall publish a notice of availability of the ROD for public review in accordance with procedures adopted pursuant to Section 1420.305, ~~a newspaper of general circulation,~~ and, to the extent practicable, provide the approved ROD to all persons, organizations, and agencies that received **a** copy of the final EIS pursuant to § 1420.319(d).	1. Clarify that consideration of enhancements is discretionary. *See Section I.C.3., Recommendations 2-2.* **2.** Cross-reference public-involvement procedures; do not specifically ***require*** newspaper notice. *See Section I.D.2., Recommendation 1.*
86	420.321	(b) After issuance of a **ROD,** the **U.S. DOT** agency shall issue a revised **ROD** if it wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final **EIS** or proposes to make substantial changes to the mitigation measures or findings discussed in the original ROD. Before issuing the revised ROD, the U.S. **DOT** agency shall consider whether additional notification, interagency coordination, and public involvement are needed in accordance with **§** 1420.303 and **§** 1420.305. To the extent practicable the approved revised ROD shall be provided to all persons, organizations and agencies that received a copy of the Final **EIS** pursuant to **§ 1420.319(d).**	
87	**420.321**	c) Upon approval of the **ROD,** the mitigation measures and any environmental enhancements stated as commitments ~~in the final EIS associated with the alternative selected~~ in the ROD become enforceable conditions of any subsequent grant	1. Clarify that Consideration of enhancements is discretionary. *See Section I.C.3.,*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		related to the action or other DOT agency approval of the action. The **U.S.DOT** agency will ensure implementation of mitigation measures and any environmental enhancements as described in § 1420.113.	*Recommendations 1-2.*
88	**1420.323 Reevaluations**	(a) **A** written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the **U.S.DOT** agency if a final EIS is not approved by the **U.S.** DOT agency within three years from the date of the draft EIS circulation. **The** purpose of **this** evaluation is to determine whether **a** supplement to the draft EIS or a new draft **EIS** is needed.	
89	**1420.323**	(b) **A** written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final **EIS** supplement, or the last major DOT agency approval or grant.	
90	1420.323	(c) After approval of the **EIS, FONSI,** or CE designation, the applicant shall consult with the U.S. DOT agency prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested U.S. DOT action. These consultations will **be** documented when determined necessary by the **U.S. DOT** agency.	
91	**1420.323**	d) A re-evaluation under **this section** shall include additional notification, interagency coordination, and public involvement as appropriate in accordance with § **1420.303** and § 1420.305.	
92	**1420.325 Supplemental Environmental Impact Statements**	a) **A** draft EIS or final EIS may be supplemented whenever the U.S. **DOT** agency determines that supplementation would improve decisionmaking, better inform the agency or the public, or serve other purposes. An EIS shall be supplemented whenever the **U.S.DOT** agency determines that: **(1)** Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS. (2) New information or circumstances relevant to environmental concerns and bearing on the	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.	
93	1420.325	(b) A supplemental EIS will not be necessary where: (1) The changes to the proposed action, new information, or new Circumstances result in the actual lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or (2) The U.S.DOT agency decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a ROD shall be prepared and circulated in accordance with § 1420.321.	
94	1420.325	(c) Where the U.S.DOT agency is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the U.S.DOT agency deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the U.S.DOT agency determines that a supplemental EIS is not necessary, the U.S.DOT agency shall so indicate in the project file.	
95	1420.325	(d) A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required. Public involvement and interagency coordination commensurate with the nature and scope of the supplemental EIS shall be conducted in accordance with § 1420.305 and the public involvement procedures developed thereunder.	
96	420.325	(e) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily prevent the granting of new approvals; require the withdrawal of previous approvals; or require the suspension of project activities for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a new evaluation of the entire action or more than a limited portion of the overall action, the U.S.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		DOT agency shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.	
97	1420.327 Tiering	For maior transvortation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the maior alternatives. The second tier would address site-svecific details on project impacts, costs, and mitigation measures.	Restore provision from 23 C.F.R771 that describes the use of tiering in NEPA documents for transportation projects. *See Section I.D.2., Recommendation 1.*
98	1420.309 Pilot Proiects	(a) Anv applicant mav propose to the U.S.DOT agency that the NEPA process for a proposed vroiect be undertaken as a pilot project. (b) If a NEPA studv is undertaken as a pilot project, the lead U.S. DOT agency may waive requirements imposed under this part to the extent that such requirements are not required by statute or by regulations other than the regulations in this part.	1. Establish a pilot projects program. *See SecfzonII.C., Recommendation 1.* 2. Allow requirements imposed under these regulations to be waived by the U.S.DOT agency as part of an approved pilot project. *See Section II.C., Rewmmendafzon2.*
99	1420.401. Terms defined elsewhere	The definitions contained in the CEQ regulation (40 CFR 1508) and in titles 23 (23 U.S.C101) and 49 of the United States Code (49U.S.C.14202) are applicable except as modified in § 1420.403.	
100	1420.403 Terms defined in :hispart.	The following definitions apply to this part and to part 1430 of this chapter: Action means a surface transportation infrastructure or service investment (e.g., highway, transit, railroad, or mixed mode) proposed for direct implementation by the U.S. DOT agency or for the J.S. DOT agency financial assistance; and other activities, such as, joint or multiple use of right-of-way, changes in access control, that require a U.S.DOT agency approval or permit, but may or may not involve a commitment of Federal funds; and other FHWA or FTA program decisions, such as, promulgation of regulations and approval of programs, unless specifically defined by statute or regulation as not being an action. Applicant means the Federal, State or local governmental authority that the U.S.DOT agency	1. Clarify that "enhancements" include, but are not limited to "transportation enhancement activities" and "transit enhancements."

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the U.S. DOT agency or the Federal land management agency will take on the responsibilities of the applicant described herein. Environmental enhancement means a measure which contributes to blending the proposed project harmoniously with its surrounding human communities and the natural environment and extends beyond those measures necessary to mitigate the specific adverse impacts resulting from a proposed transportation action. This includes measures eligible for Federal funding, ~~such as~~including but not limited to transportation enhancement activities or transit enhancements, and measures funded by the applicant or by others. Environmental studies means the investigations of potential social, economic, or environmental impacts conducted: (1) As part of the metropolitan or statewide ransportation planning process under 23 CFR part 1410, (2) To determine the NEPA class of action and ;cope of analysis, and/or (3) To provide information to be included in a NEPA decision process. Hardship acquisition means the early acquisition of property by the applicant at the property owner's equest to alleviate particular hardship to the owner, n contrast to others, because of an inability to sell is/her property. This is justified when the property owner can document on the basis of health, afety, or financial reasons that remaining in the property poses an undue hardship compared to thers. Planning process means the process of developing netropolitan and statewide transportation plans nd programs in accordance with 23 CFR part 1410. Protective acquisition means the purchase of land to prevent imminent development of a parcel which is eeded for a proposed transportation corridor or ite. Documentation must clearly demonstrate that levelopment of the land would preclude future ransportation use and that such development is nminent. Advance acquisition is not permitted for	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		the sole purpose of reducing the cost of property for a proposed project. Section 4(f) means the provision in law which provides protection to certain public lands and all historic properties (now codified in 49 U.S.C. 303 and 23 U.S.C. 138). Transportation conformity means the process for assuring or conformity of transportation projects, programs, and plans with the purpose of State plans for attainment and maintenance of air quality standards under the U.S. EPA regulation at 40 CFR parts 51 and 93. The process applies only to areas designated as nonattainment or maintenance for a transportation related pollutant. U.S. DOT agency means the FHWA, the FTA, or the FHWA and the FTA together. In addition, U.S. DOT agency refers to any other agency within the U.S. Department of Transportation that uses this part as provided for in § 1420.209. U.S. DOT agency approval means the approval by FHWA/FTA of the applicant's request relative to an action. The applicant's request may be for Federal financial assistance, or it may be for some other U.S. DOT agency approval that does not involve a commitment of Federal funds.	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
101	**1430.101 Purpose**	The purpose of this part is to implement 49 U.S.C. 303 and 23 U.S.C. 138 which were originally enacted as section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as section 4(f).	
102	**1430.103 Mandate.**	(a) The U.S. DOT agency may approve a transportation project that uses publicly owned land from a significant public park, recreation area, or wildlife and waterfowl refuge, or any land from a significant historic site only if the U.S. DOT agency has determined that: (1) There is no feasible and prudent alternative to the use of land from the property; and (2) The project includes all possible planning to minimize harm to the property resulting from such use.	
103	1430.103	(b) ~~[Reserved]~~ The standard for determining whether an alternative is prudent depends on the nature of the impact to section 4(f) resources that would be avoided or minimized by that alternative. Specifically, in determining whether an alternative is prudent, the U.S. DOT agency shall consider: (1) the importance of the section 4(f) resource; (2) the nature and extent of the reasonably foreseeable impact of the alternative on that resource; and (3) the likelihood that the resource itself will remain intact over the long term, if the avoidance or minimization alternative is selected.	1. Specifically recognize factors that can be considered in determining whether an alternative is "prudent." *See Section IV.B.1.; see also Section IV.A.3.*
104	**1430.105 Applicability.**	(a) This part applies to transportation projects that require an approval by the U.S. DOT agency, where the U.S. DOT agency has sufficient control and the statutory authority to condition the project or approval.	
105	1430.105	(b) The U.S. DOT agency will determine the applicability of section 4(f) in accordance with this part.	
106	1430.105	(c) This part does not apply to or alter approvals by the U.S. DOT agency made prior to the effective date of this regulation.	
107	**1430.107 Use of land.**	(a) Except as set forth in paragraph (b) of this section and § 1430.111, use of land occurs: (1) When land is permanently incorporated into a transportation facility; (2) When there is a temporary occupancy of land that is adverse to the statutory purpose of preserving the natural beauty of that land, as determined by the criteria in paragraph (b) of this section; or	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		(3) When there is a constructive use of land as determined by the criteria in paragraph (c) of this section.	
108	1430.107	(b) A temporary occupancy of land occurs when the use is so minimal that it does not constitute a use within the meaning of section 4(f) (§ 1420.403) when the following conditions are satisfied (1) The duration of the occupancy must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land; (2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal; (3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis; (4) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and (5) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.	
109	1430.107	(c) A constructive use of section 4(f) land occurs when the transportation project does not incorporate land from the section 4(f) resource, but the impacts of the project on the resource due to its proximity are so severe that the activities, features, or attributes that qualify the resource for the protection of section 4(f) are substantially impaired. The U.S. DOT agencies have reviewed the following situations and have determined that constructive use occurs when: (1) The projected noise level increase attributable to the transportation project substantially interferes with the use and enjoyment of a noise-sensitive facility that is a resource protected by section 4(f), such as hearing the performances at a public outdoor amphitheater, sleeping in the sleeping area of a public campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's sigruficance, or enjoyment of an urban park where serenity and quiet are significant attributes; (2) The proximity of the project to the section 4(f) resource substantially impairs aesthetic features or attributes of a resource protected by section 4(f), where such features or attributes make an important contribution to the value of the resource. For example, substantial impairment of visual or aesthetic qualities occurs where a transportation structure is	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		located in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part from its setting; (3) The project restricts access to the section 4(f) property and, as a result, substantially diminishes the utility of the resource; (4) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource, such as vibration levels from a rail project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or (5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or Substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.	
110	1430.109 Significance of he section 4(f) esource.	(a) Consideration under section 4(f) is required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire section 4(f) resource is significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant, unless the U.S. DOT agency and the officials with jurisdiction have agreed, formally or informally, that the resource is not significant. The U.S. DOT agency will review the significance determination to assure its reasonableness.	
111	.430.109	(b) Section 4(f) applies to all properties on or eligible for the National Register of Historic Places. The U.S. DOT agency, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify such historic sites. Section 4(f) applies only to historic sites on or eligible for the National Register unless the U.S. DOT agency determines that the application of section 4(f) to a historic site is otherwise appropriate.	
112	430.111 Exceptions.	(a) Consideration under section 4(f) is not required for my park road or parkway project developed in accordance with 23 U.S.C. 204.	
113	430.111	(b) Consideration under section 4(f) is not required for rail-related projects funded through the Symms National Recreational Trails Act of 1991 (16 U.S.C. 1261).	
114	430.111	(c) Consideration under section 4(f) is not required for	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		"transportation enhancement activities" as defined in 23 U.S.C. 101(a) and transit enhancements as defined in 49 U.S.C. 5302(a)(15) if: (1) The use of the section 4(f) property is solely for the purpose of preserving or enhancing the activities, features, or attributes that qualify the property for section 4(f) protection; and (2) The Federal, State, or local official having jurisdiction over the property agrees in writing that the use is solely for the purpose of preserving or enhancing the section 4(f) activities, features, or attributes of the property and will, in fact, accomplish this purpose.	
115	1430.111	(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses and are, in fact, managed for multiple uses, section 4(f) applies only to those portions of such lands which function as significant public parks, recreation areas, or wildlife refuges, or which are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife purposes or historic sites. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The determination of significance shall apply to the entire area of lands which so function or are so designated. The U.S. DOT agency will review these determinations to assure their reasonableness.	
116	.430.111	(e) Consideration under section 4(f) is not required for the restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when: (1) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the Vational Register, and (2) The SHPO has been consulted and has not objected to he U.S.DOT agency finding in paragraph (e)(1) of this section.	
117	430.111	(f) Archeological sites (1) Section 4(f) applies to all archeological sites on or discovered during construction except as set forth in paragraph (f)(2) of this section. When section 4(f) requirements apply to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		will take into account the level of investment already made in the project. The review process, including the consultation with other agencies, will be shortened as appropriate. (2) Section **4(f)** requirements do not apply to archeological sites where the U.S. DOT agency, after consultation with the SHPO, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the U.S. DOT agency decides, with agreement of the SHPO, not to recover the data in the resource.	
118	1430.111	**(g)** Designations of park and recreation lands, wildlife **and** waterfowl refuges, and historic sites are sometimes made, and determinations of significance changed, late in the development of a project. With the exception of the treatment of archeological resources **in** paragraph (f) of this section, the U.S. DOT agency may permit a project to proceed without consideration under section **4(f)** if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section **4(f)** prior to acquisition.	
119	1430.111	(h) Constructive use ~~normally does~~ not occur when: **(1)** Compliance with the requirements of section **106** of the National Historic Preservation Act and **36** CFR part 800 for proximity impacts of the proposed action, on **a** site listed on or eligible for the National Register of Historic Places results in an agreement of no adverse effect; (2) Compliance with the requirements of section 106 of the National Historic Preservation Act and *36* **CFR** part 800 for proximity impacts of the proposed action, on *a* site listed on or eligible for the National Register of Historic Places **results** in a finding of adverse effect, but the following conditions are met: (i) the section 106 process **for** the historic resource has resulted in a memorandum of agreement (MOA), containing binding mitigation measures, and (ii) the **U.S. DOT** agency determines, and the State Historic Preservation Officer concurs, that **the** historic resource in question will remain eligible for the National Register **following** implementation of the project, **as** long as the mitigation measures in the **MOA** are carried out. (~~3~~2) The projected traffic noise levels of a proposed nearby highway project do not exceed the FHWA noise	1. Remove "normally." *See Section IV.B.3.* 2. Establish new criteria re: relationship between "adverse effect" and "constructive use." *See Section IV.B.2.; see also Section IV.A.2.* 3. Restore existing language regarding properties approaching the 50-year age threshold for National Register eligibility. *See Section IV.B.4.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		abatement criteria given in Table 1, 23 CFR part 772, or the projected operational noise levels of a proposed nearby transit project do not exceed the noise impact criteria in the FTA guidelines (Federal Transit Administration, Transit Noise and Vibration Impact Assessment, April 1995, available from the FTA offices); (~~43~~) The projected noise levels exceed the relevant threshold in paragraph (h)(2) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less); (~~54~~) A proposed transportation project will have proximity impacts on a section 4(f) property, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the U.S. DOT agency approval of a final NEPA document established the location of the project before the designation, establishment, or change in the significance of the section 4(f) property. However, if the property in question is a historic site that ~~would be eligible for~~ is close to, but less than, the 50-year age threshold for National Register eligibility, ~~except for its age at~~ construction of the project would begin after the site became Eligible, then constructive use of the historic site may occur and such use must be evaluated; (~~65~~) There are proximity impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. The following examples of such concurrent planning or development include, but are not limited to: (i) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource; or (ii) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other; (iii) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f); (iv) Proximity impacts will be mitigated to a condition	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		equivalent to, or better than, that which would occur under a no-build scenario; (v) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or (vi) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.	
12c	**1430.113 Section 4(f) evaluations and determinations under the NEPA umbrella.**	(a) Alternatives to avoid the use of section 4(f) properties and measures to minimize harm to such land shall be developed and evaluated by the applicant in cooperation with the U.S. DOT agency. Such evaluation shall be initiated early when alternatives are under study. ~~An alternative that avoids section 4(f) property must be preferred unless the evaluation demonstrates that there are unique problems or unusual factors associated with it, or that the cost, the social, economic, or environmental impacts, or the community disruption resulting from such alternative reach extraordinary magnitudes.~~	1. Remove the language regarding prudence from this paragraph. The standard for defining prudence should be addressed in § 1430.103(b), above
121	1430.113	(b) In accordance with the concept of the NEPA umbrella in 23 CFR 1420.109, the section 4(f) evaluation is normally presented in the draft environmental impact statement (EIS), he environmental assessment (EA), or the categorical xclusion (CE) documentation. The evaluation may ncorporate relevant information from the planning process in ccordance with § 1430.119. A separate section 4(f) evaluation nay be necessary as described in section § 1430.115.	
122	1430.113	(c) The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the U.S. Department of he Interior, and as appropriate to the U.S. Department of Agriculture and the U.S. Department of Housing and Urban Development. A minimum of 45 days shall be established by he U.S. DOT agency for receipt of comments.	
123	1430.113	(d) When adequate support exists for a section 4(f) letermination, the discussion in the final EIS, the finding of o significant impact (FONSI), the CE documentation, or the eparate section 4(f) evaluation shall specifically address the ollowing: (1) The reasons why the alternatives to avoid a section (f) property are not feasible and prudent; and (2) All measures incorporated into the project that will be aken to minimize harm to the section 4(f) property.	
124	1430.113	(e) The U.S. DOT agency is not required to determine	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		that there is no constructive use. However, such a determination may be made at the discretion of the U.S. DOT agency. When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following: (1) Identification of the current activities, features, or attributes of a resource that qualify it for protection under section 4(f) and which may be sensitive to proximity impacts (2) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and (3) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.	
125	1430.113	(f) For actions processed with an EIS, the U.S. DOT agency will make the section 4(f) determination either in its approval of the final EIS or in the record of decision (ROD). Where the section 4(f) approval is documented in the final EIS, the U.S. DOT agency will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until the U.S. DOT agency has given notification of section 4(f) approval. For these actions, any required section 4(f) approval will be documented in the FONSI, in the CE approval, if one is provided, or in a separate section 4(f) document.	
126	430.113	(g) The final section 4(f) evaluation will be reviewed for egal sufficiency.	
127	.430.115 iepuate ection 4(f) valuatione.	(a) Circulation of a separate section 4(f) evaluation will be required when: (1) A proposed modification of the alignment or design would require the use of section 4(f) land after the CE, FONSI, draft EIS, or final EIS has been processed; (2) A proposed modification of the alignment, design, or measures to minimize harm after an original section 4(f) approval, would result in a substantial increase in the use of section 4(f) land or a substantial reduction in the measures to minimize harm included in the project; (3) The U.S. DOT agency determines, after processing the CE, FONSI, draft EIS. or final EIS that section 4(f) applies to a	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		property; or (4) An agency whose actions are not subject to section 4(f) requirements is the lead agency for the NEPA process on an action that involves section 4(f) property and requires a U.S. DOT agency action.	
128	1430.115	(b) If the U.S. DOT agency determines under paragraph (a) of this section or otherwise, that section 4(f) is applicable after the CE, FONSI, or ROD has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental NEPA document. Where a separately circulated section 4(f) evaluation is prepared after the CE, FONSI, or ROD has been processed, such evaluation does not necessarily: (1) Prevent the granting of new approvals; (2) Require the withdrawal of previous approvals; or (3) Require the suspension of project activities for any activity not affected by the new section 4(f) evaluation.	
129	1430.117 Programmatic section 4(f) evaluations.	The U.S. DOT agency, in consultation with the U.S. department of the Interior and other agencies, as appropriate, may make a programmatic section 4(f) determination for a class of *similar* projects. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.	
130	1430.119 Linkage with transportation planning.	a) *An* analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed during the planning process or in a tiered EIS.	
131	1430.119	(b) When a planning document or a first-tier EIS is intended to provide the basis for subsequent project development as provided in § 1420.201 and 40 CFR 1502.20, the detailed information necessary to complete the section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made of the potential impacts that a proposed action will have on section 4(f) land and whether those impacts could have a bearing on the decision to be made. A preliminary determination may be made at this time as to whether there are feasible and prudent locations or alternatives for the action to avoid the use of section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm, to the extent that the level of detail at this stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the	

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		project development process have not been precluded by decisions made at this stage. This preliminary determination is then incorporated into official planning documents or the first-tier EIS.	
132	1430.119	(c) A section 4(f) approval made when additional design details are available will include a determination that: (1) The preliminary section 4(f) determination made pursuant to paragraph (a) remains valid; and (2) The criteria of § 1430.103 and § 1430.113(a) have been met.	
133	**1430.121 Definitions.**	The definitions contained in 23 CFR 1420.403, 23 U.S.C. 101(a), 49 U.S.C. 5302, and 40 CFR part 1508 are applicable to this part.	
134	**622.401 Cross-reference to subpart D of 23 CFR part 1420.**	The regulations for complying with this subpart are set forth in subpart D of 23 CFR part 1420. 4. Add a new part 623 to read as follows: PART 623-PROTECTION OF PUBLIC PARKS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES	
135	**623.101 Cross-reference to 23 CFR part 1430.**	The regulations for complying with 49 U.S.C. 303 are set forth in 23 CFR part 1430.	

