AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS
AASHTO

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August 14, 2018

Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington DC 20503

RE: Comments on CEQ Advanced Notice of Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (Docket No. CEQ-2018-0001)

Dear Associate Director Boling:

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ) Advanced Notice of Proposed Rulemaking (ANPRM), issued June 20, 2018, regarding potential revisions to the implementing regulations for the procedural provisions of the National Environmental Policy Act (NEPA). (83 Fed. Reg. 28591).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

As the CEQ's NEPA regulations have not been comprehensively updated in nearly four decades, AASHTO supports the effort to review and update the regulations. Updates are needed to reflect new technologies, such as the emergence of the internet; new legal requirements, such as the enactment of 23 U.S.C. 139 and other federal laws that seek to streamline the NEPA process, as well as laws allowing assignment of NEPA responsibilities to States; and evolving practices for environmental impact analysis, public involvement, and agency coordination. Updating the regulations also provides an opportunity to make the NEPA process more efficient and inclusive.

In the attached table, we have addressed each of the 20 questions raised in the ANPRM. We have addressed many of the questions in broad terms rather than providing specific proposed changes to the regulations. We would welcome the opportunity to meet with you and your staff to discuss these comments and to provide more specific recommendations.

In addition to the specific comments provided in the attached table, we also offer the following general comments regarding the CEQ's overall approach to this rulemaking:

- The CEQ should encourage the development of more focused NEPA documents that are useful to decision-makers and understandable to the public at large. This can be done by encouraging greater reliance on studies completed prior to the NEPA process, giving agencies more flexibility to determine the appropriate range of alternatives and the level of detail in which each alternative is considered, and more clearly authorizing agencies to limit their review to issues that are "truly significant to the action in question."

- The CEQ should provide flexibility to take advantage of new and emerging technologies to make the NEPA process more inclusive and efficient, including through electronic publication of NEPA documents and electronic methods of public involvement. This can be done by allowing individual federal agencies to determine appropriate methods through their own regulations, rather than prescribing them in CEQ's regulations.

- The CEQ should ensure that the regulations reflect variation in legal requirements applicable to different federal agencies and project types. For example, many highway, transit, and railroad projects are subject to the environmental review procedures in 23 U.S.C. § 139, while other infrastructure projects must comply with Title 41 of the FAST Act, and many water infrastructure projects are subject to 33 U.S.C. § 2348. Given these different requirements, there can be no one-size-fits-all approach to NEPA compliance.

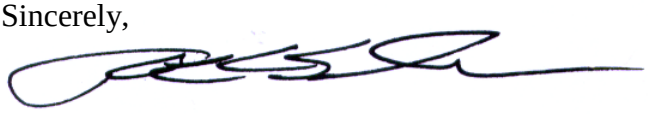
- The CEQ should avoid imposing procedural requirements that reduce flexibility for lead agencies and project sponsors. Federal agencies and project sponsors should have flexibility to determine how best to satisfy the many different legal requirements that are addressed as part of the NEPA process, particularly for complex infrastructure projects. We do not support imposing new requirements that limit flexibility in the NEPA process.

- The CEQ should strive to preserve the essence of NEPA as a process that promotes informed agency decisions and provides meaningful opportunities for public involvement in making decisions on projects with the potential for significant environmental impacts.

- The CEQ should issue guidance simultaneously with the issuance of the updated regulations to assist practitioners in implementing the updated regulations.

