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September 17, 2019

U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington DC, 20590-0001

RE: Comments on Interim Policies on Page Limits for National Environmental Policy Act Documents and the Application of One Federal Decision Process to DOT Projects (Docket No. DOT-OST-2019-0118)

To the U.S. Department of Transportation,

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the interim policies *on Page Limits for National Environmental Policy Act Documents and the Application of One Federal Decision Process to DOT Projects* (Interim Policies) issued by the U.S. Department of Transportation on August 23, 2019.

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 U.S. DOT agencies to operate, maintain, and improve the nation's transportation system.

AASHTO supports U.S. DOT's goal of expediting the delivery of transportation projects. Congress, the Administration and the State Departments of Transportation (State DOTs) have achieved success in modernizing the NEPA process through the past few transportation reauthorizations. Although there are additional changes that may be made to streamline the NEPA process, most project delivery delay in the NEPA and permitting processes are related to the processes and requirements in the substantive environmental laws, such as the Endangered Species Act, the Clean Water Act and the Clean Air Act. Imposing the page limits and timeframes outlined in the Interim Policies address the NEPA and permitting processes, without addressing the process issues within the substantive environmental laws, which have their own requirements and timeframes. We recommend U.S DOT work with the Federal Resource Agencies and Congress to modernize these substantive laws, regulations and policies. AASHTO

and the State DOTs stand ready to work with U.S. DOT to identify process improvements to these substantive laws that would greatly expedite project delivery.

## **General Comments**

U.S. DOT should preserve the flexibilities and the exceptions outlined in the Interim Policies and implement the policies in a way that minimizes the financial and administrative burdens on the state DOTs. Although the Interim Policies establish specific page limits and timelines, the various exceptions throughout the policy allow agencies to deviate from those requirements. Those exceptions provide valuable flexibility that State DOTs will need to avoid unintended consequences, such as increased costs.

The Interim Policies should include that the U.S. DOT lead agency must concur with State DOT project sponsors in determining if a project is a major investment project, project schedules and page limits. This will provide the state DOTs, as preparers of the environmental documents, a voice in these important decision points.

Additional specific comments related to the interim policies on one federal decision (OFD) and page limits are provided below.

## **One Federal Decision**

The interim policy on the *Application of OFD Processes to DOT Projects* (OFD Interim Policy) outlines how U.S. DOT and its modal administrations, as well as state DOTs with NEPA assignment, will implement the OFD process on transportation projects. The OFD Interim Policy implements Executive Order 13807, which requires federal agencies to use the OFD process for major infrastructure projects, the MOU between federal agencies involved in the development and approval of OFD transportation projects, as well as related Office of Management and Budget and Council on Environmental Quality OFD guidance.

The goal of OFD is to have one federal environmental document for each transportation project. The lead agency must develop a project schedule of not more than 2 years, if practicable, for the completion of the environmental review process. The OFD Interim Policy also requires all federal agency authorizations to be made within 90 days of the record of decision and the establishment of a performance accountability system for tracking OFD projects. There are exceptions to the OFD process for requiring single EISs as well as circumstances under which the lead agency may extend OFD timeframes.

## **Concurrence Points**

The OFD Interim Policy requires lead agencies to obtain concurrence from all cooperating agencies on project purpose and need, range of alternatives and preferred alternative. As the missions of the federal agencies involved in the environmental review of transportation projects vary, the OFD Interim Policy should clarify that the purpose and need of the project is a transportation purpose and need. The cooperating agencies should defer to the lead transportation agency on project purpose and need and range of alternatives.

In addition, U.S. DOT should note that federal resource agencies require much higher levels of detail to make decisions in the environmental review process. As such, concurrence will require states to conduct more work on each alternative to reach concurrence with federal resource agencies, requiring more resources and adding costs.