APPENDIX TO AASHTO COMMENTS: SECTION-BY-SECTION RECOMMENDATIONS

Subpart A - Definitions

1410.100 Purpose.

1410.102 Applicability.

1410.104 Definitions.

Subpart B –Statewide Transportation Planning and Programming

1410.200 Purpose.

1410.202 Applicability.

1410.204 Definitions.

1410.206 Statewide transportation planning process basic requirements.

1410.208 Consideration of statewide transportation planning factors.

1410.210 Coordination of planning process activities.

1410.212 Participation by interested parties.

1410.214 Content and development of statewide transportation plan.

1410.216 Content and development of statewide transportation improvement promam.

1410.218 Relation of planning and project development processes.

1410.220 **Funding of planning process.**

1410.222 Approvals, self-certification and findinas.

1410.224 Project selection.

1410.226 Applicability **of** NEPA to transportation planning and programming.

Subpart C - Metropolitan Transportation Planning and Programming

1410.300 Purpose **of** planning process.

1410.302 Organizations and processes affected by planning reauirements.

1410.304 Definitions.

1410.306 What is a Metropolitan Planning Organization and **how is** it created?

1410.308 Establishing the geographic boundaries for metropolitan transportation planning areas.

1410.310 Agreements among organizations involved in the planning process.

1410.312 Planning process organizational relationships.

1410.314 Planning tasks and unified work program.

1410.316 Transportation planning process and plan development.

1410.318 Relation of planning and project development processes.

1410.320 Congestion management system and planning process.

1410.322 Transportation plan content.

1410.324 Transportation improvement program content.

1410.326 Transportation improvement program modification.

1410.328 Metropolitan transportation improvement program relationship to statewide TIP.

1410.330 Transportation improvement program action by FHWA/FTA.

1410.332 Selecting projects from a TIP.

1410.334 Federal certifications.

1410.401 Applicability and Effective Date [proposed addition to regulations]

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	Subpart A — Definitions		
1	**1410.100 Purpose.**	The purpose of this subpart is to provide definitions for terms used in this part which go beyond those terms defined in 23 U.S.C. 101(a) and 49 U.S.C. 5302.	
2	**1410.102 Applicability.**	The definitions in this subpart are applicable to this part, except as otherwise provided.	
3	**1410.104 Definitions.**	Except as defined in this subpart, terms defined in 23 U.S.C. 101(a) and 49 U.S.C. 5302 are used in this part as so defined.	
4	1410.104	Conformity lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.	
5	1410.104	Conformity rule means the EPA Transportation Conformity Rule, as amended, 40 CFR parts 51 and 93.	
6	1410.104	Congestion management system means a systematic process for managing congestion that provides information on transportation system performance and on alternative strategies for alleviating congestion and enhancing the mobility of persons and goods to levels that meet State and local needs.	
7	1410.104	Consultation means that one party confers with another party, ~~in accordance with an established process,~~ about an anticipated action and ~~then keeps that party informed about actions taken.~~ prior to taking action, considers that party's views.	1. Preserve existing definition of "consultation," by making the changes proposed in this table. See *Section II.A., Footnote 12.*
8	**1410.104**	**Cooperation means that the parties involved in carrying out** the planning and/or project development processes work together to achieve a common goal or objective.	
9	1410.104	Coordination means the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs and schedules of other agencies and adjustment of plans, programs and schedules to achieve general consistency.	
10	1410.104	Design concept means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.	
11	1410.104	Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control,	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Commente
		e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.	
12	1410.104	Federally funded non-emergency tramportation services means transportation services provided to the general public, including those with special transport needs, by public transit, private non-profit service providers, and private third-party contractors to public agencies.	
13	1410.104	Financial estimate means a projection of Federal and State resources that will serve as a basis for developing plans and/or TIPs.	
14	1410.104	Freight shipper means an entity that utilizes a freight carrier in the movement of its goods.	
15	1410.104	Governor means the Governor of any one of the fifty States, or Puerto Rico, and includes the Mayor of the District of Columbia.	
16	1410.104	Illustrative project means a transportation improvement that would be included in a financially constrained transportation plan and program if reasonable additional financial resources were available to support it.	
17	1410.104	Indian Tribal Government means a duly formed governing body of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C 479a.	
18	1410.104	Interim plan means a plan composed of projects eligible to proceed under a conformity lapse (as defined in 40 CFR parts 51 and 93) and otherwise meeting all other provisions of this part including adoption by the MPOs. An interim plan may be approved as an element of a transportation plan, so that the interim plan automatically becomes effective in the event of a conformity lapse, without any further action by the MPO or USDOT agencies.	1. Clanfy that an "interim plan" can be approved in advance, prior to conformity lapse, rather than waiting until the lapse has occurred. *See Section IV(A)(2), Recommendation # 1.*
19	1410.104	Interim transportation improvement program means a TIP composed of projects eligible to proceed under a conformity lapse (as defined in 40 CFR parts 51 and 93) and otherwise meeting all other provisions of this part including approval by the Governor. An interim TIP may be approved as an element of the TIP, so that the interim TIP automatically becomes effective in the event of a conformity lapse, without any further action by the MPO or USDOT agencies.	1. Clarify that an "interim TIP" can be approved in advance, prior to conformity lapse, rather than waiting until the lapse has occurred. *See Section IV(A)(2), Recommendation 1.*

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
20	1410.104	ITS integration strategy means a systematic approach for coordinating and implementing intelligent transportation system investments funded with Federal highway trust funds to achieve an integrated regional system.	
21	1410.104	Maintenance area means any geographic region of the United States previously designated nonattainment pursuant to the Clean Air Act Amendments of 1990 (CAA) and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.	
22	1410.104	Management and operation means actions and strategies aimed at improving the person, vehicle and/or freight carrying capacity, safety, efficiency and effectiveness of the existing and future transportation system to enhance mobility and accessibility in the area served.	
23	1410.104	Metropolitan planning area means the geographic area in which the metropolitan transportation planning process required by 23 U.S.C. 134 and 49 U.S.C. 5303-5306 must be carried out.	
24	1410.104	Metropolitan planning oreanization (MPO) means the forum for cooperative transportation decision making for the metropolitan planning area pursuant to 23 U.S.C. 134 and 49 U.S.C. 5303.	
25	1410.104	Metropolitan transportation plan means the official intermodal transportation plan that is developed and adopted through the metropolitan transportation planning process for the metropolitan planning area, in accordance with 23 U.S.C. 134 and 135 and 49 U.S.C. 5303.	
26	1410.104	Nonattainment area means any geographic region of the United States which has been designated as nonattainment under section 107 of the CAA for any pollutant for which a national ambient air quality standard exists.	
27	1410.104	Non-metropolitan local official means local elected ~~or appointed~~ officials representing units of general purpose local government, outside metropolitan planning areas, and local officials with ~~jurisdiction/~~responsibility for transportation, outside metropolitan areas. ~~or other community development actions that impact transportation and elected officials for special transportation and planning agencies, such as economic development districts and land use planning agencies.~~ Local officials with responsibility for transportation include only those whose agencies are directly and primarily responsible for developing and maintaining transportation infrastructure and/or for providing	1. Conform to the statutory language in TEA-21, which specifically defines the types of non-metropolitan local officials who must be consulted; do not expand definition beyond statutory requirements. See *Section II.A.2., Recommendation 1.* 2. Clarify that "officials with responsibility for transportation" include only those officials

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		transportation services.	responsible for providing transportation services or facilities. *See Section II.A.2., Recommendation 2.*
28	1410.104	Provider of freight transportation services means a shipper or carrier which transports or otherwise facilitates the movement of goods from one point to another.	
29	1410.104	~~Purpose and need~~ Project objectives [or project justification] means the intended outcome and sustaining rationale for a proposed transportation improvement, including, but not limited, to mobility deficiencies for identified populations and geographic areas.	1. Avoid using "purpose and need" to refer to the concept described in this definition, which is different from the more detailed "purpose and need statement" that is to be developed in the NEPA process. *See Section I.C.1, Recommendation 1.*
30	1410.104	Project phase or phase of the project means a stage in the implementation of a project, including but not limited to (1) project development studies, in accordance with NEPA and related statutes; (2) project corridor or mode selection following the first tier of a tiered NEPA process; (3) right-of-way acquisition, for the entire project or for a discrete project section or sections; (4) final design, for the entire project or for a discrete project section or sections; and (5) construction, for the entire project or for a discrete project section or sections.	1. Include a definition of a project "phase," because the term "phase" is used frequently in these regulations. See *Section I.D.1, Recommendation 1.*
31	1410.104	Regionally significant project means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.	
32	1410.104	State means any one of the fifty States, the District of Columbia, or Puerto Rico.	
33	.410.104	State implementation plan (SIP) means: (1) the implementation plan which contains specific strategies for controlling emissions of and reducing ambient levels of pollutants in order to satisfy Clean Air Act (CAA)	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		requirements for demonstrations of reasonable further progress and attainment **(CAA** secs. 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), **187(a)(7),** 189(a)(1)(B), and 189(b)(1)(A); and secs. 192(a) and **192(b), for** nitrogen dioxide of the CAA); or (2) the implementation plan under section **175A** of the CAA as amended.	
34	1410.104	Statewide transportation improvement program (STIP) means a staged, multi-year, statewide, intermodal program of transportation projects which is consistent with the statewide transportation plan and planning processes and metropolitan plans, TIPs and processes pursuant to 23 **U.S.C. 135.**	
35	**1410.104**	Statewide transportation improvement program (STIP) extension means the lengthening of the scheduled duration of an existing STIP, including **the** component metropolitan **TIPs** included in the STIP, beyond **two** years by joint administrative action of the FHWA and the FTA. ~~**STIP extensions are not allowed for metropolitan TIP portions of the STIP which are in nonattainment or maintenance areas as well as for those portions of the STIP containing projects in rural nonattainment or maintenance areas.**~~	1. Allow **STIP** extensions in non-attainment and maintenance areas on a case-by-case basis. *See Section IV.A.1., Recommendation 1.*
36	**1410.104**	Statewide transportation plan means the official statewide, intermodal transportation plan that is developed through the statewide transportation planning process pursuant to **23 U.S.C. 135.**	
37	**1410.104**	TIP update means the periodic re-examination and revision of TIP contents, including, but not limited to, non-exempt projects, on a scheduled basis, normally at least every **two** years. The addition or deletion of a non-exempt project or phase **of** a non-exempt project to a TIP shall be based on **a** comprehensive update of the **TIP.**	
38	1410.104	Transportation control measure means any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in § 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants **from** transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions **from** vehicles under fixed traffic conditions are not TCMs.	
39	1410.104	Transportation improvement program (TIP) means a staged, multi-year, intermodal program of transportation projects in	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		the metropolitan planning area which is consistent with the metropolitan transportation plan.	
40	1410.104	Transportation Management Area (TMA) means an urbanized area with a population over 200,000 (as determined by the latest decennial census) or other area when TMA designation is requested by the Governor and the MPO (or affected local officials), and officially designated by the Administrators of the FHWA and the FTA. The TMA designation applies to the entire metropolitan planning area(s).	
41	1410.104	Transportation ulan update means the periodic review, revision or reaffirmation of plan content, normally every three years in nonattainment and maintenance areas and five years in attainment areas or the update period for State plans as determined by the State.	
42	1410.104	Twenty year planning horizon means a forecast period covering twenty years from the date of plan adoption, reaffirmation or modification in attainment areas and subsequent Federal conformity finding at the time of adoption in nonattainment and maintenance areas. The plan must reflect the most recent planning assumptions for current and future population, travel, land use, congestion, employment, economic activity and other related statistical measures for the metropolitan planning area.	
43	1410.104	Urbanized area (UZA) means a geographic area with a population of at least 50,000 as designated by the U.S. Department of Commerce, Bureau of the Census based on the latest decennial census or special census as appropriate.	
44	1410.104	User of public transit means any person or group representing such persons who use mass transportation open to the public other than taxis and other privately operated vehicles.	
	Subpart B — Statewide Transportation Planning and Programming		
45	1410.200 Purpose.	The purpose of this subpart is to implement 23 U.S.C.135, which requires each State to carry out a transportation planning process that shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed. The transportation planning process shall be intermodal and shall develop a statewide transportation plan and	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		transportation improvement program for all areas of the State, including those areas subject to the requirements of 23 U.S.C. 134 and 49 U.S.C. 5303-5305. The plan and program shall facilitate the development and integrated management and operation of safe transportation systems and facilities (including pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the State and an integral part of an intermodal transportation system for the United States. The intermodal transportation system shall provide for safe, efficient, economic movement of people and goods in all areas of the State and foster economic growth and development while minimizing transportation-related fuel consumption and air pollution.	
46	**1410.202 Applicability.**	The provisions of this subpart are applicable to States and any other agencies/organizations, such as MPOs, transit operators and air quality agencies, that are responsible for satisfying these requirements for transportation planning, programming and project development throughout the State pursuant to 23 U.S.C. 135.	
47	**1410.204 Definitions.**	Except as otherwise provided in subpart A of this part, terms defined in 23 U.S.C. 101(a) are used in this part as so defined.	
48	**1410.206 Statewide tramportation planning process basic requirements.**	(a) The statewide transportation planning process shall include, as a minimum, the following: (1) Data collection and analysis; (2) Consideration of factors contained in § 1410.208; (3) Coordination of activities as noted in § 1410.210; (4) Development of a statewide transportation plan for all areas of the State that considers a range of transportation options designed to meet the transportation needs (e.g., passenger, freight, safety, etc.) of the State including all modes and their connections; (5) Development of a statewide transportation improvement program (STIP) for all areas of the State; and (6) ~~Various processes to accomplish data collection and analyses essential for an effective transportation planning process, including a~~ A process to assure that, no person shall, on the grounds of race, color, sex, national origin, age, or physical handicap, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal assistance from the U.S. Department of Transportation. ~~These assurances shall be demonstrated through the following:~~	1. Re-state non-discrimination requirements from Title VI and other non-discrimination statutes; do not elaborate upon existing legal standards for determining compliance. See AA*SHTO Comments, Section III.G., Recommendation 1.* 2. If new requirements are added, regulations should be extensively revised to: • Distinguish Title VI from EJ. • Follow original definition of EJ. • Focus on public involvement, not elaborate data analysis requirements. • Recognize that benefits should not be evaluated based solely on funding levels. • Allow States to set clear limits on data gathering and

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~(i) An assessment covering the State, including at a minimum the following:~~ ~~(A) A geographic and demographic profile of the State that identifies the low-income and minority and where appropriate, elderly and persons with disabilities, components of this profile;~~ ~~(B) The transportation services available to or planned for these segments of the State population;~~ ~~(C) Any disproportionately high and adverse environmental effects, including interrelated social and economic effects, consistent with the provisions of Executive Order 12898 (59 FR 7629, 3 CFR, 1995 comp., p. 859) as implemented through US DOT Order 5610.2 and FHWA Order 6640.23; and~~ ~~(D) Any denial of or a reduction in benefits;~~ ~~(ii) Consideration of comments received during public involvement efforts (consistent with the provisions of § 1410.212(b)) to ensure that expressed concerns of the elderly, minority individuals and persons with disabilities, have been addressed during plan and program decision making;~~ ~~(iii) Identification of prior and planned efforts to address any disproportionately high and adverse effects that are found;~~ ~~(iiiv) The results of paragraphs (a)(5)(i), and (ii) and (iii) of this section will be documented in a manner to permit public review during appropriate project development activities;~~ ~~(iv) The State may rely on information provided by a metropolitan planning organization for those segments of the population in metropolitan planning areas of the State; and~~ ~~(vi) In accordance with Executive Order 12898, DOT Order 5610.2, and FHWA Order 6640.23, nothing in paragraphs (a)(5)(i) through (vi) of this section are intended to nor shall they create any right to judicial review of any action taken by the agency, its officers or its recipients taken under this part to comply with such Orders.~~	analysis requirements. • Require information, not findings. • Preserve due process for States and MPOs under Title VI regulations. See *AASHTO Comments, Section III.G., Recommendation 2-3.*
49	**1410.206**	@)[Reserved]	
50	**1410.208 Consideration of statewide transportation planning factors.**	(a) Each ~~statewide transportation planning process~~ State shall provide for consideration of projects and strategies that will: **(1)** Support the economic vitality of the United States, the States, and metropolitan areas, especially by enabling global competitiveness, productivity and efficiency; **(2)** Increase the safety and security of the transportation system for motorized and nonmotorized users; **(3)** Increase the accessibility and mobility options available to people and for freight; **(4)** Protect and enhance the environment, promote energy	**1. AASHTO** strongly supports the proposal to restate the seven statutory planning factors verbatim, without further elaboration. **2.** Replace "statewide transportation planning process" with "State" in the first line for consistency with 23 **U.S.C.§** 135(c), which specifically provides that "the State" **shall**