Thank you for the opportunity to provide comments regarding potential changes to the CEQ's NEPA regulations. If you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,



John Schroer
President, American Association of State Highway and Transportation Officials
Commissioner, Tennessee Department of Transportation

Table 1: AASHTO Responses to CEQ Notice Requesting Comments on Potential Changes to CEQ's NEPA Regulations

#	Question	Preliminary Response
1.	Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?	Section 1501.5 should be revised to establish a lead federal agency by default based on the type of action. For example, FHWA (or a State acting as FHWA, pursuant to NEPA assignment) would be designated as the lead federal agency for federally funded highway projects, unless the federal agencies involved in the project agreed that a different federal agency should take the lead. (This revisions to the CEQ regulations builds upon Title 41 of the FAST Act, which requires designation of a "facilitating agency" for various types of infrastructure projects; under that statute, the facilitating agency is normally the lead agency.) The CEQ regulations should acknowledge existing statutes, such as 23 U.S.C. 139 and Title 41 of the FAST Act, that specify agency coordination procedures to be used when an EIS is prepared, and should confirm that compliance with those requirements satisfies NEPA. The CEQ regulations should not impose additional coordination requirements beyond those in existing law. Specifically, the CEQ regulations should not require lead agencies to obtain written concurrence from other agencies at defined milestones in the NEPA process. If "concurrence points" are used, it should be at the discretion of lead agencies and project sponsors. We note that concurrent review is not always feasible or efficient. For example, the federal NEPA lead may be able to appropriately complete NEPA at 5% design, so that the project can proceed with early stages of project delivery. Whereas, a regulatory agency often needs much more site-specific details (e.g., 70+% design). There should be flexibility within the One Federal Decision-Making to conclude different federal agency decisions at different times when that is the most efficient approach to decision-making.

#	Question	Preliminary Response
2.	Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?	The CEQ regulations should acknowledge existing statutes, such as 23 U.S.C. 169 and 23 C.F.R. Part 450, which authorize the adoption of planning-level studies and decisions for use in the NEPA process Section 1502.21 is clear and useful. There is flexibility to incorporate by reference when a lead agency has ensured prior work is relevant to the current proposed action. The CEQ regulation should not create additional procedural requirements that federal agencies must satisfy before adopting planning-level studies and decisions. In particular, additional concurrence requirements should not be included in the regulations.
3.	Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?	See response to Question #1.
4.	Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?	*See responses below.*
4.a	Page lengths	The CEQ regulations already do encourage -and should continue to encourage - brevity and readability in all NEPA documents, while encouraging use of appendices to provide supporting technical information. The CEQ regulations should continue to provide flexibility regarding the page-length used in NEPA documents. The existing page-length targets (1502.7) are appropriate as a guide, but in practice it often is necessary to exceed those targets to provide sufficient information addressing the wide range of environmental topics to be covered in an EIS.

#	Question	Preliminary Response
4.b	Format	The format recommended in Section 1502.10 has become outdated and contributes to the excessive length of EISs. The CEQ should, at a minimum, streamline the standard format as recommended in the regulations by omitting chapters such as Affected Environment, List of Preparers, Index, which contribute bulk while adding little value. With searchable PDFs, for example, an index is no longer needed. In addition, the descriptive information in the Affected Environment chapter can be covered in technical reports and briefly summarized in the Environmental Consequences chapter. The CEQ regulations also should allow lead agencies greater flexibility to determine the appropriate organization of an EIS. Currently, the regulations specify a chapter structure that "shall" be used "unless the agency determines that there is a compelling reason to do otherwise." (1502.10). Agencies should be allowed to use a format that is best-suited to the content being presented. At a minimum, the word "compelling reason" should be deleted because it unnecessary restricts agencies' discretion to determine the appropriate format for an EIS. We suggest that CEQ also consider giving federal agencies' discretion to determine their own agency-specific standard formats for EIS, which would allow agencies flexibility while achieving the efficiency benefits of standardization. We recommend CEQ consider work completed by AASHTO, FHWA and state DOTs regarding high-quality NEPA documents. https://environment.transportation.org/pdf/programs/pg15-1.pdf"