### Projects Covered by OFD

The OFD EO defines major infrastructure projects (MIPs) as projects that require multiple federal authorizations, an environmental impact statement (EIS), and for which the “reasonable availability of funds” have been identified. Section 3 of the OFD Interim Policy indicates that “consultations, such as those conducted under section 7 of the Endangered Species Act and under section 106 of the National Historic Preservation Act, are considered federal authorizations.” Section 106 does not involve issuance of any permit or approval; the ACHP merely consults (if it is involved at all). As major infrastructure projects are those that require “multiple authorizations” and most projects involve NEPA and Section 106, the practical consequence of defining an “authorization” to include Section 106 consultations means that virtually every project will involve “multiple authorizations.” As such, OFD authorizations should be limited to actions requiring issuance of a permit or approvals, not mere consultations. An authorization would be required only if a project property is determined to be eligible for or listed on the National Registry of Historic Places.

### Responsibilities of Lead DOT Agencies in Reporting Potential and Current OFD Projects

Section 10 of the OFD Interim Policy requires lead agencies to provide a monthly status report identifying any new EIS projects, the lead agency determination on whether the new EIS is a MIP and the basis for that decisions, and updates on current MIPS. This requirement creates a large administrative burden on lead agencies and project sponsors. As the goal of the OFD processes are to expedite project delivery and reduce program burdens, this requirement should be eliminated.

### Permitting Timetable

Section 12 of the OFD Interim Policy requires the lead agency to develop, in concurrence with the cooperating agencies, a timetable with milestone dates for identified actions. Once finalized, the timetable is published on the permitting dashboard. In addition, the lead agency is required to update the milestones on the permitting dashboard on a quarterly basis. Requiring a quarterly update will place project sponsors on a constant update loop, rather than doing the work needed to deliver projects. As such, the permitting dashboard milestones should be updated on an as needed basis, as determined by the project sponsor and lead agency. This would allow the milestones to be updated when there are substantive changes to the schedule, rather than quarterly.

In addition, states need flexibility in the milestones placed on the permitting dashboard. The permits needed for a project as well as the right of way to be acquired will not be known until a

preferred alternative is selected. Also, there are many actions that must take place between issuing a record of decision and permit issuance, such as right of way acquisition, that will cause the timetable to exceed the 90 days for permit issuance.

### Pre Notice of Intent Activities

Section 14 and Attachment A of the OFD Interim Policy contain a long list of activities to be completed prior to the lead agency issuing a project notice of intent (NOI), which starts the OFD clock. The OFD Interim Policy should clarify that states have flexibility in the activities that are conducted prior to issuing the NOI.

### **Page Limits**

The interim policy on Page Limits restricts environmental impact statements to 150 pages, and for projects of unusual scope or complexity, 300 pages. The Interim Policy also limits environmental assessments (EAs) to 75 pages. EAs that include mitigation measures for environmental impacts may be no more than 150 pages.

Section 3.1 of the Interim Policy states that page limits do not include the executive summary, appendices or materials that are incorporated by reference. This language should be retained to provide project sponsors and lead agencies flexibility in developing environmental documents.

Section 5 of the Interim Policy provides an accountability process for exceeding page limits. The process requires various approvals, including approval of the U.S. DOT Assistant Secretary for Policy; however approval is presumed if the Assistant Secretary does not respond within 10 days. Having to require these approvals for even slightly exceeding the page limits is an unnecessary administrative burden and may delay projects. OFD EISs exceeding page limits should be decided by the lead agency and project sponsor.

The page limits should be goals rather than specific limits. Establishing goals, along with requiring the lead agency to concur with State DOT project sponsors in determining appropriate environmental document page limits and the application of exceptions, will provide the state DOTs, as preparers of the environmental documents, the flexibility to ensure the documents are legally sufficient.

Thank you for the opportunity to provide comments regarding the *Interim Policies on Page Limits for National Environmental Policy Act Documents and the Application of One Federal Decision Process to DOT Projects*. If you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,

A handwritten signature in black ink that reads "Carlos Braceras". The signature is written in a cursive, flowing style.

Carlos Braceras

President, American Association of State Highway and Transportation Officials