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		conservation, and improve quality of life; *(5)* Enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight; *(6)* Promote efficient system management and operation; and (7) Emphasize the preservation of the existing transportation system.	provides that "the State" shall consider these factors.
51	1410.208	(b) In addition, in carrying out statewide transportation planning, the State shall consider, at a **minimum,** the following factors ~~and other factors and issues that the planning process participants might identify which are important considerations within the statewide transportation planning process~~: (1) With respect to nonmetropolitan areas, the concerns of local elected officials representing units of general purpose local government; and (2) The concerns of Indian Tribal Governments and Federal land management agencies that have jurisdiction over land within the boundaries of the State.	1. Require consideration of only those factors listed in (b)(1) and (b)(2). Do not give "planning process participants" the authority to require consideration of additional factors. *See Section II.C.1, Recommendation 1.*
52	1410.208	(c) Nothing in this regulation shall preclude a State **from** considering additional factors and issues that State identifies as important considerations within the statewide transportation planning process.	1. Designate the State – not "planning process participants" – as the unit of government responsible for deciding whether to consider additional "factors and issues" in the statewide planning process. *See Section II.C.1, Recommendation 2.*
53	**1410.210 Coordination of planning process activities.**	**(a) The statewide transportation planning process shall** be carried out in coordination ~~with adjacent States, adjacent countries as appropriate at the international borders, and~~ with the metropolitan planning process required by subpart C of this part.	**1. Require "coordination" only** with MPOs; require "consultation" with adjacent States and "communication" with adjacent countries. *See Section II.B.2, Recommendation 1, **and** Section II.B.3, Recommendation 1; see also comments on § 1410.212(c) in **this** table.*
54	1410.210	(b) The statewide transportation planning process shall be coordinated with air quality planning and provide for appropriate conformity analyses to the extent required by the Clean Air Act (40 U.S.C 175 and 176). The State shall carry out its responsibilities for the development of the transportation portion of the State Implementation Plan to	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		the extent required by the Clean Air Act (42 U.S.C. 7504), as appropriate within the statewide transportation planning process.	
55	1410.210	(c) States shall consider coordinating the ~~D~~development of transportation plans, programs and planning activities ~~shall be coordinated~~ with related planning activities being carried out outside of metropolitan planning areas.	1. Revise regulation to conform to statutory language in Section 1204 of TEA-21, which requires States to "consider" coordinating with related planning activities in non-metropolitan areas. *See Section II.B.1, Recommendation 1.*
56	1410.210	(d) The statewide transportation planning process shall provide a forum for coordinating data collection and analyses to support, planning, programming and project development decisions.	
57	1410.210	(e) The degree of coordination shall be based on the scale and complexity of many issues including transportation problems, safety concerns, land use, employment, economic, environmental, and housing and community development objectives, and other circumstances statewide or in subareas within the State.	
58	1410.212 Participation by interested parties	(a) Non-metropolitan local official participation (1) The State shall ~~have a documented process for consultation~~ consult with local officials in non-metropolitan areas within the continuing, cooperative and comprehensive planning process for development of the statewide transportation plan and the statewide transportation improvement program. The process for consultation with non-metropolitan local officials shall be ~~documented and cooperatively~~ developed by ~~both~~ the State ~~and nonmetropolitan local officials~~ (2) The process for participation of nonmetropolitan local officials shall not be reviewed or approved by the FHWA and the FTA, nor shall it be considered ~~However, local official participation will be among the issues considered~~ by the FHWA and the FTA in making the transportation planning finding called for in § 1410.222(b).	1. Clarify that consultation procedures with non-metropolitan local officials are to be determined by the States; it is not necessary for States to obtain the consent of other parties to these procedures. *See Section II.A.3, Recommendation 1.* 2. As required by statute, revise regulation to preclude FHWA/FTA from reviewing adequacy of States' procedures for consulting with local governments. *See Section II.A.1, Recommendation 1.*
59	1410.212	(b) Public involvement. (1) Public involvement processes shall be open and proactive by providing complete information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement. ~~(1) Public involvement processes shall be open and proactive by providing complete information, timely public notice, full~~	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~public access to key decisions, and opportunities for early and continuing involvement.~~ **(2) To** satisfy these objectives public involvement processes shall provide for: (i) Early and continuing public involvement opportunities throughout the transportation planning and programming process; and (ii) Timely information about transportation issues and processes to citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, freight shippers, providers of freight transportation services, representatives of users of public transit, and other interested parties and segments of the community affected by transportation plans, programs, and projects; (iii) Reasonable public access to technical and policy information used in the development of the plan and STIP; (iv) Adequate public notice of public involvement activities and time for public review and comment at key decision points, including, but not limited, to action on the plan **and** STIP; (v) **A** process for demonstrating explicit consideration and response to public input during the planning and program development process, including responses to input received from persons **with** disabilities and minority, elderly, and low-income populations; (vi) A process for seeking out and considering the needs of those traditionally under served by existing transportation systems, including, but not limited to, low-income and **minority** populations which may face challenges accessing employment and other amenities; [vii) Periodic review of the effectiveness of **the** public involvement process to ensure that the process provides full and open access to all and revision of the process as necessary, with specific attention to the effectiveness of Efforts **to** engage persons with disabilities, minority individuals, the elderly and low-income populations. (3) Public involvement activities carried out in a metropolitan area in response to metropolitan planning requirements in §1410.322(c) or § 1410.324(c) may by agreement of the State and the MPO satisfy the requirements of this section. (4) During initial development and major revisions of the statewide transportation plan required under § 1410.214, the State shall provide citizens, affected public agencies and urisdictions, representatives of transportation agency	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		employees, private and public providers of transportation, representatives of users of public transit, freight shippers providers of freight transportation services and other interested parties a reasonable opportunity to comment on the proposed plan. The proposed plan shall be published, with reasonable notification of its availability, or otherwise made readily available for public review and comment. Likewise, the official statewide transportation plan (see § 1410.214(d)) shall be published, with reasonable notification of its availability, or otherwise made readily available for public information. *(5)* During development and major revision of the statewide transportation improvement program required under § 1410.216, the Governor shall provide citizens, affected public agencies and jurisdictions, representatives of transportation agency employees, private and public providers of transportation, representatives of users of public transit, freight shippers, providers of freight transportation services and *other* interested parties, a reasonable opportunity for review and comment on the proposed program. The proposed program shall be published, with reasonable notification of its availability, or otherwise made readily available for public review and comment. The approved program (see § 1410.222(b)) if it differs significantly from the proposed program, shall be published, with reasonable notification of its availability, or otherwise made readily available for public information. (6) The time provided for public review and comment for minor revisions to the statewide transportation plan or statewide transportation improvement program shall be determined by the State and local officials based on the complexity of the revisions. (7) The State shall, as appropriate, provide for public comment on existing and proposed procedures for public involvement throughout the statewide transportation planning and programming process. As a minimum, the State shall publish procedures and allow 45 days for public review and written comment before the procedures and any major revisions to existing procedures are adopted.	
60	410.212	(c) Federal agency and other government participation. The transportation planning process shall allow for participation of other governments and agencies, ~~particularly~~ including consultation with Indian Tribal Governments, ~~and~~ Federal lands managing agencies, and adjacent States, and communication with adjacent countries at international borders. ~~The process for consulting with Indian Tribal Governments and Federal lands managing agencies shall be~~	1. Revise regulation to require "consultation" with adjacent States and "communication" with adjacent countries. See Section *II.B.2, Recommendation 1, and Section II.B.3, Recommendation 1.*

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~cooperatively developed and documented by both the State and the Indian Tribal Government(s) or the respective Federal lands managing agency.~~	*Recommendation 1.* 2. Eliminate requirement for "documented and cooperatively developed" consultation process. See ***Section II.A.3., Recommendation 2.***
61	1410.212	(d) State air quality agency and other state agency participation. The transportation planning process shall allow for Participation of the State air quality agency and other state agencies as determined appropriate by the ~~planning process participants~~State.	1. Clarify that the State, not "planning process participants," has the authority to decide the role of other State agencies in the planning process. ***See Section II.C.2., Recommendation 1.***
62	1410.212	(e) Participation and the planning finding. The processes for participation of interested parties will be considered by the FHWA and the FTA as they make the planning finding required in § 1410.222(b) to assure that full and open access is provided to the decision making process.	
63	**1410.214 Content and development of statewide transportation plan.**	(a) The State shall develop a statewide transportation plan that shall: (1) Cover all areas of the State; (2) Be intermodal (including consideration and provision, as applicable, of elements and connections of and between transit, non-motorized, rail, commercial motor vehicle, waterway, and aviation facilities, particularly with respect to intercity travel) and statewide in scope in order to facilitate the safe and efficient movement of people and goods; (3) Address the development of intelligent transportation systems (ITS) investment strategies, including an ITS Integration Strategy consistent with the provisions of §1410.322(b)(11), to support the development of integrated technology based investments, including metropolitan and non-metropolitan investments. The scope of the integration strategy shall be appropriate to the scale of investment anticipated for ITS during the life of the plan and shall address the level of resources and ***staging*** of planned investments. ITS Integration Strategy shall be developed and documented no later than the first update of the transportation plan or STIP that occurs two years following the effective date of the final rule; (4) Be reasonably consistent in time horizon among its elements, but cover a forecast period of at least 20 years; (5) Provide for development and integrated management and operation of bicycle and pedestrian transportation system and facilities which are appropriately interconnected with	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		other modes; (6) Be coordinated with the metropolitan transportation plans required under 23 U.S.C. 134 and 49 U.S.C. 5303; (7) Reference, summarize or contain any applicable short range planning studies, strategic planning and/or policy studies, transportation needs studies, management system reports and any statements of policies, goals and objectives regarding issues, such as, transportation, economic development, housing, social and environmental effects, energy, etc., that were sigruficant to development of the plan; (8) Reference, summarize or contain information on the availability of financial (including as appropriate an optional financial plan consistent with 23 CFR 1410.214(d)) and other resources needed to carry out the plan; and (9) Contain strategies that ensure timely compliance with the applicable SIP.	
64	1410.214	(b) The following entities shall be involved in the development of the statewide transportation plan: (1) MPOs shall be involved on a cooperation basis for the portions of the plan affecting metropolitan planning areas; (2) Indian Tribal Governments and the Secretary of the Interior shall be involved on a consultation basis for the portions of the plan affecting areas of the State under the jurisdiction of an Indian Tribal Government; (3) Federal lands managing agencies shall be involved on a consultation basis for the portions of the program affecting areas of the State under their jurisdiction; (4) Affected local officials with responsibility for transportation shall be involved on a consultation basis for the portions of the plan in nonmetropolitan areas of the State.	
65	1410.214	(c) In developing the statewide transportation plan, the State shall (1) Provide for participation by interested parties as required under § 1410.212; (2) Provide for consideration and analysis as appropriate of specified factors as required under § 1410.208; (3) Provide for coordination as required under § 1410.210; and (4) Identify transportation strategies necessary to efficiently serve the mobility needs of people.	
66	410.214	(d) The statewide transportation plan may include a financial plan that: (1) Demonstrates how the adopted transportation plan can be	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		implemented; (2) Indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan; (3) Recommends any additional financing strategies for needed projects and programs; (4) Might include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available. The State is not required to select any project from the illustrative list for implementation, and projects on the illustrative list cannot be advanced to implementation without an action by the Secretary of Transportation on the STIP.	
67	1410.214	(e) The State shall provide and carry out a mechanism to adopt the plan as the official statewide transportation plan.	
68	1410.214	(f) The plan shall be continually evaluated and periodically updated, as appropriate, using the procedures in this section for development and establishment of the plan.	
69	**1410.216 Content and development of statewide transportation improvement program (STIP).**	(a) Each State shall develop a statewide transportation improvement program for all areas of the State. In case of difficulties in developing the STIP portion for a particular area, e.g., metropolitan area, Indian Tribal lands, etc., a partial STIP covering the rest of the State may be developed. The portion of the STIP in a metropolitan planning area (the metropolitan TIP developed pursuant to subpart C of this part) shall be developed in cooperation with the MPO. To assist metropolitan TIP development the State, and the MPO, in consultation with ~~and~~ the transit operator, will cooperatively develop timely estimates of available Federal and State funds which are to be utilized in developing the metropolitan TIP. Metropolitan planning area TIPs shall be included without modification in the STIP, directly or by reference, once approved by the MPO and the Governor and after needed conformity findings are made. Metropolitan TIPs in nonattainment and maintenance areas are subject to the FHWA and the ETA conformity findings before their inclusion in the STIP. In nonattainment and maintenance areas outside metropolitan planning areas, Federal findings of conformity must be made prior to placing projects in the STIP. The State shall notify the appropriate MPO, local jurisdictions, Federal land management agency, Indian Tribal Government, etc., when a TIP including projects under the jurisdiction of the agency has been included in the STIP. All title 23 U.S.C and 49 U.S.C Chapter 53 fund recipients will	1. For consistency with Section 1203(g) of TEA-21, revise the regulation to provide that the State DOT and the MPO are the entities responsible for developing revenue estimates.

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		share information as projects in the STIP are implemented. The Governor shall provide for participation of interested parties in development of the STIP as required by § 1410.212.	
70	1410.216		
71	1410.216	(c) The STIP shall: (1) Include a list of priority transportation projects proposed to be carried out in the first three years of the STIP. Since each TIP is approved by the Governor, the TIP priorities will dictate STIP priorities for each individual metropolitan area. As a minimum, the lists shall group the projects that are to be undertaken in each of the years, e.g., year 1, year 2, year 3; (2) Cover a period of not less than three years, but may at State discretion cover a longer period. If the STIP covers more than three years, the projects in the additional years will be considered by the FHWA and the FTA only as informational; (3) Contain only projects consistent with the statewide plan developed under § 1410.214; (4) In nonattainment and maintenance areas, contain only transportation projects that have been found to conform, or which come from programs that conform, in accordance with the requirements contained in the EPA conformity regulation 40 CFR parts 51 and 93; (5) Contain a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. The STIP financial constraint will be demonstrated and maintained by year and the STIP shall include sufficient financial information to demonstrate which projects are to be implemented using current revenues and	1. Eliminate the requirement, in paragraph (c)(9)(iv)-(v), for designating the funding category for projects. Requiring assignment of funding category in the STIP is not useful and causes States extra work, and therefore should be removed (especially the requirement for years 2 and 3).

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		revenue sources while the system as a whole is being adequately operated and maintained. In nonattainment and maintenance areas, projects included in the first two years of the current STIP/TIP shall be limited to those for which funds are available or committed. In the case of proposed funding sources, strategies for ensuring their availability shall be identified, preferably in an optional financial plan consistent with § 1410.216(f); (6) Contain all capital and non-capital transportation projects (including transportation enhancements, safety, Federal lands highways projects, trails projects, pedestrian walkways, and bicycle transportation facilities), or identified phases of transportation projects, proposed for funding under 49 U.S.C. Chapter 53 and/or title 23, U.S.C., excluding: (i) Metropolitan planning projects funded under 23 U.S.C. 104(f) and 49 U.S.C. 5303; (ii) State planning and research projects funded under 23 U.S.C. 307(c)(1) and 49 U.S.C. 5313(b)(except those funded with national highway system (NHS), surface transportation program (STP) and minimum guarantee funds that the State and MPO for a metropolitan area agree should be in the TIP and consequently must be in the STIP); and (iii) Emergency relief projects (except those involving substantial functional, locational or capacity changes); (7) Contain all regionally significant transportation projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded with title 23, U.S.C., or 49 U.S.C. Chapter 53 funds, and/or selected funds administered by the Federal Railroad Administration, e.g., addition of an interchange to the Interstate System with State, local and/or private funds, high priority or demonstration projects not funded under title 23, U.S.C., or 49 U.S.C. Chapter 53. (The STIP should include all regionally significant transportation projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA. It should also include, for information purposes, if appropriate and cited in any TIPs, all regionally significant projects, to be funded with non-Federal funds); (8) Identify ITS projects funded with highway trust fund monies, including as appropriate an integration strategy, consistent with the statewide plan. Where ITS projects are identified that fit the provisions of § 1410.322(b)(11), an agreement shall exist between participating agencies in the project area that will govern their implementation. 9) Include for each project or phase the following:	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		(i) Sufficient descriptive material (i.e., type of work, termini, length, etc.) to identify the project or phase; (ii) Estimated total project cost, which may extend beyond the three years of the STIP; (iii) The amount of funds proposed to be obligated during each program year for the project or phase; ~~(iv) For the first year, the proposed category of Federal funds and source(s) of non-Federal funds for the project or phase;~~ ~~(v) For the second and third years, the likely category of Federal funds and sources of non-Federal funds for the project or phase;~~ (iv~~vi~~) Identification of the agencies responsible for carrying out the project or phase; and (10) For non-metropolitan areas, include in the first year only those projects which have been selected in accordance with the requirements in § 1410.224(c).	
72	1410.216	(d) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under 23 CFR 1420.311(c) and (d) and/or 40 CFR part 93. In addition, projects funded under chapter 2 of 23 U.S.C. may be grouped by funding category and shown as one line item, unless they are determined to be regionally significant.	
73	410.216	(e) Projects in any of the first three years of the STIP may be moved to any other of the first three years of the STIP subject to the reauirements of § 1410.224.	
74	410.216	(f) The statewide transportation improvement program may include a finanaal plan that: (I) Demonstrates how the adopted transportation improvement program can be implemented; (2) Indicates resources from public and private sources that are reasonably expected to be made available to carry out the program; (3) Recommends any additional financing strategies for needed projects and programs; (4) Might include, for illustrative purposes, additional projects that would be included in the transportation improvement program if reasonable additional resources beyond those identified in the financial plan were available. The State is not required to select any project from the illustrative list for implementation, and projects on the illustrative list cannot be advanced *to* implementation without an action by the Secretary on the STIP.	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
75	1410.216	(g) The **STIP** may be modified at any time under procedures agreed to by the cooperating parties consistent with the procedures established in this section (for STIP development), in § 1410.212 (for interested party participation) and in § 1410.222 (for the **FHWA** and the FTA approval).	
76	**1410.218 Relation of planning and project development processes.**	(a) ~~Depending upon its character and the level of detail desired as determined by the planning process participants,~~ tThe statewide planning process products and analyses can be utilized as input to subsequent project development. The process described in § 1410.318 relating planning and project development may be utilized at the discretion of the ~~statewide transportation planning process participants~~State in non-metropolitan areas. Analyses performed within the statewide planning process to support project development may lead to a statement of ~~purpose and need~~project objectives for-individual projects or groups or projects.~~regionally significant proposed transportation investments~~	1. Delete opening clause to avoid implication that "planning process participants" decide level of detail. (Alternatively, substitute "State" for "planning process participants.") *See Section II.C.3., Recommendation* **3.** **2.** Replace the second reference to this term with "the State" to clarify that the State is responsible for deciding whether to conduct project-level studies for projects in non-metropolitan areas as part of the statewide planning process. *See Section II.C.4., Recommendation 1.* **3.** Replace "purpose and need" with the more general term "project objectives," to avoid creating the impression that the planning process is expected to generate a purpose-and-need statement sufficient to meet the requirements of **NEPA.** *See Section I.C.1., Recommendation I. See also proposed change to definition of "purpose and need" in 1410.104, above.* 4. Clarify that the development of a statement of project objectives in the statewide planning process is optional, **by** inserting the word "may."
77	**1410.218**	(b) The results of analyses conducted under paragraph (a) of this section, at the option of the State~~planning participants~~, may: (1) Be documented as part of the plan development	1. Revise regulation to designate "the State" as the entity responsible for deciding whether to conduct MIS-type analysis in

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		record for consideration in Subsequent project development actions; (2) Serve as input to the NEPA process required under 23 CFR 1420; (3) Provide a basis, in part, for project level decision making; and (4) Be proposed for consideration as support for actions and decisions by federal agencies other than US DOT;	non-metropolitan areas. *See Section II.C.4., Recommendation 1.*
78	1410.218	(c) ~~To the extent feasible,~~ Federal, State, and local agencies with subsequent project level responsibilities for investments included in a transportation plan, ~~shall~~ are strongly encouraged to become involved in planning analyses and studies as a means to reduce subsequent project development analyses and studies, support decisionmaking, and provide early identification of key concerns for later consideration and analysis as needed. Where the processes available under § 1410.318(f) are invoked, the FHWA and the FTA shall be consulted.	1. Replace "shall" with "strongly encourage" to avoid any possibility that the planning process could be held inadequate if agencies referenced in this regulation decided not to participate. *See 1410.318(d), which directs USDOT agencies to "strong encourage" involvement by other agencies in the metropolitan planning process.*
79	1410.218	(d) Nothing in this section shall be interpreted as requiring ~~formal~~ NEPA review of or action on plans and TIPS.	1. AASHTO strongly supports this provision, which implements Section 1308 of TEA-21. 2. Delete the word "formal," which is unnecessary and potentially confusing.
80	1410.218	(e) In nonattainment and maintenance areas, ~~T~~the FHWA and the FTA project level actions, including, but not limited to issuance of a categorical exclusion, finding of no significant impact or a final environmental impact statement under 23 CFR 1420, right of way acquisition (with the exception of hardship and protective buying actions), interstate interchange approvals, high occupancy vehicle (HOV) conversions, funding of ITS projects, project conformity analyses and approval of final design and construction and transit vehicle acquisition may not be completed unless the proposed project ~~action is~~ included in a plan and the phase of the project for which federal action is sought is included in an approved STIP ~~which meets the requirements of this subpart~~. None of these project level actions can occur in nonattainment and maintenance areas unless the project conforms according to the requirements of the EPA's conformity rule (40 CFR parts 51 and 93).	1. Revise to limit applicability of this requirement to non-attainment and maintenance areas; outside those areas, inclusion in the plan/STIP by the end of the NEPA process is desirable, but should not be required. *See Section I.D., Recommendation 3.* 2. Clarify that the NEPA process can be completed as long as the project *phase* for which Federal approval is sought is included in the STIP. *See Section I.D., Recommendation 2.* *See also § 1410.318(g)., which refers to inclusion of the appropriate*