#	Question	Preliminary Response
4.c	Time Limits	The CEQ regulations should retain existing language that allows lead agencies to "establish appropriate time limits for the environmental impact statement process" (1500.5(e)), and should acknowledge that agencies may also set time limits for completing other NEPA documents. The CEQ regulations themselves should not set rigid time limits for completing NEPA documents, because appropriate completion times vary from agency to agency and from project to project. However, the CEQ regulations should emphasize the importance of completing the NEPA process expeditiously, and could also recommended standard or default timeframes for completion of various types of NEPA documents, while allowing flexibility to vary the timeframes based on project-specific requirements. Since the NEPA process is being used as an umbrella for compliance with multiple federal and state laws, the regulations must recognize that compliance with multiple laws may require a schedule extension.
5.	Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?	The CEQ should retain and further emphasize existing provisions that encourage a focused approach to NEPA documents - e.g., "NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail" (1500.1(b)) and agencies should reduce paperwork by "preparing analytic rather than encyclopedic" EISs. "discussing only briefly issues other than significant ones," and "writing environmental impact statements in plain language." (1500.4(b)-(d)). The direction provided in the existing regulations is correct, but in practice, it has been disregarded. Agencies are reluctant to limit their analysis to specific issues, or to cover some issues in less detail than others, primarily out of concern about litigation risks. The CEQ regulations and related guidance should establish the expectation that the scoping process will be used to identify the "truly significant" issues and the EIS will then focus on those issues, while discussing other issues only briefly. We recommend that CEQ clarify the lead agency's authority to determine that specific types of impacts do not need to be considered in detail in an EIS; this would allow agencies to focus their analysis on impacts relevant to the agency's decision.

#	Question	Preliminary Response
6.	Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?	The public involvement provisions in the existing CEQ regulations (1506.6) should be updated to recognize electronic communications, including the internet and social media platforms, as permissible methods for providing notice to the public. In addition, the CEQ regulations should provide flexibility to tailor public involvement methods based on the populations affected by the proposed project. The CEQ should remove existing provisions that explicitly require use of regular mail (1506.6(b)) and should instead allow agencies flexibility to determine the appropriate effective means of public communication. Given the pace of technological changes, we recommend that the CEQ remove references to specific methods such as U.S. mail and newspaper publication and allow use of any effective methods to provide public notice, simply options rather than explicitly requiring use of those methods.
7.	7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?	*See responses below.*

#	Question	Preliminary Response
7.a	a. Major Federal Action;	The CEQ should clarify the definition of "major federal action" (1508.18), especially as it applies to circumstances in which the federal agency approves only a small portion of a larger project. Under current regulations, a "major federal action" is defined to include, among other things, "approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." (1508.18(b)(4)). This definition makes no distinction regarding the degree of federal control or financial assistance. As a result, a non-federal action may be deemed "major federal action" for NEPA purposes based on a very slight federal role, such as the need to obtain FHWA approval for a change in interstate access, or for a design exception, when the highway project as a whole is being built entirely with non-federal funds. We recommend revising the definition of "major federal action" to provide greater clarity as to when federal involvement - whether through funding, permitting, or both - rises to the level of a "major federal action" that triggers NEPA review. In defining this standard, the CEQ should look to the extensive body of NEPA case law on this topic. *See, e.g., Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990) ("[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise.") (quoting *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir.1988)); *Touret v. National Aeronautics and Space Admin.*, 485 F.Supp.2d 38, 43 (D.R.I.,2007) ("Where the federal 'involvement' consists only of funding a construction project, the project does not rise to the level of 'major federal action' unless the funds represent a significant portion of the project cost."); *Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 1129, 1135 (5th Cir. 1992) (quoting *Sierra Club v. Hodel*, 848 F.2d at 1068).

#	Question	Preliminary Response
7.b	b. Effects;	The CEQ should clarify the definition of "indirect effects" (1508.8), which has created considerable confusion in practice, often resulting in voluminous documentation about highly uncertain effects, as well as frequent litigation over the adequacy of indirect effects analyses. At a minimum, we recommend defining "reasonably foreseeable" to mean "likely or probable, rather than merely possible." (See comment # _ above). We also recommend that the CEQ regulations recognize that a qualitative analysis normally is sufficient when describing potential indirect effects associated with actions that would be carried out by others and would be subject to their own environmental review and permitting processes. We also recommend clarifying that land use changes that are contemplated in adopted land use plans can simply be acknowledge in "indirect effects" of the action. NEPA encourages coordination of federal actions with State and local planning decisions; detailed analysis of indirect effects should not be required when a federal action simply contributes to the implementation of duly enacted State and local land use and transportation plans.
7.c	c. Cumulative Impact;	The CEQ should clarify the definition of "cumulative impact" (1508.7), which also has created considerable confusion in practice, resulting in excessive documentation and frequent litigation challenges. We recommend clarifying and emphasizing the direction provided in CEQ's cumulative effects guidance, which encourages agencies to focus their cumulative effects analyses only on "significant cumulative effects issues." In current practice, it is common for agencies to prepare an encyclopedic cumulative effects analysis, covering every environmental resource area addressed in the Environmental Consequences chapter. Preparing a more focused cumulative effects analysis will be more efficient and more useful to decision-makers. In addition, as with indirect effects, we recommend that the CEQ regulations recognize that a qualitative analysis normally is sufficient when describing potential cumulative effects associated with actions that would be carried out by others and would be subject to their own environmental review and permitting processes.

#	Question	Preliminary Response
7.d	d. Significantly;	The CEQ should modify the criteria for determining whether an action "significantly" affects the environment. The current regulation (1508.27) requires consideration of "context" and "intensity" in determining significance. The "intensity" criteria should be clarified to ensure that an EIS is not required based solely on: (1) beneficial effects of the proposed action; (2) cumulative effects resulting from other actions; (3) public controversy.
7.e	e. Scope; and	The CEQ should modify the definition of "scope" (1508.25), which lists "connected actions," "cumulative actions," and "similar actions" as ones that may need to be included in the same EIS. Connected actions are inter-dependent and need to be considered together. But the references to "cumulative actions" and "similar actions" are confusing and should be removed. The regulations should not require two distinct actions to be considered in the same EIS if they have independent utility and therefore are not connected actions.
7.f	f. Other NEPA terms.	The definition of "environmental document" (1508.10) should be modified to include a "Record of Decision."
8.	Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?	*See responses below.*
8.a	a. Alternatives;	A definition of "alternatives" may be useful. If added, the definition should acknowledge the many different contexts in which this term is used, ranging from broad concepts considered in the scoping stage to more specific proposals carried forward for detailed study. The definition should also acknowledge that alternatives may include "options" that involve a portion of an overall project.
8.b	b. Purpose and Need;	[No comments.]

#	Question	Preliminary Response
8.c	c. Reasonably Foreseeable;	A definition of "reasonably foreseeable" may be useful. If added, the definition should echo principles in NEPA case law holding that NEPA does not call for speculation. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) ("Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'"); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 206 (1st Cir. 1999) ("These contingencies render any possibility of airport expansion speculative and .... neither imminent nor inevitable. Therefore, we find that airport expansion is not 'reasonably foreseeable,' as that term has been defined in this context.") Based on the case law, we recommend defining "reasonably foreseeable" to mean "likely or probable, rather than merely possible.".