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
			"phase" of the project in the TIP prior to NEPA process completion. 3. Define the term "phase of the project" as recommended in comments on § 1410.104, above. See *Section I.D., Recommendation 1.*
81	**1410.220 Funding of Planning Process**	Funds provided under 49 U.S.C 5303, 5307, 5309, 5311, and 5313(b) and 23 U.S.C 104(b)(1), 104(b)(3), 104(f), 105, and 505(a) may be used to accomplish activities in this subpart.	
82	**1410.222 Approvals, self-certification and findings.**	(a) At least every two years, each State shall submit the entire proposed STIP, and amendments as necessary, concurrently to the FHWA and the FTA for joint approval. The *State* shall certify that the transportation planning process is being carried out in accordance with all applicable requirements of: (1) 23 U.S.C. 134 and 135, 49 U.S.C 5303-5305 and 5323(k), and this part; (2) Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-1) and implementing regulations (49 CFR part 21 and 23 CFR part 230); (3) Section 162(a) of the Federal-Aid Highway Act of 1973 (23 U.S.C 324); (4) The Older Americans Act of 1965, as amended (42 U.S.C. 6101); (5) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations (49 CFR part 35); (6) Section 1101 of the Transportation Equity Act for the 21st Century (Public Law 105-178) regarding the involvement of disadvantaged business enterprises in the FHWA and the FTA funded projects (sec. 105(f), Public Law 97-424, 96 Stat. 2100; 49 CFR part 23); (7) The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)) and U.S. DOT regulations "Transportation for Individuals with Disabilities" (49 CFR parts 27/37, and 38); (8) The provisions of 49 CFR part 20 regarding restrictions on influencing certain Federal activities; (9) In States containing nonattainment and maintenance areas, sections 174 and 176 (c) and (d) of the Clean Air Act as amended (42 U.S.C. 7504, 7506 (c) and (d)); and (10) ~~all~~ any other applicable provisions of Federal law that are specifically identified by the FHWA or the FTA in writing to the State.	1. Require the State to certify compliance with "other applicable Federal laws" only if those laws have been specifically identified as applicable by the USDOT agencies.
83	**1410.222**	(b) The FHWA and the FTA Administrators, in consultation with, where applicable, Federal land managing	1. Revise this section to require the USDOT agencies to identify,

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		agencies, will review the STIP or amendment and jointly make a written finding (based on self-certifications made by the State and appropriate reviews established and conducted by FTA and FHWA) as to the extent the projects in the **STIP** are based on a planning process that meets or substantially meets the requirements of title 23, **U.S.C.**, 49 **U.S.C.** Chapter 53 and subparts A, B, and C of this part. **(1)** If, upon review, the FHWA and the FTA Administrators jointly find that the planning process through which the **STIP** was developed meets the requirements of 23 **U.S.C.** 135 and these regulations (including subpart C where a metropolitan TIP is involved), they will unconditionally approve the **STIP.** **(2)** If the **FHWA** and the **FTA** administrators jointly find that the planning process through which the **STIP** was developed substantially meets the requirements of 23 U.S.C. 135 and these regulations (including subpart C where a metropolitan TIP is involved), they will specifically identify the statutory basis for any corrective actions required and act on the **STIP** or amendment as follows: (i) Joint conditional approval of the STIP subject to certain corrective actions being taken; (ii) Joint conditional approval of the STIP as the basis for approval of identified categories of projects; and/or (iii) Under special circumstances, joint conditional approval of a partial **STIP** covering only a portion of the State. **(3)** If, upon review, the **FHWA** and the **FTA** Administrators jointly find that the STIP or amendment does not substantially meet the requirements of 23 **U.S.C.** 135 and this part for any identified categories of projects, they will not approve the **STIP** or amendment.	in writing, the specific statutory basis for any denial of certification or any conditional certification. *See Section III.G., Recommendation 3.* 2. If EJ concepts are retained in the final rule, revise this section to clarify that certification will not be denied, or conditionally approved, based upon non-compliance with the EJ orders, until the **U.S.DOT** *agency* has complied with the procedural requirements in the Title VI regulations, **49 C.F.R. § 21.5.** *See Section III.G., Recommendation 2.*
84	**1410.222**	(c) The joint approval period for a new **STIP** or amended STIP shall not exceed two years. Where the State demonstrates, in writing, that extenuating circumstances will delay the submittal of a new **STIP** or amended **STIP** for approval, the FHWA and the FTA will consider and take appropriate action on requests to extend the approval beyond two years for all or part of the STIP for a ~~limited~~ specific period of time~~, not to exceed 180 days~~. Where the request involves projects in a metropolitan planning area(s), the affected MPO(s) must concur in the request and if the delay was due to the development and approval of the TIP, the affected MPO(s) must provide supporting information, in writing, for the request. ~~If nonattainment and/or maintenance areas are involved, a request for an extension cannot be granted.~~	1. Allow STIP extensions in attainment areas to be granted on a case-by-case basis; do not arbitrarily limit to 180 days. *See Section IV.B., Recommendation 1.* 2. Allow STIP extensions in non-attainment and maintenance areas to be granted on case-by-case basis; do not completely eliminate. *See Section IV.A.1, Recommendation 1.*

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
85	**1410.222**	(d) The FHWA and the FTA will notify the State in writing of actions taken under this section and, in such written communication, will specify and explain the statutory basis for any denial of certification or any conditional approval of certification.	1. Revise this section to require the **USDOT** agencies to identify, in writing, the specific statutory basis for any denial of certification or any conditional certification. *See Section III. G., Recommendation 3.*
86	**1410.222**	(e) Where necessary in order to maintain or establish operations, the Federal Transit Administrator and/or the Federal Highway Administrator may approve operating assistance for specific projects or programs funded under 49 U.S.C. 5307 and 5311 even though the projects or programs may not be included in an approved **STIP.**	
87	**1410.224 Project selection.**	(a) Except as provided in §§ 1410.222(e) and 1410.216(c)(6), only projects included in the federally approved **STIP** shall be eligible for funds administered by the FHWA or the FTA.	
88	1410.224	(b) In metropolitan planning areas, transportation projects requiring 23 **U.S.C.** or 49 **U.S.C.** Chapter 53 funds metropolitan planning regulation in subpart C of this part.	
89	1410.224	(c) Outside metropolitan planning areas, transportation projects undertaken on the National Highway System with title 23 funds and under the bridge and Interstate maintenance programs shall be selected from the approved **STIP** by the State in consultation with the affected local officials. Federal lands highway projects shall be selected from the approved **STIP** in accordance with 23 U.S.C. 204. Other transportation projects undertaken with funds administered by the FHWA shall be selected from the approved **STIP** by the State in cooperation with the affected local officials, and projects undertaken with 49 U.S.C. Chapter 53 funds shall be selected from the approved **STIP** by the State in cooperation with the appropriate affected local officials and transit operators.	
90	1410.224	(d) The projects in the first year of an approved **STIP** shall constitute an "agreed to" list of projects for subsequent scheduling and implementation. No further action under paragraphs (b) or (c) of this section is required for the implementing agency to proceed with these projects except that if appropriated Federal funds available are sigruficantly less than the authorized amounts, § 1410.332(c) provides for a revised list of "agreed to" projects to be developed upon the request of the State, the MPO, or transit operators. If an	

Re #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		implementing agency wishes to proceed with a project in the second and third year of the STIP, the procedures in paragraphs (b) and (c) of this section or as agreed to by the parties under paragraph (e) of this section must be used.	
91	1410.224	(e) Expedited procedures which provide for the advancement of projects from the second or third years of the STIP may be used if agreed to by all the parties involved in the selection process.	
92	**1410.226 Applicability of NEPA to transportation planning and programming.**	Any decision by the Secretary concerning a transportation plan or transportation improvement program developed through the processes provided for in 23 U.S.C. 134 and 135 and 49 U.S.C. 5303 through 5305, shall not be considered to be a Federal action subject to review under NEPA.	AASHTO strongly supports the inclusion of this provision, which implements Section 1204(h) of TEA-21.
	Subpart C – Metropolitan Transportation Planning and Programming		
93	**1410.300 Purpose of planning process.**	The purpose of this subpart is to implement 23 U.S.C. 134 and 49 U.S.C. 5303-5306 which require that a Metropolitan Planning Organization (MPO) be designated for each urbanized area (UZA) and that the metropolitan area have a continuing, cooperative, and comprehensive transportation planning process that results in plans and programs that consider all transportation modes and support metropolitan community development and social goals. The transportation plan and program shall facilitate the development, management and operation of an integrated, intermodal transportation system that enables the safe, efficient, economic movement of people and goods.	
94	**1410.302 Organizations and processes affected by planning requirements.**	The provisions of this subpart are applicable to agencies responsible for satisfying the requirements of the transportation planning, programming, and project development processes in metropolitan planning areas pursuant to 23 U.S.C. 134.	
95	**1410.304 Definitions.**	Except as otherwise provided in subpart A of this part, terms defined in 23 U.S.C. 101(a) and 49 U.S.C. 5302 are used in this part as so defined.	
96	**1410.306 What is a Metropolitan Planning Organization and how is it created?**	(a) Designations of metropolitan planning organizations (MPOs) made after December 18, 1991, shall be by agreement among the Governor(s) and units of general purpose local governments representing 75 percent of the affected metropolitan population (including the central city or cities as defined by the Bureau of the Census), or in accordance with procedures established by applicable State or local law.	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	created?	A single metropolitan planning organization, to the extent possible, shall be designated to serve a metropolitan planning area containing: **(1)** A single UZA, or (2) Multiple UZAs that are contiguous **with** each **other** or located within the same Metropolitan Statistical Area (MSA).	
97	**1410.306**	(b) The designation or redesignation shall clearly identify the policy body that is the forum for cooperative decision making that will be taking the required approval actions **as** the MPO.	
98	**1410.306**	(c) To the extent possible, the MPO designated should be established under specific State legislation, State enabling legislation, or by interstate compact, and shall have authority to carry out metropolitan transportation planning.	
99	**1410.306**	(d) Nothing in this subpart shall be deemed to prohibit an MPO from utilizing the staff resources of other agencies to carry out selected elements of the planning process.	
10(	**1410.306**	(e) Existing MPO designations remain valid until a new MPO is redesignated. Redesignation is accomplished by the Governor and local units of government representing 75 percent of the population in the area served by the existing MPO (the central city(ies) must be among those desiring **to** revoke the MPO designation). If the Governor and local officials decide to redesignate an existing MPO, but do not formally revoke the existing MPO designation, the existing MPO designation remains in effect **until** a new MPO is formally designated.	
101	**1410.306**	(f) Redesignation of an **MPO** in a multistate metropolitan area requires the approval of the Governor of each State and local officials representing 75 percent of the population in the entire metropolitan planning area. The **local officials** in **the** central city(ies) must be among **those** agreeing ***to*** the redesignation.	
102	1410.306	***(g)*** Redesignation of an MPO covering more than one UZA requires the approval of the Governor(s) and local officials representing 75 percent of the population in the metropolitan planning area covered by the current MPO. The local officials in the central city(ies) in each urbanized area must be among those agreeing to the redesignation.	
103	**1410.306**	(h) The voting membership of **an MPO** policy body designated/redesignated subsequent to December 18, 1991, and **serving** a TMA, must include representation of local elected officials, officials of agencies that administer or operate major modes or systems of transportation, e.g., transit operators, sponsors of major local airports, maritime ports, rail operators, etc. (including all transportation agencies that were included in the **MPO** on June 1, 1991), and	