#	Question	Preliminary Response
8.d	d. Trivial Violation; and	The regulations currently state that "it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 40 CFR 1500.3. Courts routinely rely upon this provision in cases holding that minor shortcomings do not require a NEPA document to be invalidated. See, e.g., *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir.1997) (recognizing "a harmless-error rule ... such that a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination"). Importantly, courts have recognized that even when a violation is not necessarily "trivial," the EIS may still be upheld if provided the basis for informed decisionmaking. *City of Waltham v. U.S. Postal Service*, 786 F.Supp. 105, 140 (D.Mass. 1992) ("These matters are hardly 'trivial' violations. Still, the record indicates no prejudicial error resulting from this non-compliance."); *see also Project B.A.S.I.C. v. Kemp*, 721 F.Supp. 1501, 1517 (D.R.I.1989) Thus, courts have focused not on whether the error is trivial, but on whether the public disclosure and informed-decisionmaking goals of NEPA were met. In light of the case law, we suggest replacing the term "trivial violation" with a broader term such as "technical deficiency" and defining that term in a manner consistent with existing case law. *See, e.g., Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 986 (N.D.Cal.,2002) ("A technical deficiency is an omission that does not frustrate NEPA's twin goals of ensuring that the decision-maker was otherwise fully informed as to the environmental consequences of the proposed action and that members of the public had sufficient information with respect to the omitted topic.") (quoting Laguna Greenbelt v. Department of Transportation, 42 F.3d 517, 527 (9th Cir.1994)).

#	Question	Preliminary Response
	e. Other NEPA terms.	We recommend adding the following definitions: "Assignment" - to refer to programs under which a federal agency has assigned its responsibilities under NEPA and related laws to a State under 23 U.S.C. 327 or similar laws. "Statutory environmental review process" - to refer to environmental review requirements that apply to the NEPA process but are specified in a statute outside NEPA itself, such as 23 U.S.C. 139 or Title 41 of the FAST Act. "Participating agency" - to have the same meaning as the term defined 23 U.S.C. 139 and Title 41 of the FAST Act. "Dashboard" - to refer to the electronic portal on which project schedules are required to be posted under 23 U.S.C. 139 and Title 41 of the FAST Act. "Combined Final EIS/ROD" - to refer to issuance a Final EIS and Record of Decision as a single document, as authorized under 23 U.S.C. 139.
9.	Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?	*See responses below.*
9.a	a. Notice of Intent;	Consider revising the existing regulation (1508.22) to recognize that a 'revised notice of intent' may be issued.

#	Question	Preliminary Response
9.b	b. Categorical Exclusions Documentation;	The CEQ regulations should encourage the use of CEs, as appropriate and provide maximum flexibility for agencies to create and apply CEs. Potential changes include: 1) authorize the creation of regional or State-specific CEs, analogous to regional general permits under the Section 404 permitting program; 2) provide a more flexible process for updating and expanding CE lists - e.g., require public notice but not a rulemaking process; 3) allow agency to apply a CE that has been included in the NEPA regulations or procedures of any other federal agency, if the conditions for that CE are met.
9.c 9.d	c. Environmental Assessments; d. Findings of No Significant Impact;	The definition of a FONSI should specifically acknowledge that federal agencies can issue a "mitigated FONSI" - i.e., a finding of no significant impact that is contingent on implementation of specific measures to avoid, minimize, or mitigate impacts.
9.e 9.f	e. Environmental Impact Statements; f. Records of Decision; and	The CEQ regulations should be updated to reflect the requirements of 23 U.S.C. 139, including the ability to issue a Final EIS and Record of Decision as a single document, without a 30-day waiting period as is required under the existing CEQ regulations.