Ref #	Section	*Text* of Propoeed Regulation (with AASHTO's recommended changes)	AASETO Comments
		appropriate State officials. Where agencies that operate other major modes of transportation do not already have a voice on existing MPOs, the MPOs (in cooperation with the States) are encouraged to provide such agencies a voice in the decision making process, including representation/membership on the policy body and/or other appropriate committees. Further, where appropriate, existing MPOs should increase the representation of local elected officials on the policy board and other committees as a means for encouraging their greater involvement in MPO processes. Adding such representation to an MPO will not, in itself, constitute a redesignation action. (i) Where the metropolitan planning area boundary for a previously designated MPO needs to be expanded, the membership on the MPO policy body and other committees, should be reviewed to ensure that the added area has appropriate representation.	
10	1410.306	(j) Adding membership (e.g., local elected officials and operators of major modes or systems of transportation, or representatives of newly urbanized areas) to the policy body or expansion of the metropolitan planning area does not automatically require redesignation of the MPO. This may be done without a formal redesignation. The Governor and MPO shall review the previous MPO designation, State and ocal law, MPO bylaws, etc., to determine if this can be ıccomplished without a formal redesignation. If 'edesignation is considered necessary, the existing MPO will 'emain in effect until a new MPO is formally designated or he existing designation is formally revoked in accordance with the procedures of this section.	
10	1410.308 Establishing he geographic oundaries fo netropolitan ransportation lanning reas.	(a) The metropolitan planning area boundary shall, as a minimum, cover the UZA(s) and the contiguous geographic ırea(s) likely to become urbanized within, at a minimum, the twenty year forecast period covered by the transportation lan described in § 1410.322. (1) For existing MPOs, unless modified by agreement of he Governor and the MPO, the planning area boundaries hall be those in existence as of June 9,1998. For MPOs iesignated after June 9,1998, the boundaries shall be those ıgreed to by the Governor and local officials as indicated in § .410.306(a). (2) The boundary may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census. (3) For new MPOs, the planning area boundary shall reflect agreements between the MPO and the State DOT regarding the relationship of the metropolitan planning area boundary to any nonattainment and maintenance area within	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		its designated limits or contiguous nonattainment or maintenance area excluded from the boundary.	
1C	1410.308	(b) The metropolitan planning area for a new UZA served by an existing or new MPO shall be established in accordance with these criteria. The current planning area boundaries for previously designated UZAs shall be reviewed and modified if necessary to comply with these criteria.	
1C	1410.308	(c) In addition to the criteria in paragraph (a) of this section, the planning areas currently in use for all transportation modes should be reviewed before establishing the metropolitan planning area boundary. Where appropriate, adjustments should be made to reflect the most comprehensive boundary to foster an effective planning process that ensures connectivity between modes and their operational integration, and promotes efficient overall transportation investment strategies in support of mobility and accessibility.	
10	1410.308	(d) Approval of metropolitan planning area boundaries by the FHWA and/or the FTA is not required. However, metropolitan planning area boundary maps must be submitted to the FHWA and the FTA after their approval by the MPO and the Governor and be made publicly available.	
10	1410.308	(e) The STP funds suballocated to urbanized areas greater than 200,000 in population shall not be utilized for projects outside the metropolitan planning area boundary.	
11	1410.310 Agreements among organizatione involved in the planning process.	(a) The responsibilities for cooperatively carrying out transportation planning and programming shall be clearly identified in an agreement or memorandum of understanding among the State(s), operators of publicly owned mass transit, and the MPO.	
11	1410.310	(b) Where project development activities are conducted under the planning process, they shall be documented in an agreement between the MPO and the applicable project sponsor addressing, at a minimum, the provisions of §1410.318. This requirement may be satisfied by an agreement applicable to all projects in a metropolitan area, by an agreement applicable to a category of projects, or by an agreement applicable to a specific project or projects.	1. Clarify that this provision does not require a project-specific agreement for each project for which project-level analyses are completed in the planning process. *See 1410.310(h), below, which encourages the use of a single agreement to satisfy this requirement.*
11	1410.310	(c) In nonattainment or maintenance areas, if the MPO is not designated as the agency responsible for air quality planning under section 174 of the Clean Air Act (42U.S.C. 7504), there shall be an agreement between the MPO and the	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		designated agency describing their respective roles and responsibilities for air quality related transportation planning.	
11	1410.310	(d) Where the parties involved agree, the requirement for agreements specified in paragraphs (a), (b), and (c) of this section may be satisfied by including the responsibilities and procedures for carrying out a cooperative process in the unified planning work program or a prospectus.	
11	1410.310	(e) If the metropolitan planning area does not include the entire nonattainment or maintenance area, there shall be an agreement among the State department of transportation, State air quality agency, affected local agencies, and the MPO describing the process for cooperative planning and analysis of all projects outside the metropolitan planning area but within the nonattainment or maintenance area. The agreement must indicate how the total transportation related emissions for the nonattainment or maintenance area, including areas both within and outside the metropolitan planning area, will be treated for the purposes of determining conformity in accordance with the U.S. EPA conformity regulation (40 CFR parts 51 and 93). The agreement shall address policy mechanisms for resolving conflicts concerning transportation related emissions that may arise between the metropolitan planning area and the portion of the nonattainment or maintenance area outside the metropolitan planning area. Proposals to exclude a portion of the nonattainment or maintenance area from the planning area boundary shall be coordinated with the FHWA, the FTA, the EPA, and the State air quality agency before a final boundary decision is made for the metropolitan planning area.	
115	1410.310	(f) Where more than one MPO has authority within a metropolitan planning area, a nonattainment or maintenance area, and/or in the case of adjoining metropolitan planning areas, there shall be an agreement between the State department(s) of transportation and the MPOs describing how the processes and projects will be coordinated to assure the development of an overall transportation plan for the planning area(s). In metropolitan planning areas that are nonattainment or maintenance areas, the agreement shall include State and local air quality agencies, and be consistent with the provisions of § 1410.312(c). The agreement shall address policy mechanisms for resolving potential conflicts that may arise between the MPOs, e.g., issues related to the exclusion of a portion of the nonattainment area from the planning area boundary.	
116	.410.310	(g) Where the planning process develops an ITS Integration Strategy under the provisions of §	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		1410.322(b)(11), there shall be an agreement among the **MPO,** the State **DOT,** the transit operator and other agencies as described in the ITS Integration Strategy. This agreement shall address policy and operational issues that will affect the successful implementation of the ITS Integration Strategy, including at a minimum ITS project interoperability, utilization of ITS related standards, and the routine operation of the projects identified in the ITS Integration Strategy;	
117	**1410.310**	(h) To the extent possible, a single cooperative agreement containing the understandings required by paragraphs (a) through (c) of this section among the State(s), the MPO, publicly owned operators of mass transportation services, and air quality agencies may be developed. Where the participating p anning organizations desire, they may further consolidate agreements required by paragraphs (d) through (g) of this section with those addressed in paragraphs (a) through (c) of this section.	
118	**1410.310**	(i) For all requirements specified in paragraphs (a) through (h) of this section, existing agreements shall be reviewed by the MPO, the State DOT and the transit operator for compliance and reaffirmed or modified as necessary to ensure participation by all appropriate modes.	
119	**1410.312 Planning process organizational relationships.**	(a) The MPO in cooperation with the State and with operators of publicly owned transit services shall be responsible for carrying out the metropolitan transportation planning process. The MPO, the State and transit operator(s) shall cooperatively determine their mutual responsibilities in the conduct of the planning process. They shall cooperatively develop the unified planning work program, transportation plan, and transportation improvement program specified in §§ 1410.314 through 1410.332. In addition, the development of the plan and TIP shall be coordinated with other providers of transportation, e.g., sponsors of regional airports, maritime port operators, rail freight operators~~, and where appropriate, planning agencies in Mexico and/or Canada.~~	1. Delete requirement for "coordination" with adjacent countries; replace with requirement for "communication." *See Section II.B.3., Recommendation 1.*
120	1410.312	(b) The MPO shall approve the metropolitan transportation plan, plan amendments and plan updates. The MPO and the Governor shall approve the metropolitan transportation improvement program and any amendments.	
121	**410.312**	(c) In nonattainment or maintenance areas: (1) The transportation and air quality planning processes shall be coordinated; (2) TCMs proposed for FHWA and FTA funding and/or approvals shall come from a plan and TIP that fully meet the requirements of this subpart (new TCMs authorized to proceed during a conformity lapse will meet the requirements of this subpart if they are included in an interim plan and program and approved into a SIP with	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		emission reduction benefits); and (3) MPOs shall participate in the development of motor vehicle emissions budgets, inventories and other transportation related air quality activities undertaken to develop SIPs to the extent required by the Clean Air Act (42 U.S.C. 7504).	
12	1410.312	(d) In nonattainment or maintenance areas for transportation related pollutants, the MPO shall not approve any transportation plan or program which does not conform with the SIP, as determined in accordance with the U.S. EPA conformity regulation (40 CFR parts 51 and 93).	
12	1410.312	(e) If more than one MPO has authority in a metropolitan planning area (including multi-State metropolitan planning areas) or in an area which is designated as nonattainment or maintenance for transportation related pollutants, the MPOs and the Governor(s) shall cooperatively establish the boundaries of the metropolitan planning area (addressing the required twenty year planning horizon and relationship to the nonattainment or maintenance areas) and the respective jurisdictional responsibilities of each MPO. The MPOs shall consult with each other and the State(s) to assure that plans and transportation improvement programs are coordinated for the entire metropolitan planning area, including, but not limited to, coordinated data collection, analysis and plan development. Alternatively, a single plan and/or TIP for the entire metropolitan area may be developed jointly by the MPOs in cooperation with their planning partners. Coordination efforts shall be documented in subsequent transmittals of the unified planning work program (UPWP) and various planning products (the plan, TIP, etc.) to the State(s), the FHWA, and the FTA.	
12	1410.312	(f) The FTA and the FHWA must designate as transportation management areas all UZAs over 200,000 population as determined by the most recent decennial census. The TMAs so designated and those designated subsequently by the FTA and the FHWA (including those designated upon request of the MPO and the Governor) must comply with the special requirements applicable to such areas regarding congestion management systems, project selection, and planning certification. The TMA designation applies to the entire metropolitan planning area boundary. If a metropolitan planning area encompasses a TMA and other UZA(s), the designation applies to the entire metropolitan planning area regardless of the population of constituent UZAs.	
12	1410.312	(g) In TMAs, the congestion management system shall be developed as part of the metrouolitan transuortation	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		planning process.	
126	1410.312	(h) The State shall cooperatively participate in the development of metropolitan transportation-plans and metropolitan plans shall be coordinated with the statewide transportation plan. The relationship of the statewide transportation plan and the metropolitan plan is specified in subpart B of this part.	
127	1410.312	(i) Where a metropolitan planning area includes Federal public lands and/or Indian Tribal lands, the *affected* Federal agencies and Indian Tribal Governments shall be consulted in the development of transportation plans and programs.	
128	1410.312	(j) Discretionary grants awarded by the FHWA and the FTA under section 1221 of the TEA-21 (23 U.S.C 101 note) (Transportation and Community and System Reservation Pilot Program), sections 1118 and 1119 of the TEA-21 (Borders and Comdors) and section 3037 (49 U.S.C. 5309 note) (Access to Jobs) shall be included in the appropriate metropolitan plan and program, except where these funds are utilized for planning and/or research activities. Applicants shall coordinate with the appropriate MPO to ensure that such projects are consistent with the provisions of this subpart. Where planning and research activities are funded under the Transportation and Community and System Preservation Pilot Program or the Borders and Corridors Program, they shall be identified in the Unified Planning Work Program as identified at § 1410.314.	
129	1410.314 Planning tasks and unified work program.	(a) The MPO(s) in cooperation with the State and operators of publicly owned transit shall develop unified planning work programs (UPWPs) that meet the requirements of 23 CFR part 420, subpart A, and: (1) Discuss the planning priorities facing the metropolitan planning area and describe all metropolitan transportation and transportation-related air quality planning activities anticipated within the area during the next one or two year period, regardless of funding sources or agencies conducting activities, in sufficient detail to indicate who will perform the work, the schedule for completing it and the products that will be produced; and (2) Document planning activities to be performed with funds provided under title 23 and Chapter 53 of title 49 U.S.C.	
130	1410.314	(b) Arrangements may be made with the FHWA and the FTA to combine the UPWP requirements with the work program for other Federal sources of planning funds.	
131	1410.314	(c) In areas not designated as TMAs and which are in attainment for air quality purposes, the MPO in cooperation with the State and transit operator(s), with the approval of the FHWA and the FTA, may prepare a simplified statement	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		of work, in lieu of a UPWP, that describes who will perform the work and the work that will be accomplished using Federal funds (administered under title 23 U.S.C. and Chapter 53 of title 49 U.S.C. If a simplified statement of work is used, it may be submitted as part of the statewide planning work program, in accordance with 23 CFR part 420.	
13	1410.314	(d) MPOs, which include non-attainment or maintenance areas, should consult with the US EPA and state/local air agencies in the development of their UPWP regarding appropriate tasks to support attainment of air quality standards.	
13	**1410.316 Transportation planning process and plan development.**	(a) Each metropolitan planning process shall provide for consideration of projects and strategies that will: (1) Support the economic vitality of the metropolitan planning area, especially by enabling global competitiveness, productivity, and efficiency; (2) Increase the safety and security of the transportation system for motorized and non-motorized users; (3) Increase the accessibility and mobility options available to people and for freight; (4) Protect and enhance the environment, promote energy conservation, and improve quality of life; (5) Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight; (6) Promote efficient system management and operation; and (7) Emphasize the efficient preservation of the existing ransportation system.	1. AASHTO strongly supports the proposal to restate the seven statutory planning factors verbatim, without further elaboration.
13	1410.316	(b) In addition, the metropolitan transportation planning process shall develop and adopt a proactive public involvement process that provides complete information, timely public notice, full public access to key decisions, and supports early and continuing involvement of the public in developing plans and TIPs. To attain these objectives the process as developed shall meet the requirements and criteria is follows: (1) Require a minimum public comment period of 45 days before the public involvement process is initially adopted or revised; (2) Provide timely information about transportation issues and processes (including but not limited to initiation of plan and TIP updates, revisions and/or other modifications and the general structure of the planning process) to citizens, affected public agencies, representatives of transportation agency employees, users of public transit, freight shippers, private providers of transportation, other interested parties and segments of the community affected by transportation	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		plans, programs and projects (including but not limited to central city and other local jurisdiction concerns); (3) Provide reasonable public access to technical and policy information used in the development of plans and TIPs and open public meetings where matters related to the Federal-aid highway and transit programs are being considered; (4) Require adequate public notice of public involvement activities and time for public review and comment at key decision points, including, but not limited to, approval of plans and TIPs (in nonattainment areas classified as serious and above, the comment period shall be at least 30 days for the plan, TIP and major amendment(s)); (5) Demonstrate explicit consideration, recognition and feedback to public input received during the planning and program development processes, including responses to input received from minority, elderly, low-income, and persons with disabilities populations; (6) Seek out and consider the needs of those traditionally under served by existing transportation systems, including, but not limited to, low-income, the elderly, persons with disabilities and minority populations; (7) When comments are received on the draft transportation plan or TIP (including the financial plan) as a result of the public involvement process or the interagency consultation process required under the U.S. EPA conformity regulations, a summary, analysis, and report on the disposition of comments shall be made part of the final plan and TIP; (8) If the final transportation plan or TIP differs significantly from the one which was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen from the public involvement efforts, an additional opportunity for public comment on the revised plan or TIP shall be made available; (9) Public involvement processes shall be periodically reviewed by the MPO in terms of their effectiveness in assuring that the process provides full and open access to all, with specific attention to the effectiveness of efforts to engage persons with disabilities, minority individuals, the elderly and low income populations; (10) These procedures will be reviewed by the FHWA and the FTA during certification reviews for TMAs, and as otherwise necessary for all MPOs, to assure that full and open access is provided to MPO decision making processes; (11) Metropolitan public involvement processes shall be coordinated with statewide public involvement processes	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		and with project development public involvement processes wherever possible to enhance public consideration of the issues, plans, and programs and reduce redundancies and costs.	
13	1410.316	(c) Transportation plan development and plans shall be consistent with Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-1) and implementing regulations (49 CFR part 21 and 23 CFR part 230); section 162(a) of the Federal-Aid Highway Act of 1973 (23 U.S.C. 324); the Older Americans Act of 1965, as amended (42 U.S.C. 6101); the Americans With Disabilities Act of 1990 (Public Law 101-336, 104 Stat. 327, as amended) and implementing regulations (49 CFR parts 27, 37, and 38); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations (49 CFR part 35), which ensure that no person shall, on the grounds of race, color, sex, national origin, age, or physical handicap, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal assistance from the United States Department of Transportation. ~~Consistency shall be demonstrated through:~~ ~~(1) An assessment covering the entire metropolitan planning area, including at a minimum the following:~~ ~~(i) A geographic and demographic profile of the metropolitan planning area that identifies the low-income and minority, and where appropriate, the elderly and persons with disabilities components of this profile;~~ ~~(ii) The transportation services available to and planned for these segments of the metropolitan planning area's population, and~~ ~~(iii) Any disproportionately high and adverse environmental impacts, including interrelated social and economic impacts, affecting these populations, consistent with the provisions of Executive Order 12898 as implemented through US DOT Order 5610.2 and FHWA Order 6640.23. Adverse effects can include a denial of or a reduction in benefits;~~ ~~(2) Consideration of comments received during public involvement efforts (consistent with the provisions of paragraph (b) of this section to ensure that expressed concerns of the elderly, low-income individuals, minority individuals and persons with disabilities, have been addressed during plan and program decision making;~~ ~~(3) Identification of prior and planned efforts to address any disproportionately high and adverse effects that are found;~~ ~~(3~~4) ~~The results of paragraphs (c)(1), and (2), and (3) of this section will be documented in a manner to permit public~~	1. Re-state non-discrimination requirements from Title VI and other non-discrimination statutes; do not elaborate upon existing legal standards for determining compliance. See *AASHTO Comments, Section III.G., Recommendation 1.* 2. If new requirements are added, regulations should be extensively revised to: • Distinguish Title VI from EJ. • Follow original definition of EJ. • Focus on public involvement, not elaborate data analysis requirements. • Recognize that benefits should not be evaluated based solely on funding levels. • Allow States to set clear limits on data gathering and analysis requirements. • Require information, not findings. • Preserve due process for States and MPOs under Title VI regulations. *See AASHTO Comments, Section III.G., Recommendation 2-3.*

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~review during appropriate project development activities. In accordance with Executive Order 12898, DOT Order 5610.2, and FHWA Order 6640.23, nothing in this subpart is intended to nor shall create any right to judicial review of any action taken by the agencies, their officers or recipients under this subpart to comply with such orders.~~	
13	1410.316	(d) The transportation planning process shall identify actions necessary to comply with the Americans With Disabilities Act of 1990, U.S. DOT regulations "Transportation for Individuals With Disabilities" (49 CFR parts 27, 37, and 38) and section 504 of the Rehabilitation Act of 1973 and implementing regulations (49 CFR part 35).	
13	1410.316	(e) The transportation plan development process shall provide for the involvement of traffic, ridesharing, parking, transportation safety and enforcement agencies; commuter rail operators; airport and port authorities; toll authorities; appropriate private transportation providers and where appropriate city officials; freight shippers; transit users.	
13	1410.316	(f) The transportation planning process shall provide for the involvement of local, State, and Federal environmental resource and permit agencies as appropriate.	
13	**1410.316**	*(g)* The transportation planning process **shall** provide for **the** involvement of Indian Tribal Governments and the Secretary of Interior on a consultation basis for the portions of the plan affecting areas under the jurisdiction of an Indian Tribal Government.	
14	1410.316	(h) Simplified planning procedures may be proposed in non-TMAs which are in attainment for air quality purposes. The FHWA and the FTA shall review the proposed procedures for consistency with the requirements of **this** section.	
14	**1410.316**	(i) **The** metropolitan transportation planning process shall include preparation of technical and other reports to assure documentation of the development, refinement, and update of the transportation plan. The reports shall be reasonably available to interested parties, consistent with paragraph (b) of **this** section.	
14	**1410.316**	(j) The metropolitan planning process should provide a forum to coordinate all federally funded non-emergency transportation services within the metropolitan planning area. Where coordination processes are developed within the transportation planning process, at a minimum they should address the planning and delivery of services supporting access to **jobs** and reverse commute options, relying where feasible on existing processes and procedures.	
14	**1410.318 Relation of**	(a) **As** Dart of the metropolitan planning process, the State DOT, the MPO, and the transit operator may undertake	1. Establish an *optional* process for conducting project-specific

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	planning and project development processes	studies of specific projects or groups of projects. **Such a** study may be initiated at the request of the MPO or the project sponsor. If such a study is initiated, the study may include one or more of the following elements, as determined appropriate by the MPO and the project sponsor: (1) an evaluation of the need for the project and a statement of project objectives; (2) the development and evaluation of alternatives for accomplishing the project objectives; (3) the opportunity for public involvement in the development of the study, which **may** include the opportunity to review and comment upon study documents, attend public meetings, or participate in other ways; (4) the opportunity for involvement by other governmental agencies in the development of the study, **which** may include the opportunity to review and comment upon study documents, participate in inter-agency meetings, or participate in other ways; (5) decisions by **the** MPO and the project **sponsor,** acting individually or jointly, regarding the project objectives, the range of alternatives requiring further consideration, and other factors affecting the scope **of** subsequent project-development studies; and (6) the designation of a preferred alternative or alternatives by the MPO and the project sponsor, acting individually or jointly. ~~In order to coordinate and streamline the planning and NEPA processes, the planning process, through the cooperation of the MPO, the State DOT and the transit operator, shall provide the following to the NEPA process:~~ ~~(1) An identification of an initial statement of purpose and need for transportation investments;~~ ~~(2) Findings and conclusions regarding purpose and need, identification and evaluation of alternatives studied in planning activities (including but not limited to the relevant design concepts and scope of the proposed action), and identification of the alternative included in the plan;~~ ~~(3) An identification of the planning documents that provide the basis for paragraphs (a)(1) and (a)(2) of this section; and~~ ~~(4) Formal expressions of policy support or comment by the planning process participants on paragraphs (a)(1) and (a)(2) of this section.~~	studies at the planning stage, rather than *requiring* project-specific analysis for all metropolitan projects. *See Section I.B., Recommendation 1.* **2.** If project-specific studies are required at all, they **should** be confined to major projects, which should be defined to include *only* projects that the criteria described in these comments. *See Section I.B., Recommendation 5; see also Section I.A., Recommendation 1.*
144	**410.318**	(b) **The** following sources of information ~~shall~~ may be u[redacted] at a level of detail agreed to by the MPO, ~~the State DOT, and the transit~~ and the project sponsor, when carrying out project-	1. In keeping with the changes recommended for paragraph (a), above, make this provision permissive, not mandatory. It

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		specific studies during the planning process: (1) ~~Inventories~~ Information regarding ~~of~~ social, economic and environmental resources and conditions; (2) Analyses of economic, social and environmental consequences; **(3)** Evaluation(s) of transportation benefits, other benefits, costs, and consequences, ~~at a geographic scale agreed to by the planning participants,~~ of alternatives, including but not limited to the relevant design concepts and scope of the proposed action; **(4)** Data and supporting analyses to facilitate funding related decisions by Federal agencies where appropriate or required, including but not limited to **49** CFR **part 611.**	permissive, not mandatory. It should list sources of information that may be considered; it should not mandate a specific approach. *See **Section I.B., Recommendation 1.*** **2.** Delete reference to "planning process participants" as entity responsible for deading level of detail of planning process; if clause **is** retained, substitute "at a geographic scale determined by the State." *See Sechon I.C.2., Recommendation 1.*
14	**1410.318**	(c) The products resulting from paragraphs (a) and (b) of this section shall be reviewed early in the NEPA process in accordance with § 1420.201 *to* determine their appropriate use.	
14	**1410.318**	(d) In order to streamline subsequent project development analyses and studies, and promote better decision making, the FTA and the FHWA will, if requested by the MPO and the project sponsor: (1) Participate in developing the scope for the planning-level **study;** (2) Identify any additional elements that should be added to the scope of work for the planning-level study, if the results of that study are to be accepted as the starting point for a subsequent NEPA study; (3) Enter into a Memorandum of Understanding documenting the **USDOT** agency's agreement that, if the planning-level study is executed in accordance with the approved scope of work, the decisions reached at the conclusion of that study will be accepted by the **USDOT** agency as the starting point for the NEPA study; **(4)** Take the lead role in negotiating a Memorandum of Understanding with other federal agencies to ensure their active participation in the planning-level study. ~~strongly encourage all Federal, State, and local agencies with subsequent project level responsibilities for investments included in a transportation plan to do the following:~~ ~~(1) Participate in planning analyses and studies to the extent possible;~~ ~~(2) Provide early identification of key concerns for later consideration and analysis as needed; and~~	**1.** Require USDOT agencies to take specific actions to support planning-level studies, *if* requested by the **MPO** and the project sponsor. *See Section I.B., Recommendation 2.*

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~(3) Utilize the sources of information identified in paragraph (b) of this section.~~	
14	1410.318	(e) The analyses conducted under paragraph (b)(3) of this section may serve as the alternatives analysis required by 49 U.S.C. 5309(e) for new fixed guideway transit systems and extensions and the information required under 49 CFR part 611 shall be generated.	
14	1410.318	(f) Any decision by the Secretary concerning a transportation plan or transportation improvement program developed in accordance with this part shall not be considered to be a Federal action subject to -review under NEPA (42 U.S.C. 4321 et. seq.). At the discretion of the MPO, in cooperation with the State DOT and the transit operator, an environmental analysis may be conducted on a transportation plan.	
14	1410.318	(g) In non-attainment and maintenance areas, ~~The~~ FHWA and the FTA project level actions, including but not limited to issuance of a categorical exclusion, finding of no sigruficant impact or final environmental impact statement under 23 CFR part 1420, approval of right of way acquisition, interstate interchange approvals, approvals of HOV conversions, funding of ITS projects, final design and construction, and transit vehicle acquisition, may not be completed unless the proposed project is included in a plan and the phase of the project for which Federal action is sought is included in the metropolitan TIP. None of these project-level actions can occur in nonattainment and maintenance areas unless the project conforms according to the requirements of the US EPA conformity regulation (40 CFR parts 51 and 93).	1. Revise to limit applicability of this requirement to non-attainment and maintenance areas; outside those areas, inclusion in the plan/TIP by the end of the NEPA process is desirable, but should not be required. *See Section I.D., Recommendation 3.* 2. Define the term "phase of the project" as recommended in comments on § 1410.104, above. *See Section I.D., Recommendation 1.*
15	**1410.320 Congestion management system and planning process.**	(a) In TMAs designated as nonattainment for ozone or carbon monoxide, Federal funds may not be programmed for any project that will result in a significant increase in carrying capacity for single occupant vehicles (a new general purpose highway on a new location or adding general purpose lanes, with the exception of safety improvements or the elimination of bottlenecks) unless the project results from a congestion management system (CMS) meeting the requirements of 23 CFR part 500. Such projects shall incorporate all reasonably available strategies to manage the single occupant vehicle (SOV) facility effectively (or to facilitate its management in the future). Other travel demand reduction and operational management strategies, as appropriate for the comdor, but not appropriate for incorporation into the SOV facility itself, shall be committed to by the State and the MPO for implementation in a timely manner, but no later than the completion date for the SOV	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		project.	
151	1410.320	(b) In TMAs, the planning process must include the development of a CMS that provides for effective management of new and existing transportation facilities through the use of travel demand reduction and operational management.	
152	1410.320	(c) The effectiveness of the congestion management system in enhancing transportation investment decisions and improving the overall efficiency of the metropolitan area's transportation systems and facilities shall be evaluated periodically, preferably as part of the metropolitan planning process.	
15	**1410.322 Transportation plan content.**	(a) The metropolitan transportation planning process shall include the development of a transportation plan addressing at least a twenty year planning horizon. The plan shall include both long-range and short-range strategies/actions, including, but not limited to, operations and management activities, that lead to the systematic development of an integrated intermodal transportation system that facilitates the safe and efficient movement of people and goods in addressing current and future transportation demand. The transportation plan shall be reviewed and updated every five years in attainment areas and at least triennially in nonattainment and maintenance areas to confirm its validity and its consistency with current and forecasted transportation and land use conditions and trends and to extend the forecast period. The transportation plan must be approved by the MPO. Update processes shall include a mechanism for ensuring that the MPO, the State DOT and the transit operator agree that the data utilized in preparing other existing modal plans providing input to the transportation plan are valid and benchmarked in relation to each other and the transportation plan. In updating a plan, the MPO shall base the update on the latest estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. Reaffirmation or revisions of metropolitan plan contents and supporting analyses produced by an update review require approval by the MPO.	
154	1410.322	(b) In addition, the plan shall, consistent with the following: (1) Identify the projected transportation demand of persons and goods in the metropolitan planning area over the period of the plan; (2) Identify adopted management and operations strategies (e.g., traveler information, traffic surveillance and control, incident and emergency response, freight routing, reconstruction and work zones management, weather response, pricing, fare payment alternatives, public	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		transportation management, demand management, alternative routing, telecommuting, parking management, and intermodal connectivity) that address the need for improved system performance and the delivery of transportation services to customers under varying conditions; (3) Identify pedestrian walkway and bicycle transportation facilities in accordance with 23 U.S.C 217(g); (4) Reflect the consideration given to the results of the congestion management system, including in TMAs that are nonattainment areas for carbon monoxide and ozone, identification of SOV projects that result from a congestion management system that meets the requirements of 23 CFR part 500; (5) Assess capital investment and other measures necessary to preserve the existing transportation system (including requirements for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, as well as operations, maintenance, modernization, and rehabilitation of existing and future transit facilities) and make the most efficient use of existing transportation facilities to relieve vehicular congestion and enhance the mobility of people and goods; (6) Include design concept and scope descriptions of all existing and proposed transportation facilities in sufficient detail, regardless of the source of funding, in nonattainment and maintenance areas to permit conformity determinations under the U.S. EPA conformity regulations at 40 CFR parts 51 and 93. In all areas, all proposed improvements shall be described in sufficient detail to develop cost estimates; (7) Reflect a multimodal evaluation of the transportation, socioeconomic, environmental, and financial impact of the overall plan; (8) Reflect, to the extent that they exist, consideration of comprehensive long-range land use plan(s) and development objectives; State and local housing goals and strategies, community development and employment plans and strategies, and environmental resource plans; linking low income households with employment opportunities as reflected in work force training and labor mobility plans and strategies; energy conservation goals; and the metropolitan area's overall social, economic, and environmental goals and objectives; (9) Indicate, as appropriate, proposed transportation enhancement activities as defined in 23 U.S.C 101(a); and (10) Include a financial plan that demonstrates the consistency of proposed transportation investments (including illustrative projects where identified in the	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		financial plan) with already available and projected sources of revenue. The financial plan shall compare the estimated revenue from existing and proposed funding sources that can reasonably be expected to be available for transportation uses, and the estimated costs of constructing, maintaining and operating the total (existing plus planned) transportation system over the period of the plan. Financial estimates utilized in preparing transportation plans (and TIPs) shall be developed through procedures cooperatively established and mutually agreed to by the MPO, the State DOT and the transit operator(s). The estimated revenue by existing revenue source (local, State, Federal and private) available for transportation projects shall be determined and any shortfalls identified. Proposed new revenues and/or revenue sources to cover shortfalls shall be identified, including strategies for ensuring their availability for proposed investments. Existing and proposed revenues shall cover all forecasted capital, operating, management, and maintenance costs. All cost and revenue projections shall be based on the data reflecting the existing situation and historical trends. For nonattainment and maintenance areas, the financial plan shall address the specific financial strategies required to ensure the implementation of projects and programs to reach air quality compliance. (11) Include an ITS integration strategy for the purposes of guiding and coordinating the management and funding of ITS investments supported with highway trust fund dollars to achieve an integrated regional system. The scope of the integration strategy shall be appropriate to the scale of investment anticipated for ITS during the life of the plan and shall address the resource commitments and staging of planned investments. Provision shall be made to include participation from the following agencies, at a minimum, in the development of the integration strategy: Highway and public safety agencies; appropriate Federal lands agencies; State motor carrier agencies as appropriate; and other operating agencies necessary to fully address regional ITS integration. In determining how ITS investments will meet metropolitan goals and objectives, the integration strategy shall clearly assess existing and future ITS systems, including their functions and electronic information sharing expectations. Unique regional ITS initiatives (a program of related projects) that are multi-jurisdictional and/or multi-modal, ITS projects that affect regional integration of ITS systems, and projects which directly support national interoperability shall be identified. Documentation within the plan shall reflect the scale of investment and the needs and size of the metropolitan area.	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
15	1410.322	(c) There must be adequate opportunity for public official (including elected officials) and citizen involvement in the development of the transportation plan before it is approved by the MPO, in accordance with the requirements of § 1410.316(b). Such procedures shall include opportunities for interested parties (including citizens, affected public agencies, representatives of transportation agency employees, freight shippers, representatives of users of public transit, providers of freight transportation services, and private providers of transportation) to be involved in the early stages of the plan development/update process. The procedures shall include publication of the proposed plan or other methods to make it readily available for public review and comment and, in nonattainment TMAs, an opportunity for at least one formal public meeting annually to review planning assumptions and the plan development process with interested parties and the general public. The procedures also shall include publication of the approved plan or other methods to make it readily available for information purposes.	
15(	1410.322	(d) In nonattainment and maintenance areas for transportation related pollutants, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any new/revised plan in accordance with the Clean Air Act and the EPA conformity regulations (40 CFR parts 51 and 93). If a conformity determination cannot be accomplished by either the MPO and or the FHWA and the FTA, the results will be communicated to the Governor or the Governor's designee and the public transit operator with an explanation of the potential consequences.	
15'	1410.322	(e) The FHWA and the FTA do not approve transportation plans. However, Federal actions and approvals, including, but not limited to, conformity determinations, planning findings (pursuant to § 1410.322(b)), STIP approvals, completion of the NEPA process, grant agreements, and project authorizations, are based on a transportation plan with a horizon of at least twenty years on the effective date of the plan. Plans that remain substantially unchanged (i.e., regionally significant projects in attainment areas and non-exempt projects in nonattainment and maintenance areas have not been added) after adoption may serve as the basis for subsequent Federal actions until such time as the next update. In attainment areas the effective date of the plan shall be its date of adoption by the MPO. In nonattainment and maintenance areas, the effective date shall be the date of a conformity determination by the FHWA and the FTA.	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
15	1410.322	(f) Although transportation plans do not need to be approved by the FHWA or the FTA, copies of any new/revised plans must be provided to each agency.	
15	1410.322	(g) During a conformity lapse metropolitan areas can prepare an interim plan as a basis for advancing projects that are eligible to proceed under a conformity lapse (as defined in 40 CFR parts 51 and 93). ~~In areas which expect to return to conformity earlier than six months, the emphasis should be on reestablishing conformity, rather than embarking on developing an interim plan and TIP.~~	1. Allow decision about whether to seek approval of an interim plan to be made on case-by-case basis; do not include arbitrary six-month threshold in regulations. *See Section IV.A.2., Recommendation 2.* 2. If six-month standard is retained, clarify that it applies only to plans containing new TCMs. *See Section IV.A.2., Recommendation 3.* (Note: These comments apply *if* the requirement for an interim plan is retained in the final rule. As stated above, AASHTO opposes the requirement for an interim plan as the basis for advancing exempt projects and existing TCMs during a conformity lapse. Such projects should be allowed to proceed during a lapse without additional paperwork.)
16(	1410.324 Transportation improvement program content.	(a) The metropolitan transportation planning process shall include development of a transportation improvement program (TIP) for the metropolitan planning area by the MPO in cooperation with the State and public transit operators.	
16:	1410.324	(b) The TIP must be updated at least every two years and approved by the MPO and the Governor. The frequency and cycle for updating the TIP must be compatible with the STIP development and approval process. Since the TIP becomes part of the STIP, the TIP lapses when the FHWA and the FTA approval for the STIP lapses. In the case of extenuating circumstances, the FHWA and the FTA will consider and take appropriate action on requests to extend the STIP approval period for all or part of the STIP in accordance with § 1410.222(c). ~~TIP extensions shall not be granted in nonattainment or maintenance areas.~~ Although metropolitan TIPs are not approved individually by the	1. Allow TIP extensions in non-attainment and maintenance areas on a case-by-case basis. *See Section IV.A.1., Recommendation 1.*

	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		FHWA or the FTA, they are approved as part of the STIP approval action by the FTA and the FHWA. Copies of any new or amended TIPs must be provided to each agency. Additionally, in nonattainment and maintenance areas for transportation related pollutants, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any new or amended TIPs (unless the new amended TIP consists entirely of exempt projects) in accordance with the Clean Air Act requirements and the EPA conformity regulations (40 CFR parts 51 and 93).	
2	1410.324	(c) There must be reasonable opportunity for public comment in accordance with the requirements of § 1410.316(b) and, in nonattainment TMAs, an opportunity for at least one formal public meeting during the TIP development process. This public meeting may be combined with the public meeting required under § 1410.322(c). The proposed TIP shall be published or otherwise made readily available for review and comment. Similarly, the approved TIP shall be published or otherwise made readily available for information purposes.	
3	1410.324	(d) The TIP shall cover a period of not less than three years, but may cover a longer period if it identifies priorities and financial information for the additional years. The TIP must include a priority list of projects to be advanced in the first three years. As a minimum, the priority list shall group the projects that are to be undertaken in each of the years, i.e., year one, year two, year three. In nonattainment and maintenance areas, the TIP shall give priority to eligible TCMs identified in the approved SIP in accordance with the U.S. EPA conformity regulation (40CFR parts 51 and 93) and shall provide for their timely implementation.	
4	1410.324	(e) The TIP shall be financially constrained by year and include a financial plan that demonstrates which projects can be implemented using current revenue sources and which projects are to be implemented using proposed revenue sources (while the existing transportation system is being adequately operated and maintained). The financial plan shall be developed by the MPO in cooperation with the State and the transit operator. Financial estimates utilized in preparing TIPs shall be developed through procedures cooperatively established and mutually agreed to by the MPO, the State DOT and the transit operator(s). It is expected that the State would develop this information as part of the STIP development process and that the estimates would be refined through this process. Only projects for which construction and operating funds can reasonably be expected to be available (and illustrative projects) may be included. In the case of new funding sources, strategies for ensuring their	

Re: #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		availability shall be identified. In developing the financial analysis, the MPO shall take into account all projects and strategies funded under title 23, U.S.C., 49 U.S.C. Chapter 53, other Federal funds, local sources, State assistance, and private participation. In nonattainment and maintenance areas, projects included for the first two years of the current TIP shall be limited to those for which funds are available or committed.	
1(	1410.324	(f) The TIP shall include: (1) All transportation projects, or identified phases of a project, (including pedestrian walkways, safety, bicycle transportation facilities and transportation enhancement projects) within the metropolitan planning area proposed for funding under title 23, U.S.C., and Federal Lands Highway projects. Title 49, U.S.C., Emergency relief projects (except those involving substantial functional, locational or capacity changes) and planning and research activities (except those funded with NHS, STP, and/or Minimum Guarantee funds) are exempt from this requirement. Planning and research activities funded with NHS, STP and/or Minimum Guarantee funds may be excluded from the TIP by agreement of the State and the MPO; (2) Only projects that are consistent with the transportation plan; (3) All regionally significant transportation projects for which an FHWA or FTA action is required whether or not the projects are to be funded with title 23, U.S.C., or title 49, U.S.C., funds, e.g., addition of an interchange to the Interstate System with State, local, and/or private funds, demonstration projects not funded under titles 23 and 49, U.S.C., etc.; (4) Any FTA or FHWA funded or approved projects submitted to EPA for consideration as a SIP TCM; (5) For air quality analysis in nonattainment and maintenance areas and informational purposes in other areas, all regionally significant transportation projects proposed to be funded with Federal funds, including intermodal facilities, not covered in paragraphs (f)(1) or (f)(3) of this section; and (6) For air quality analysis in nonattainment and maintenance areas and informational purposes in other areas, all regionally significant projects to be funded with non-Federal funds.	
16	1410.324	(g) With respect to each project or project phase under paragraph (f) of this section the TIP shall include: (1) Sufficient descriptive material (i.e., type of work, termini, length, etc.) to identify the project or phase; (2) Estimated total project cost (which may extend beyond the three years of the TIP);	1. Eliminate the requirement to designate the funding *category* for projects. Requiring assignment of funding category in the SIP *is* not useful and causes States extra work. and

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		~~(3) The amount of Federal funds proposed to be obligated during each program year for the project or phase of the project;~~ ~~(4) Proposed category and source of Federal and non-Federal funds;~~ **(5)** Identification of the recipient/subrecipient and State and local agencies responsible for carrying out the project or phase of the project; (6) In nonattainment and maintenance areas, identification of those projects or phases of projects which are identified as TCMs in the applicable SIP or are new TCMs with emissions benefits being submitted for SIP approval during a conformity lapse; and s (7) In areas with Americans with Disabilities Act required paratransit and key station plans, identification of those projects or phases of projects which will implement the plans.	causes States extra work, and therefore should be removed (especially the requirement for years 2 and 3).
167	1410.324	(h) In nonattainment and maintenance areas, projects included shall be specified in sufficient detail (design concept and scope) to permit air quality analysis in accordance with the U.S. EPA conformity requirements (40 CFR parts 51 and 93).	
168	1410.324	(i) Projects proposed for FHWA and/or FTA funding that are not considered by the State and the MPO to be of	
169	410.324	(j) Projects utilizing Federal funds that have been allocated to the area pursuant to 23 U.S.C. 133(d)(3)(E) shall be identified.	
170	410.324	(k) The total Federal share of projects included in the TIP proposed for funding under 49 U.S.C. 5307 may not exceed formula backed apportioned funding levels available to the area for the program year.	
171	410.324	(l) Procedures or agreements that distribute suballocated Surface Transportation Program or urbanized area formula (49 U.S.C. 5307) funds to individual jurisdictions or modes within the metropolitan area by predetermined percentages or formulas are inconsistent with the legislative provisions that require MPOs in cooperation with the State and transit operators to develop a prioritized	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		and financially constrained TIP and shall not be used unless they can be clearly shown to be based on considerations required to be addressed as part of the planning process.	
17	1410.324	(m) For the purpose of including transit projects funded through Capital Investment Grants or Loans (49 U.S.C. 5309) in a TIP, the following approach shall be followed: (1) The total Federal share of projects included in the first year of the TIP shall not exceed levels of funding committed to the area; and (2) The total Federal share of projects included in the second, third and/or subsequent years of the TIP may not exceed levels of funding committed, apportioned,	
17	1410.324	the obligation of funds.	
17	1410.324	(o) In order to maintain or establish operations, in the absence of an approved metropolitan TIP, the FTA and/or the FHWA Administrators, as appropriate, may approve operating assistance.	
17	.410.324	(p) During a conformity lapses metropolitan areas may prepare an interim TIP as a basis for advancing projects that are eligible to proceed under a lapse (as defined in 40 CFR parts 51 and 93). ~~In areas which expect to return to conformity earlier than six months, the emphasis should be on reestablishing conformity, rather than embarking on developing an interim plan and TIP.~~	1. Allow decision about whether to seek approval of an interim TIP to be made on case-by-case basis; do not include arbitrary six-month threshold in regulations. See *Section IV.A.2.,*

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
			Recommendation 2. 2. If six-month standard is retained, clarify that it applies only to plans containing new TCMs. See *Section IV.A.2., Recommendation 3.* (Note: These comments apply *if* the requirement for an interim TIP is retained in the final rule. As stated above, AASHTO opposes the requirement for an interim TIP as the basis for advancing exempt projects and existing TCMs during a conformity lapse. Such projects should be allowed to proceed during a lapse without additional paperwork.)
176	**1410.326 Transportation improvement program modification.**	The TIP may be modified at any time under procedures agreed to by the cooperating parties consistent with the procedures established in this part for its development and approval. In nonattainment or maintenance areas for transportation related pollutants, if the TIP is modified by adding or deleting non-exempt projects or is replaced with a new TIP, a new conformity determinations by the MPO and the FHWA and the FTA shall be made. Public involvement procedures consistent with § 1410.316(b) shall be utilized in modifying the TIP, except that these procedures are not required for TIP modifications that only involve projects of the type covered in § 1410.324(i).	
177	**1410.328 Metropolitan transportation improvement program relationship in statewide TIP.**	(a) After approval by the MPO and the Governor, the TIP shall be included without modification, directly or by reference, in the STIP program required under 23 U.S.C 135 and consistent with § 1410.220, except that in nonattainment and maintenance areas, a conformity finding by the FHWA and the FTA must be made before it is included in the STIP. After approval by the MPO and the Governor, a copy shall be provided to the FHWA and the FTA.	
178	1410.328	(b) The State shall notify the appropriate MPO and Federal Lands Highways Program agencies, e.g., Bureau of Indian Affairs and/or National Park Service, when a TIP including projects under the jurisdiction of these agencies has been included in the STIP.	
179	1410.330 Transportation improvement	(a) The FHWA and the FTA must jointly find that each metropolitan TIP is consistent with the metropolitan transportation plan produced by the continuing,	

Ref. #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
	program action by FHWA/FTA.	comprehensive transportation process carried on cooperatively by the States, the MPOs and the transit operators in accordance with the provisions of 23 U.S.C. 134 and 49 U.S.C. 5307 and 5313(b). This finding shall be based on the self-certification statement submitted by the State and MPO under § 1410.334, a review of the metropolitan transportation plan and upon other reviews as deemed necessary by the FHWA and the FTA.	
180	1410.330	(b) In nonattainment and maintenance areas, the FHWA and the FTA must also jointly determine, in accordance with 40 CFR parts 51 and 93, that the metropolitan TIP conforms with the applicable SIP and that priority has been given to the timely implementation of transportation control measures contained in the applicable SIP. As part of their review in nonattainment and maintenance areas requiring TCMs, the FHWA and the FTA will specifically consider any comments relating to the financial plans for the plan and TIP contained in the *summary* of significant comments required under § 1410.316(b). If the TIP is determined to be in nonconformance with the SIP, the FHWA and FTA shall return the TIP to the Governor and the MPO with an explanation of the joint determination and an explanation of potential consequences. If the TIP is found to conform with the SIP, the Governor and MPO shall be notified of the joint finding. After the FHWA and the FTA find the TIP to be in conformance, the TIP shall be incorporated, without modification, into the STIP, directly or by reference.	
181	1410.330	(c) If an illustrative project is included in the TIP, no Federal action may be taken on that project by the FHWA and the ETA until it is formally included in the fiscally constrained and conforming plan and TIP. The MPOs are not required to include illustrative projects in future TIPs.	
182	1410.332 Selecting projects from a TIP.	(a) Once a TIP that meets the requirements of § 1410.324 has been developed and approved, the first year of the TIP shall constitute an "agreed to" list of projects for project selection purposes and no further project selection action is required for the implementing agency to proceed with projects, except where the appropriated Federal funds available to the metropolitan planning area are significantly less than the authorized amounts. In this case, a revised "agreed to" list of projects shall be jointly developed by the MPO, the State, and the transit operator if requested by the MPO, the State, or the transit operator. If the State or transit operator wishes to proceed with a project in the second or third year of the TIP, the specific project selection procedures stated in paragraphs (b) and (c) of this section *must* be used unless the MPO, the State, and the transit operator jointly develop expedited project selection procedures to provide for	

Ref, #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		the advancement of projects from the second or third year of the TIP.	
18	1410.332	(b) In areas not designated as TMAs and when §1410.332(c) does not apply, projects to be implemented using title 23 funds other than Federal lands projects or title 49 funds shall be selected by the State and/or the transit operator, in cooperation with the MPO from the approved metropolitan TIP Federal Lands Highway Program projects shall be selected in accordance with 23 U.S.C 204.	
18	1410.332	(c) In areas designated as TMAs where § 1410.332(c) does not apply, all title 23 and title 49 funded projects, except projects on the NHS and projects funded under the bridge, and Federal Lands Highways programs, shall be selected by the MPO in consultation with the State and transit operator from the approved metropolitan TIP and in accordance with the priorities in the approved metropolitan TIP. Projects on the NHS and projects funded under the bridge program shall be selected by the State in cooperation with the MPO, from the approved metropolitan TIP. Federal Lands Highway Program projects shall be selected in accordance with 23 U.S.C. 204.	
18	1410.332	(d) Projects not included in the federally approved STIP shall not be eligible for funding with title 23 or title 49, U.S.C., funds.	
18	1410.332	(e) In nonattainment and maintenance areas, priority shall be given to the timely implementation of TCMs contained in the applicable SIP in accordance with the U.S. EPA conformity regulations at 40 CFR parts 51 and 93.	
187	1410.334 Federal certifications.	(a) The State and the MPO shall annually self-certify to the FHWA and the FTA that the planning process is addressing the major issues facing the area and is being conducted in accordance with all applicable requirements of (1) 23 U.S.C. 134 and 49 U.S.C.5303-5306; (2) Sections 174 and 176 (c) and (d) of the Clean Air Act (42U.S.C.7504, 7506 (c) and (d)); (3) Title VI of the Civil Rights Act of 1964 and the Title VI assurance executed by each State under 23 U.S.C 324 and 29 U.S.C.794; (4) Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240, 105 stat. 1914) regarding the involvement of disadvantaged business enterprises in the FHWA and the FTA funded planning projects (sec. 105(f), Public Law 97-424, 96 Stat. 2100; 49 CFR part 23); (5) Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et sea) and U.S.DOT regulations Transportation for Individuals with Disabilities (49 CFR parts 27, 37, and 38); (6) Older Americans Act, as amended (42 U.S.C 6101);	1. Require MPO to certify compliance only with other Federal laws that have been specifically identified as applicable.