#	Question	Preliminary Response
9.g	g. Supplements.	The CEQ regulations should clarify that if an agency has issued its own regulations specifying criteria for determining when a supplemental EIS is needed, those regulations supersede the criteria in the CEQ regulations, so that it is not necessary for the agency to apply both its own supplementation criteria *and* the criteria in the CEQ regulations. This has been an issue in litigation. *See, e.g., Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (plaintiffs argued that FTA "erred as a matter of law because it should have applied the CEQ SEIS regulation rather than FTA's own regulation, noting a textual difference between them."). The CEQ should also clarify that an agency has discretion to consider issues such as cost, impact to project schedules, local economic impacts, and job losses when determining whether, and to what extent, to halt or defer project activities while an SEIS is prepared. The CEQ should also clarify that EAs, like, EISs, can be supplemented. In addition, the CEQ should clarify the terminology and procedures use for determining that supplementation is not required (e.g., through reevaluations).
10.	Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?	Section 1506.1(a) is currently written in the passive voice ("no action concerning the proposal shall be taken ..."), which creates uncertainty about its applicability. This provision should be revised to make clear that it applies to federal agencies ("the federal agency shall take no action concerning the proposal ..."). Section 1506.1 also should be updated to allow greater flexibility for project sponsors to undertake preconstruction activities that have no adverse environmental impacts after a preferred alternative is identified in the NEPA process, following an opportunity for public comment. Examples include utility relocations, procurement of long-lead-time items, and acquisition of property from willing sellers.

#	Question	Preliminary Response
11.	Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?	Section 1506.5 currently requires any "contractor" selected to prepare an EIS to execute a "disclosure statement ... specifying that they have no financial or other interest in the outcome of the project." This provision should be updated to allow greater flexibility for the project sponsor (including a private entity in a public-private partnership) to participate in preparation of the NEPA document under the direction of the federal lead agency, provided that the sponsor's involvement is disclosed. For example, when a public-private partnership is used to develop a large program of highway improvements, the most efficient project-delivery method may involve tasking the P3 with overseeing both the development of engineering plans and related environmental documents for those plans, subject to oversight and approval by the State DOT and FHWA.
12.	Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?	The CEQ regulations (1502.20) should be updated to clarify that when a Tier 1 or programmatic EIS is prepared, the agency is not required to complete other statutory consultation and approval requirements (e.g., Section 106 consultation, Section 7 consultation, Section 4(f) determinations) until Tier 2. We also suggest describing more specifically the level of detail normally required (and not required) in a Tier 1 EIS. If the CEQ regulations address the One Federal Decision framework, they should acknowledge that One Federal Decision may not occur at Tier 1. The lead agency may issue a Tier 1 ROD, and other federal agencies can adopt that decision as part of Tier 2 studies.
13.	Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?	The CEQ regulations (1502.14) require "all reasonable alternatives" to be studied. Many courts have interpreted this to mean a "reasonable range of alternatives," and the 40 Questions guidance allows agencies to study "reasonable number of examples, covering the full spectrum of alternatives." To avoid confusion, the regulations should be updated to explicitly adopt the "reasonable range" standard. In addition, courts have recognized that in some case, it is permissible for an EIS to carry forward only a single build alternative for detailed study, along with the No Action alternative; the CEQ regulations should explicitly allow that approach as well, especially where the agency has engaged in an extensive alternatives development and refinement process before initiating the NEPA process.

#	Question	Preliminary Response
14.	Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.	Yes, the following provisions should be updated: 1506.6(b)(1) and (2) - requirement to provide notice by "mail"; should allow for notices to be sent via any reasonably effective means rather than specifying the use of U.S. Postal Service mail. 1506.6(f) - reference to the cost of producing "copies"; should allow for documents to be provided electronically via posting on internet.
15.	Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?	Yes, the following provisions should be updated: 1502.19 - requirements for "circulation" of an EIS do not address electronic publication; should expressly allow for EISs to be published in electronic form and made available to the public via the internet, with hard copies available at selected locations such as public libraries.
16.	Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?	The regulations (1500.4(n)) currently require agencies to reduce paperwork by "Eliminating duplication with State and local procedures, by providing for joint preparation, and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency." This general directive should be retained in the regulations. Lead agencies and project sponsors should have the flexibility to decide whether it is more efficient for a single EIS to be prepared and signed by all federal agencies, or for the lead agency to prepare an EIS in consultation with other agencies, which would later adopt that EIS at the time they make their permitting decisions. This flexibility may be needed when the permitting agency needs a higher level of engineering detail for its decision. For example, the level of detail requested by the USFWS and NMFS for Endangered Species Act consultation, or by the Corps of Engineers for Section 404 and 408 permitting, often exceeds the level of detail required for FHWA's decision-making. The CEQ regulations should not require all alternatives considered in the NEPA process to be developed to the same level of detail required for ESA consultation and Section 404 permitting.

#	Question	Preliminary Response
17.	Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?	The regulations state that all "substantive" comments on a Draft EIS should be "attached" to the Final EIS, "whether or not the comment is thought to merit individual discussion by the agency in the text of the statement." (1503.4(b)). With electronic publication, the regulations should simply require agencies to compile substantive comments on the Draft EIS and make the compilation publicly available, concurrently with the Final EIS, either in an appendix to the Final EIS, or in a separate technical report. The regulations are commonly interpreted to require responses to all substantive comments, although that requirement is not explicitly stated in the regulations. In addition, while the regulations allow comments to be summarized (if voluminous), agencies often address each comment individually. The regulations should be updated to clarify that agencies are only obligated to responding to substantive comments, and that agencies normally should prepare summaries of the substantive comments and respond to those summaries, rather than responding to each comment individually. The regulations should acknowledge that lead agencies have discretion about what comments to deem substantive in the context of that agencies' decision-making process.
18.	Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?	Section 1503.1 states that lead agencies "shall invite Indian tribes, when the effects may be on a reservation." The regulations appear to assume that Indian tribes have interests only when projects have impacts on tribal lands (within a reservation). The regulations should acknowledge that tribes may have interests on projects based on potential effects even when tribal lands are not involved - e.g., where a project has potential effects on cultural resources of significance to a tribe.
19.	Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?	*See responses below.*

#	Question	Preliminary Response
19.a	Level of detail for analysis of alternatives carried forward for detailed study.	The CEQ regulations require agencies to "rigorously explore" and "devote substantial treatment" to all reasonable alternatives (1502.14(b)), and the 40 Questions guidance recommend that each alternative be discussed in a level of detail "substantially similar to that devoted to the 'proposed action.'" The regulations and guidance have created an expectation that agencies will exhaustively analyze every alternative carried forward for detailed study, at an equal level of detail - an expensive, time-consuming, and often wasteful exercise. The regulations should be updated to clarify that agencies have the flexibility to study the alternatives carried forward for detailed study to the extent needed to reach a decision on each alternative. If more detailed study is needed on some alternatives to resolve specific issues or concerns, the agency should not automatically need to advance the engineering and environmental analysis on all other alternatives to the same degree. In addition, it is essential to allow the preferred alternative - after it has been identified - to be developed to a higher level of detail. Compliance with other environmental laws, such as the ESA, often require a higher level of detail and focus solely on the preferred alternative. To facilitate compliance with those laws as part of the NEPA process, lead agencies must have flexibility to develop the preferred alternative to a higher level of detail.
19.b	Assignment programs.	The CEQ regulations should be updated to recognize that in some cases, the responsibilities of the federal lead agency will be carried out by a State agency pursuant to an assignment program under 23 U.S.C. 327 or other laws.
19.c	Effective use of scoping.	[No comments.]

#	Question	Preliminary Response
20.	20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?	The regulations should be amended to recognize programmatic mitigation plans developed in advance of specific projects and to authorize the participation of cooperating agencies in the development of these plans. The regulations also should clarify that NEPA requires only discussion of potential mitigation measures, not full developed mitigation plans, and acknowledge that many of the details of mitigation measures will normally be developed after the NEPA process is complete. For example, on highway projects, final mitigation decisions occur during final design regarding project elements such as noise barriers, stormwater retention/detention, etc. Also, we note that some mitigation measures are proposed for areas outside those being studied in the NEPA document. We recommend that CEQ develop guidance on how mitigation measures can be considered in the NEPA document without requiring the impacts of the mitigation measures to be studied at the same level of detail as the impacts of the project itself.