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		and (7) The provisions of 49 CFR part 20 regarding restrictions on influencing certain Federal activities. (8) ~~All~~ Any other applicable provisions of Federal law that are specifically identified by the FHWA or the ETA in writing to the MPO.	
18	1410.334	(b) The FHWA and the FTA jointly will review and evaluate the transportation planning process for each TMA (as appropriate but no less than once every three years) to determine if the process meets the requirements of this subpart.	
18	1410.334	(c) In TMAs that are nonattainment or maintenance areas for transportation related pollutants, the FHWA and the FTA will also review and evaluate the transportation planning process to assure that the MPO has an adequate process to ensure conformity of plans and programs in accordance with procedures in 40 CFR parts 51 and 93.	
19	1410.334	(d) Upon the review and evaluation conducted under paragraphs (b) and (c) of this section, the FHWA and the FTA shall take one of the following actions, as indicated: (1) Where the process meets the requirements of this part, jointly certify the transportation planning process; (2) Where the process substantially meets the requirements of this part, jointly certify the transportation planning process subject to certain specified corrective actions being taken; or (3) Where the process does not meet the requirements of this part, jointly certify the planning process as the basis for approval of only those categories of programs or projects that the Administrators may jointly determine and subject to certain specified corrective actions being taken.	
19	1410.334	(e) A certification action under this section will remain in effect for three years unless a new certification determination is made sooner or a shorter term is specified in the certification report.	
19	1410.334	(f) If, upon the review and evaluation conducted under paragraph (b) or (c) of this section, the FHWA and the ETA jointly determine that the transportation planning process in a TMA does not substantially meet the requirements, they may take the following action as appropriate: (1) Withhold up to twenty percent of the apportionment attributed to the relevant metropolitan planning area under 23 U.S.C. 133(d)(3), capital funds apportioned under 49 U.S.C. 5307-5309; or (2) Withhold approval of all or certain categories of projects.	
19	1410.334	(g) In conducting a certification review, the FHWA and the ETA shall make provision, relying on the local public	

Ref #	Section	Text of Proposed Regulation (with AASHTO's recommended changes)	AASHTO Comments
		involvement processes and supplemented with other involvement strategies as appropriate, to engage the public in the review process. The **FHWA** and the **FTA** shall consider the public input received in amving at a decision on a certification action.	
19	**1410.334**	(h) The State and the MPO shall be notified in writing of the actions taken under paragraph (f) of this section. If certification is denied or conditional approved, the ***FHWA*** and **FTA** shall state in writing the specific statutory basis for that decision. In no event shall certification be denied based upon non-compliance by a non-federal entity with orders or policies that apply only to Federal agencies. Upon full, joint certification by the **FHWA and the** FTA, all funds withheld will be restored to the metropolitan area, unless the funds have lapsed.	1. Revise this section to require the **USDOT** agencies to identify, in writing, the specific statutory basis for any denial of certification or any conditional certification. *See Section III.G., Recommendation 3.* 2. If EJ concepts are retained in the final rule, revise this section to clarify that certification will not be denied, or conditionally approved, based upon non-compliance with the EJ orders, until the **U.S. DOT** agency has complied with the procedural requirements in the Title VI regulations, 49 **C.F.R. § 21.5.** *See Section III.G., Recommendahon 2.*
19	**1410.401 Auulicability and Effective Date**	[a) The effective date of the regulations in this part shall be *[insert date two years after publication of final rule in Federal Register].*	1. Postpone effective date for two years after publication of final rule. *See Section V, Recommendation 1.*
19		(b) The consistency of a transportation plan, **STIP, or TIP** with these regulations shall be demonstrated as part of the first update **of** the transportation plan, **STIP,** or **TIP** that occurs following the effective date of the final rule.	1. **Require** consistency with these regulations to be **shown** at first plan/STIP/TIP update *after* the end of the two-year period. *See Section V, Recommendation 2.*
19		(c) If a **NEPA** document **for a** transportation project was released for public comment prior **to** the effective date **of** the regulations in **this** part, any planning or programming decisions related to that project may be taken **in** accordance with the planning and programming regulations that were in effect in *23* **C.F.R.** 450 at the time that **NEPA** document was released for public comment.	1. **If** a project **is** grandfathered under the **NEPA** regulations, **it also** should be grandfathered under these regulations. *See Section V, Recommendation 3.*

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on ITS Architecture and Standards (23 CFR 940)
***[See* accompanying memo for discussion]**

NPRM on ITS Architecture and Standards - Architecture Section (23 CFR 940)		
SECTION	**ISSUES**	**AASHTO RECOMMENDED CHANGES**
340.3 Definitions	• Need clearer definition of " project" for purposes of 'conformity" . • Lack of distinction between an MPO " region" and an ITS " region" . • Identify authority to determine responsibility for architecture and determination of appropriate region.	• Add to end of definition of " ITS Project: " ITS *technology investments which introduce new or changed interoperability and integration requirements via software and communications over an above existing conforming projects/systems."* • Change title in definition of " " Region" to " ITS *Region"* • Add to definition of " ITS Region' : *The Governor shall have final responsibility for definition of ITS region(s)."* • Replace definition of ITS Integration Strategy with: " *documentation of the agreed-upon process and key plan elements for coordination and implementing ITS investments funded with highway trust funds to achieve an integrated regional transportation system."*
940.9 Regional Architecture elements	• The concept of operations and coneptual designs are not conventionally part of the architecture itself (although they may be developed as part of the same process.) • There appears to be inconsistency with definitions used in guidance and courses; contents should not be mandated.	• Replace 940.9 (c) with " *The regional architecture should include: high level system functional requirements, high level concept of operations (such as market packages), interface requirements and information exchanges with planned and existing systems and subsystems (for example, subsystems and architecture flows as defined in the National Architecture, identification of kev recommended standards). The architecture should be supplemented to include the following" .....[follow with (c) (1) and (2)]*

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on ITS Architecture and Standards (23 CFR 940)
[See accompanying memo for discussion]

NPRM on ITS Architecture and Standards -- Project Design Section (23 CFR 0)		
SECTION	**ISSUES**	**AASHTO RECOMMENDED CHANGES**
940.11 Systems Engineering	• This is not a rigorous definition of Systems Engineering as taught in FHWA courses.	▪ Eliminate Sections 940 (b) (1) through (b) (5)
940.13 Project Implementation	• No standards are adopted • No accepted interoperability tests *are* available. • No accommodation for grandfathering of legacy projects.	• 940.13 (b) replace with: " *All ITS projects funded with highway trust funds shall use applicable standards after adoption by relevant SDOs and adequate tests as determined by industry consensus.*" • Eliminate 940.13 (d) related to interoperability • Eliminate 940.13 (e) related to interoperability • Add new 940.13 (f):" *All ITS projects that have been deployed prior to the date this regulation takes effect shall be consistent with the regional architecture and integration strategy as per Section 940.13 (a) but shall be exempted from the requirements of paragraphs (b) through (e) but shall include a migration plan where adopted national standards exist*" .

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on ITS Architecture and Standards (23 CFR 940)
[See accompanying memo for discussion]

940.15: Project Administration	• " Commitment" not defined. Formal (written) implementation agreements - especially with multiple local governments or with private sector participants- - may not be feasible, timely or necessary. • Documentation requirements redundant in event architecture already exists. • Given the untried nature of many of the Rule requirements, a longer transition time is appropriate.	▪ At the end of **940.15** (a) substitute for " commitment" the following: " *clear understanding as governed by existing federal, state, and local stature and regulations...* • add to 940.15 (a)" *The conformity documentations required at the Project Design Level* can *be satisfied by the architecture, concept of operations and conceptual design prepared at the regional level under section 940.9 assuming functionality* and *project were part of the architecture*" . • add new section **940.15** (f): " " *projects which do not change the regional architecture or introduce new concepts of operations are exempted from the requirements of this section.*" • Modify 940.15 (d) to read:" *Prior to four years after date of final rule publication in the Federal Register…..*"

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on Statewide and Metropolitan Planning (23 CFR 1410)
[Note: Read in conjunction with Comments memo]

NPRM Material Related to ITS in Statewide Planning & Programming (23 CFR 1410)		
SECTION	**ISSUES**	**MSHTO RECOMMENDED CHANGES**
1410.104 Definitions	• **Definition of " ITS Integration Strategy" is inconsistent with ITS Rule. Definition should eliminate projects with no integration or interoperability implications.**	• **Replace with: " *documentation of the agreed-upon process and key plan elements for coordination and implementing ITS investments funded with highway trust funds to achieve an integrated regional transportation system."***
1410.208 (a) (6) Planning Factors	• **Clarify that ITS is part of Management and Operations.**	• **Replace definition of Management and Operations with: " *Promote efficient systems management and operations as per sections 1410 (b) (2) and (11)."***

Comments *of* the American Association of State Highway and Transportation Officials on Proposed Rule on Statewide and Metropolitan Planning (23 CFR 1410)

[Note: Read in conjunction with Comments memo]

1410. 214 (a) (3) ITS Investment Strategy	▪ The ITS Integration Strategy to be included in the SW Plan relies on the Metro Planning regulations for specifics. 322 (b) (11) contains certain features that may be an inappropriate level of detail for most SW plans. The documents and agreements utilized at the Metropolitan level should be sufficient for SW Plan purposes. • ITS investments may consist of a series of small projects not meriting line item consideration in plans or programs. • Public cost-sharing with private investments in ITS may involve expenditures or items impossible to anticipate within the planning process time frames. Special plan elements and STIP line item for such purposes should be considered acceptable plan and program elements. • Many ITS strategies consist of a program of evolutionary improvements that cannot be specifically identified at a given point in time because of evolving technology. ▪ Given the untried nature of many of the Rule requirements, a longer transition time is appropriate.	▪ Replace the last line as follows: " *ITS integration Strategy shall be developed and documented* no *later the second update* of *the transportation plan or STIP that occurs following the effective date of the final rule."* ▪ Add the following: " *ITS Integration strategies and TIP materials 1410.320 (b) (11) and agreements 1410.310 (g) developed* for *metropolitan regions can serve as the documentation of the metropolitan component of the statewide investment plan and STIP" . Strategies may consist* of *individual projects or programs of like projects. ITS elements that are parts* of *larger non-ITS projects do not have to be separately programmed* although *they must be included in the Statewide ITS Investment Strategy and Metropolitan Integration Strategy as per 1410.322 (b) (11)."*
1410. 214 (a) (4) Time Horizon of Plan	▪ The long range time frame may be inappropriate context in which to program and evaluate many ITS investments.	▪ Replace with: *" be reasonably consistent in time horizons among its elements, but cover a forecast period of 20 years, unless inconsistent with project or technology life."*

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on Statewide and Metropolitan Planning (23 CFR 1410)
[Note: Read in conjunction with Comments memo]

1410.216 (c) (8) ITS in STIPs	• **Formal (written) implementation agreements -- especially with multiple local governments or with private sector participants -- may not be feasible in a relevant time frame- or necessary.**	• **Substitute for " agreement" the following**: " *clear understanding as governed* ***by*** *existing federal, state and local stature and regulations.*"

Comments of the American Association of State Highway and Transportation Officials on Proposed Rule on Statewide and Metropolitan Planning (23 CFR 1410)
[Note: Read in conjunction with Comments memo]

NPRM Material Related to ITS in Metropolitan Planning & Programming (23 CFR 1410)		
SECTION	ISSUES	AASHTO RECOMMENDED CHANGES
1410.310 (g) Agreements among Organizations	• Formal implementation agreements - especially with multiple local governments or with private sector participants- may not be feasible in a relevant time frame- or necessary. Also difficult to obtain significantly in advance of implementation.	• Substitute: " *clear understanding as governed by existing federal, state and local stature and regulations.*"
1410.316 (a)(6) Planning Factors	• Clarify that ITS is part of Management and Operations.	• Replace definition of Management and Operations with: " Promote *efficient systems management and operations as per sections* ***1410*** *(b) (2) and (11).*" .
1410.322 (b) (11) ITS Integration Strategy	• ITS investments may consists of a series of small projects not meriting line item consideration in plans and programs. • Public cost-sharing with private investments in ITS may involve expenditures or items impossible to anticipated within the planning process time frames. Special plan elements and STIP line item for such purposes should be considered acceptable plan and program elements. • Many ITS strategies consist of a program of evolutionary improvements that cannot be specifically identified at a given point in time because of evolving technology	• Add the following: " *Elements in ITS Integrations Strategies may consist of individual projects or programs of like projects. ITS elements that are parts of larger non-ITS projects do not have to be separately programmed although they must be included in the Statewide ITS Integration Strategy as per* ***1410.322*** *(b) (11).*"

Comments of tho American Association of State Highway and Transportation Officials on Proposed Rule on Statewide and Metropolitan Planning (23 CFR 1410)
[Note: Read in conjunction with Comments memo]

SECTION	ISSUES	COMMENTS
1410.324 Metropoli	▪ ITS investments may consists of a series of small projects not meriting line item consideration in plans and programs. ▪ Many ITS strategies consist of a program of evolutionary improvements that cannot be specifically identified at a given point in time because of evolving technology.	• Add new **324** (q) " ***ITS*** *egies* ***t*** *or programs* *c(; of indi* ***of*** *1 ke projects "*
1410.334 Federal Certifica tions	• Public-Private Partnerships may depend on the ability of state and local governments being able to respond in time frames shorter than the conventional planning and programming process.	• Add new **1410.334** (i) : " *projects included in the regional architecture in which the federal aid share is less than 25%* ***may*** *be added* **to** *the TIP under the procedures* ***of*** *1410.326 and approved on a " fast track"* ***basis*** *by FHWA and FTA within 45 days* **as** *consistent with the planning process."*

OVERVIEW: THE EXISTING CONTEXT OF PLAN PROGRAM AND ARCHITECTURE DEVELOPMENT

ITS "planning" and programming to date has been substantially outside the "mainstream" process.

ITS "plans" – largely for urban regions have been developed on an ad hoc basis -- typically (but always) led by states as the owners of upper level systems, who have been the recipients of various discretionary federal grants (Early Deployment Plans, Model Deployment., special earmarks, etc.) and possess the necessary technical staff. These "plans" have rarely been part of a multimodal comprehensive planning process, but often included their own general deficiency and needs analysis sufficient to justify initial investments.

Most of these "first round efforts" have produced a general regional architecture sufficient to guide initial deployment and have typically used a systems engineering approach, including general concepts of operations and high-level conceptual design. The national architecture has usually been used **as** a guidance resource. Such components of potential national standards as are available have usually been incorporated. **The** deployment focus has typically been on a limited number of specific **ITS** services (freeway management, traveler information) using federal or state discretionary funds. Most **of** these efforts have been conducted by consultants for state DOTs with MPOs, local governments and other non-transportation agencies participating.

Specific projects that have been developed out of these efforts – typically led by state DOTs – have typically carried out more detailed concepts **of** operations with greater participant involvement as well **as** the necessary project design. The major efforts at this level have been led by operational personnel from the participating agencies with modest contact with planning process. Funding for these projects has been discretionary, earmarked or programmed on **an** ad hoc basis.

Few **MPO** Comprehensive long range plans **or** Comprehensive Statewide Plans have an "operations **"or** ITS element **. A** very few have stand-alone statewide **ITS** Plans have been developed. Few states or **MPOs** have specific ITS line-item budgets; and only one or two "integrated" **ITS** plans.

The Objectives of the Rules for ITS

The FHWA/FTA Regulations relating to ITS are presented in two NPRMS – revisions to part 1410 of **23** CFR and **a** new part 940 of subpart K of **23** CFR. Both **of** these regulatory changes **are** to implement a single sentence in the TEA-21 legislation **(5**106m(e):: the requirement that Intelligent Transportation Systems projects, carried out using funds made available from the Highway Trust Fund, "conform to the national architecture, applicable standards, and protocols.. ."

However, this legislative mandate has been interpreted broadly in the Rules in a effort to (1) insure that the appropriate degree **of** national operability will be achieved – in the future – when federally adopted standards **are** available (2) encourage/require regional systems development based on technical and institutional integration (3) incorporate ITS strategy development and investment allocation into the overall mutimodal planning, programming **and** project development process at the state and metropolitan level

The proposed mechanism for the first ***two*** objectives is to introduce and institutionalize a ***new*** component in the federal aid planning process: the development of **ITS** "Implementation Plans" (largely architecture) as **a** formal regional activity. Implementation plans focus on regional architecture development with requirements for

conformity with certain yet-to-be-adopted national standards, utilization of a general systems engineering process with a strong focus on concept of operations, conceptual design and formal agreements among participants regarding capital and operating responsibilities

The mechanism for the third objective is to include a" higher level" version of the Regional ITS Implementation Plan (i.e., regional architecture) with its investment requirements and sources in both the Metropolitan Plan (as an ITS Integration Strategy) and TIP the Statewide Plan (as an ITS Investment Strategy) and STIP

The regulations are written without the presumption of sequence: that is; the language requires consistency up and down but does not presume either a bottoms-up or top-down approach. Oversight would be exercised through the normal FHWA certification reviews of the planning processes, the normal STIP approval process and (usually) self-certification at the project level

ANALYSIS OF MAJOR ISSUES

1. Focus on Future "Conformity

The focus/justification for the ITS Architecture and Standards Rule is conformity with the National Architecture and Standards within the public sector segment of ITS investments as per Section 5206 (e) of TEA-21. *AASHTO strongly supports the importance of regional architecture development and recognizes the value of the National Architecture.* It has served as a valuable tool in regional ITS development and should continue to do so if it is appropriately maintained over time.

Conformity is defined in three ways:

- Section 940.9 (a) "using the national Architecture as a resource"...and (940.9 (c) (2) including "subsystems and architecture as defined in the national ITS Architecture." Concept of Operations and Conceptual Design are (inappropriately) included as part of the architecture
- Section 940.13 (b) "use applicable ITS standards that have been officially adopted by the US DOT" and using them "as they become available, priori to adoption by US DOT"
- Section 940.13 (d) and (e) conducting "applicable interoperability tests that have been officially adopted by the US DOT.. ..as they become available, prior to adoption by US DOT".

The impact of these requirements is difficult to judge:

- Architecture The national architecture is a valuable resource. But the regulation is vague as to how conformity with the national architecture is to be demonstrated. The regional architecture may not be a clear subset of the national? Must specific functions or data flows conform? What if new functionalities are locally desirable? Who will make this determination? Who is responsible for systems configuration management over the long range (Is the national architecture designated in T23?
- Standards: No adopted standards yet exist, and the rule is silent regarding their focus, making the impact of the regulation difficult to judge. There is no process defined for phasing in of new standards. Clearly most standards – since they do not relate to national interoperability -- will not be adopted by US DOT in a rulemaking – but rather accepted by industry Standards Development Organizations on a voluntary basis. Premature adoption of and use of standards (as might be inferred by Rule language) is to be avoided.
- Interoperability: Interoperability is not defined. If fact there is more focus in the regulations on integration than on interoperability. It is not possible to judge the implications of this provision.

Recommendations

a) ***Architecture: AASHTO strongly supports the Rule's approach to the use of the National Architecture. The value of the national architecture is principally as a reference or resource to serve (informally) as a checklist. The concept of operations and conceptual designs as conventionally developed are not part of the architecture itself. Section 940.9 (c) therefore should be replaced with the following: "The Regional architecture should include: high level system functional requirements, high level concept of operations (such as market packages), interface requirements and information exchanges with planned and existing***

systems and subsystems (for example, subsystems and architecture flows as defined in the National Architecture, identification of key recommended standards." [Follow with (c)(1) and (2)]

b) *Adoption of the National Architecture: As a key national reference, the National Architecture should be formally adopted in this Rule along with a commitment to participatory review and configuration management. A new section to this effect should be added to the Rule.*

c) *Concept of Operations and Conceptual Design: AASHTO supports the development of these important products. However, concepts of operations and conceptual design are not part of an architecture – they are closely related and preliminary and subsequent activities. Section 940.9 (c) should be changed to read:" The ITS architecture should [not shall] be supplemented to include the following:" [descriptions of concepts of operations and conceptual design].*

d) *Standards: The rule should more accurately reflect the standards development process and its uncertainties and reflect appropriate caution regarding the meaning of "as they become available". Change language in 940.13 (b) to "after adoption by relevant SDOs and adequate testing as determined by industry consensus."*

e) *Interoperability: There are no such tests developed or accepted other than CVO. There is no proposed process for adoption of such tests. All reference in the Rule (940.13 (d) and (e) should be eliminated.*

2. The Lack of Clarity Regarding Definitions (project, plan, region)

AASHTO is concerned about the lack of clarity is definitions of certain key terms. Most notably, the use of the traditional term "project" in conjunction with ITS introduces difficulties in the several different contexts in which it is employed:

- What is a ITS "project" for purposes of requiring separate conformity documentation. An extension of an existing system with no new interoperability requirements requires no special conformity documentation
- What is an ITS "project" for purposes of planning and programming. Can a project be defined as a combination of projects in the form of a "program" or a "strategy"?
- How is an ITS component embedded in a larger (non-ITS) project to be accounted for as a "project" (i.e., it might required architectural consideration but never appear as a line item in a STIP or TIP).
- How are ITS investments (such as upgrades, operating costs, etc) which – by state policy -- may be treated as part of other non-ITS programs and budgets (operations, maintenance, etc.) and therefore not appear as a "line item" to be accommodated by the STIP requirement for identification of "ITS projects"?
- The definitions of "Integration Strategy" (the Metropolitan ITS element) presented in the Planning and ITS Rules in inconsistent.
- The use of the term "region" for purposes of ITS information sharing and coordination in confusing in its overlap with jurisdictional definitions of this term.

Fuzzy definitions are problematical – especially as they will be subject to varying Division interpretations.

Recommendations

a) *Change definition in Section 940.3 of an "ITS Project" -- for purposes of conformity documentation -- to: "ITS technology investments which introduce new or changed interoperability and integration requirements via software and communications over an above existing conforming projects/systems"*

b) *Clarify interpretation in 1410.322 (b)(11) that the " scope of the integration strategy ... appropriate to the scale of the investment" means that the ITS Integration Strategy in the metropolitan plan and Investment Strategy in the Statewide Plan (1410.214(a)(3) can consist of one or more "programs (of capital and operating investments) and that such "programs" (rather than each separate project component) can be line items in the STIP and TIP with the exception of unique regional initiatives as described in 1410.322 (b)(11)".*

c) *Clarify in 1410.322(b)(11) that ITS elements that are part of other non-ITS projects do not have to be separately accounted for as line items in the STIP and TIP even though these investments would be included in the statewide plan ITS investment strategy and the metropolitan ITS Integration strategy unless they are "unique regional initiatives.*

d) *Modify the definition of ITS Integration Strategy in both 1410.104 and 940.3 to say: "documentation of the agreed-upon process and key plan elements for coordination and implementing ITS investments funded with highway trust funds to achieve an integrated regional transportation system".*

e) *Modify the term defined in 940.3 to be "ITS Region" (to distinguish it from MPO's jurisdiction)*

3. Inappropriate Requirements for Formal Agreements

***AASHTO** is supportive of the need to develop the appropriate level of understanding and commitment to ITS projects in terms of concepts of operations and for deployment implementation.* Experience indicates a wide variation in the necessary (and achievable) level of formality. Until accumulated experience indicates otherwise, there is not reason to introduce the formal requirements that present a substantial potential barrier and/or delay factor.

The Rule 1410.310 (g) and 1410.216 (c.) (8) call for the development of a formal agreement among the key participants in a metropolitan integration strategy covering "policy and operations issues that will affect the successful implementation of the **ITS** Integration Strategy, including at a minimum. **ITS** project interoperability, utilization of ITS related standards, and the routine operation of the projects identified in the **ITS** Integration Strategy". Two issues are raised.

Erosion **of** Authority -- The introduction of "other agencies" -- above and beyond the implementing state DOTs, **MPO and** transit authorities -- into a decision-making role through a vaguely defined agreement process would erode existing authority to determine the appropriate new consultation procedures (above and beyond those already mandatory). None of this is indicated in TEA-21, which this Rule presumably interprets.

In addition, the regulation seems to permit any number of possible ITS stakeholders to exercise a degree of control over the federal aid process by their willingness/reluctance to enter into certain kinds of (vaguely specified) agreements. Some stakeholders in these processes **are** traditionally at odds over unrelated issues. Should they have veto power over state programs?

Limits on state leverage -- The requirements for states to secure formal written agreements indicates lack of consideration regarding the difficulty in securing (often unnecessary) written **MOUs** and the limited leverage of state DOTs **over** many of the key participants in ITS – including other non-transportation public agencies and the increasing role of the private sector. Problems include:

- Each **ITS** program may have different participants (suggesting the need for multiple agreements).
- What type of "agreement" would be considered sufficient (MOUs, legal contracts)? **Any** formal Agreements should be governed by ***existing*** federal, state and local statute and regulations and documented at the project implementation level.
- The time cycle for execution of certain agreement types is inconsistent with many **ITS** programs. Are such agreements **useful** when they must be reached **2-3** years prior to implementation **(as** required for STIP and **TIPS)?**
- What **can** realistically be expected of private sector participants?

Recommendations:

a) ***Documentation requirements at the statewide and metropolitan plan should be modified as follows: In 1410.310 (g) and 1410.216 (c) (8) substitute "clear understanding" for "agreement"***

b) ***Regarding type and content of implementation agreements, modify 940.15 (a) by adding "as governed** by existing federal, state and local statute and regulations"*

4. ITS-Related Processes and Products: Lack of "fit" in Statewide and Metropolitan Plans.

AASHTO supports the incorporation of ITS strategies and investments into the Statewide and metropolitan Planning and Programming Process where it can compete in the strategy development and resource allocation process. However there are some significant inconsistencies between ITS program characteristics and the project-focused long-range capital project planning and programming process.

The conventional statewide and metropolitan planning process is designed for the characteristics of large, capital intensive projects with single public transportation agency sponsors and multi-year planning and programming cycles. By contrast much (but not all) of ITS planning is focusing on incremental, ***relatively*** low cost, low impact, rapidly evolving technology projects with multiple mixed participants and short turn around.

A level playing field in which ITS can compete on its strengths requires some modification to this process. At the same time, the introduction of "efficient systems management and operations as a planning factors (1410.208 (a) is not clearly related to ITS or to CMS. The Rule should more clearly relate the new systems operations and management planning factor to ITS

Recommendations

a) Part 1410.214 (a)(4) should be modified as follows: "be reasonably consistent in time horizons among its elements, but cover a forecast period of 20 years unless inconsistent with technology life.

b) Modify Part 1410.208 (a)(6) as follows: "Promote efficient system management and operations as per sections 1410.322 (b)(2) and (11)".

5. Fuzzy Authority Regarding responsibilities for ITS Regional Implementation Plans (architecture, etc)

AASHTO is supportive of the need to develop regional implementation Plans for ITS improvements. It is also recognized that with very few exceptions, state DOTs – as principal owner of upper level highway systems -- have taken the lead in developing metropolitan (regional) plans (such as Early Deployment plans and Model Deployment Plans).

The Regulation recognizes the continuing potential for a leadership role in the responsibility for developing regional ITS implementation planning on the part of the state (as distinct from assuming all metropolitan planning would be/must be by MPOs) despite the fact that a regional Integration Strategy must still be part of the "normal" MPO process. This discussion is presented in the Background Section of the Rule, rather than in the Rule itself.

Furthermore, the Background section of Part 940 indicates the specification of the "region" for Implementation Plan purposes is to be designated by he "responsible planning entity (MPO or State)" (note: this does not appear to be in the Rule proper).

Thus while there is appropriate flexibility regarding (1) who does regional implementation planning (2) varied definitions of the appropriate region, there is no clear ultimate authority to be evoked in the event that an impasse is reached between a state DOT and an MPO.

Recommendation:

a) Add sentence to 940.5 designating the Governor with final authority over designation of responsibility for Implementation Plan preparation and regional boundary definitions.

6. Expanded Planning and Design Process Documentation Requirements

AASHTO is concerned that the extensive new documentation requirements present many difficulties which threaten to deter – rather than – streamline and encourage ITS. This is inconsistent with the current USDOT policy of streamlining and reduction in direct federal oversight of state and metropolitan planning and categorical exclusions, etc., in design.

Each of the four levels of ITS requirements (see attached chart) has its own (and often) unique documentation requirements. The regional architecture development and conformity documentation adds a new level of planning and documentation for the small cadre of ITS experts. Introduction of the new metropolitan and statewide planning and programming processes will add to the burden of an already overburdened operations staff. At the same time, much of the existing state and metropolitan planning community is unfamiliar with the operational and technical requirements of ITS and their documentation implications.

Recommendations.

a) *Add language to clarify" roll-up"features: Add to 1410 214 (a)(3)that the" ITS Integration strategies and TIP materials (1410.320(b)(11) and 'agreements(1410.310(g) developed for metropolitan regions can serve as the documentation of the metropolitan component of the statewide investment plan and STIP" (They are cross referenced in the Rule).*

b) *Add language to clarify the overlap between architecture documentation and project design documentation. Add to 940.15 " The conformity documentations required at the Project Design Level can be satisfied by the architecture, concept of operations and conceptual design prepared at the regional level under section 940.9 assuming functionality and project were part of the architecture".*

c) *Clarify the grandfathering features of legacy systems. Add new paragraph 940.13 (f) as follows: "All ITS projects that have been deployed prior to the date this regulation takes effect shall be consistent with the regional architecture and integration strategy as per Section 940.13 (a) but shall be exempted from the requirements of paragraphs (b) through (e) but shall include a migration plan where adopted national standards exist".*

d) *Regulations should be clear about planning and program inclusion of ITS on a "program" – rather than project – basis. Part 1410.216 (c)(8) should be modified by substituting "projects or programs" for "projects".*

e) *Projects which are extensions and repetitions and/or which do not introduce new software or communications requirements can rely on previous documentation. Add to section 940.15, a new section (f) as follows: "projects which do not change the regional architecture or introduce new concepts of operations are exempted from the requirements of this section,*

7. Discouragement of Public-Private Cooperation

AASHTO – like USDOT – is extremely supportive of attracting private investment into ITS. Private investment is playing an increasing role in ITS. Many of the upcoming ITS initiatives will be led by, or involve, major private sponsors. (80% of the total ITS investment is predicted to be private). Many of these projects are likely to involve wireless communications and in-vehicle information–based services—with large private investments, competitive contexts and a premium on implementation schedules. The ability of the public sector to incentivize and influence these projects – including representing certain key public interests – will depend on the ability of States to partner in a timely and efficient manner.

If state participation in private-led activities introduce substantial process delays, this is likely to reduce public sector involvement and leverage. The conventional federal aid planning and programming time cycle is already proving itself inconsistent with partnering. Rather than removing federal aid from the equation, an exception approach to projects where the federal share is modest, is needed. Special procedures must be established to accommodate private sector-led ITS investments and their time frames

Recommendation:

a) *Member departments may wish to establish an "ITS public-private partnership Support" as a separate statewide and metropolitan Plan clement with such an element as a distinct STIP and TIP "project" from which funds could be drawn on a when-and-as -needed basis to provide anticipated public partner participation. This would be consistent with the recommendations under Issue 2 above that "the ITS Integration Strategy in the metropolitan plan and Investment Strategy in the Statewide Plan (1410.214 (a) (3) can consist of one or more "programs (of capital and operating investments) and that such "programs' (rather than each separate project component) can be line items in the STIP and TIP".*

b) *Add to 1410.334 Federal Certifications a new section 1410.334 (i) "projects included in the regional architecture in which the federal aid share is less than 25% may be added to the TIP under the procedures of 1410.326 and approved on a 'fast track'' basis by FHWA and FTA within 45 days as consistent with the planning process.*

8. The Special Definition of Systems Engineering

AASHTO strongly supports the use of systems engineering approaches in the development of ITS programs and projects and agrees that that "analysis should be on a scale commensurate with the project scope" 940.11(b). However the Rule goes on to indicate what it identifies as certain "basic elements" in 940.11 (b) (1) through *(5).* These elements are not consistent with the basic elements as set forth in other FHWA guidance and training materials.

Recommendations

a) *Retain 940.11 (a) and (b) which require the use of systems engineering and eliminate the specific elements which have been uniquely included by dropping sections (b)(1) through (5).*

9. The Overuse of Mandates Focused on Vague or Untried Processes

AASHTO supports the development of ITS Integration plans (architecture, concept of operations and conceptual designs) as well as the systematic inclusion of ITS strategies and related investments in statewide and metropolitan planning and programming. While much of the new Rules are process-oriented, there is a good deal of content that is part of the regulation. Mandatory requirements ("Shalls") regarding ITS occur in both Rules (many of which were added since the Interim Guidance) are as follows:

- Statewide and Metropolitan planning: Section 1410.214 (a) (3) regarding content of an ITS investment strategy in Statewide Plan; Section '1410.216 (c) (8) regarding ITS project agreements in the STIP; Section 1410.310 (g) regarding including of an agreement among agencies in the ITS regional integrating strategy; Section 1410.322 (b) (11) regarding contents of an ITS regional integration strategy in Metropolitan plans.

- In Systems Architecture and Standards: Sections 940.5 and 940.9 regarding conformity with national architecture and standards; Section 940.9 regarding contents of a regional architecture and coordination;

Section 940.11 regarding use of systems engineering; Section 940.13, regarding level of project specification and use of applicable adopted standards and applicable interoperability tests; and Section 940.15 regarding documentation requirements and schedules

In a few of the above instances, he use of "shalls" is especially problematic in the light of the *process* focus of the regulations

- The required processes are partially or unevenly described in the Regulations.
- The process descriptions vary from existing federal guidance or case study documents.
- There are few available precedents or examples of the required planning documents.
- There is evidently a wide variation in processes can **still** produce desire outcomes.
-

Note that modifications have been proposed to the substantive content of the Rules following the "shalls" (as presented in other issues discussed in issue numbers 2-9 of this memo), so that the "shalls" relate to the broad intent and outcome rather than content or process details. In the instance below, a "shalls" is proposed for elimination owing to the specificity of the substantive content:

Recommendation

a) In Section 940.9 eliminate all "shalls" in (c) and replace with "should" to accommodate appropriate contents (see Issue 1 above)

10. ITS Projects Meriting Categorical Exclusions

***AASHTO** believes that most ITS projects have no negative environmental impacts.* They should be continue to be accorded categorical exclusions from the NEPA process as per Section 1420.311 Categorical Exclusions; paragraphs (c) (4) [ITS elements] and (d) (2)

Recommendation:

a) *Make any necessary additions to existing list for all ITS projects not involving significant right of way acquisition*

11. Lack of Adequate Transition Period

***AASHTO** is concerned that – given the untried nature of many of the processes and products set forth in the rule – that a longer transition time is appropriate.* Section 1410.214 *(a)* (3) specifies that the statewide ITS Investment Strategy" shall be" developed and documented no later than the first update of the transportation plan or STIP that occurs two years following the effective date of the find rule". Section 940.15 (d) specifies that the regional architecture is required within two years of the publication of the Rule; however conformance to the systems engineering process and use of applicable standards is applicable immediately.

Recommendation:

a) Provide for an additional two year transition to allow for transition, the development of guidance and experience with approaches and formats through the following modifications:

b) Modify Section 1410.214 (a)(3) as follows: the statewide ITS Investment strategy "shall be developed and documented no later than the second update of the Statewide Transportation plan or STIP".

c) ***Modify section 940.15 (d) as follows: 'Prior to four years after the date of final rule publication"***

d) ***FHWA should commit to a process of reviewing this process during the transition period and issuing best practice examples with appropriate guidance***

(Approved by the Board of Directors
on August 16,2000)

POLICY RESOLUTION PR-10-00

Title: Regarding the Proposed Statewide and Metropolitan Planning and National Environmental Policy Act Regulations

---

WHEREAS, on May **25,2000,** the U.S. Department of Transportation issued a notice of proposed rulemaking to revise regulations governing the development of metropolitan and statewide transportation plans and improvement programs (proposed **23** CFR **1410);** as well as a rulemaking to revise the implementing regulation for the National Environmental Policy Act of 1969 (NEPA) and related statutes with respect to projects funded or approved by FHWA and FTA (proposed **23** CFR 1420 and 1430); and

WHEREAS, States agree that the planning and environmental review process for transportation projects should include ample public participation and careful review of impacts and issues, and further agree that present practices already go beyond this standard; and

WHEREAS, these proposed regulations would significantly modify and disrupt the statewide and metropolitan planning process and the project development process for transportation and safety projects; and

WHEREAS, the Notices of Proposed Rulemaking state that no additional costs would be incurred due to these proposed regulations but, in fact, these proposed regulations will significantly increase both the time and expense of delivering transportation projects at the federal, state and local agency levels; and

WHEREAS, the clear intent of Congress as illustrated by Section 1309 (Environmental Streamlining) of the Transportation Equity Act for the 21st Century **(TEA-21)** was to reduce the time it takes to conduct environmental reviews, but under these proposed regulations, the process will become significantly more complicated and time consuming; and

WHEREAS, in the treatment of many critical issues, particularly the replacement of major investment studies, local consultation requirements, and environmental justice. the proposed regulations exceed or contradict statutory requirements; and

WHEREAS, several of the anticipated consequences of implementing these proposed regulations include:

- increased project review requirements,
- erosion of authority of states and metropolitan planning organizations,
- new unfunded mandates to collect and analyze data, and
- significant risk of litigation which is likely to disrupt program delivery; and

WHEREAS, AASHTO strongly **supports** sound participative planning and full compliance with the letter and spirit of the environmental laws, but rushing to implement these proposed regulations fraught with additional requirements that both obscure and complicate the planning and NEPA processes will result in the unnecessary delay of transportation improvements that

would otherwise improve transportation system safety and efficiency for the traveling public; and

WHEREAS, AASHTO stands ready to work with Congress, Federal agencies, and other appropriate groups to develop improved regulations that will efficiently deliver important transportation projects and services in an environmentally sound manner while providing for important communications with local officials and interested citizens.

NOW, THEREFORE, BE IT RESOLVED that **AASHTO** requests that (1) work on these proposed regulations be suspended; (2) the relevant committees of Congress hold oversight hearings; and (3) USDOT comprehensively revise the proposed planning and environmental regulations and then issu revised notice of proposed rulemaking, before proceeding with a final rule ; and

BE IT FURTHER RESOLVED, that Congress hold these hearings for the purpose of reviewing the content and direction of these proposed regulations and providing additional guidance to the responsible federal agencies charged with implementing these regulations; and

BE IT FURTHER RESOLVED, that any final rules in the areas of statewide and metropolitan planning and environmental review must streamline, and not complicate or delay, the process of delivering transportation and safety projects.