December 22, 2020

April Marchese, Director, Infrastructure Permitting Improvement Center
Krystyna Bednarczyk, Office of the General Counsel
c/o Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building, Ground Floor, Room W12-140
Washington, DC 20590

Subject: AASHTO Comments on Notice of Proposed Rulemaking, Procedures for Considering Environmental Impacts (Docket No. DOT-OST-2020-0229)

Dear Director Marchese and Ms. Bednarczyk:

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the U.S. Department of Transportation's (USDOT or Department) Notice of Proposed Rulemaking (NPRM) published November 23, 2020, regarding updates to the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA) (85 Fed. Reg. 74640; Docket No. DOT-OST-2020-0229). USDOT's proposed regulations would replace USDOT Order 5610.1C, Procedures for Considering Environmental Impacts, which was issued in 1979 and last updated in 1985.

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments (State DOTs) in the 50 States, the District of Columbia, and Puerto Rico. AASHTO represents all five transportation modes: air, highways, public transportation, rail, and water. AASHTO's primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our member State DOTs work closely with USDOT operating administrations (OAs) to operate, maintain, and improve the nation's transportation system. AASHTO and the State DOTs have a long history of successful partnership and collaboration with USDOT and its OAs on developing and implementing improvements in the environmental review process. We look forward to continuing this partnership.

AASHTO supports updating USDOT's existing Procedures for Considering Environmental Impacts, which have not been updated in 35 years. However, AASHTO has recommended against finalizing this proposal in response to the 30-day comment period provided on the NPRM. Because this is a significant policy matter, as USDOT notes in its NPRM section on compliance with Executive Order 12866,[1] AASHTO requested that USDOT provide an additional 15 days of commenting time with a revised date of January 7, 2021. Our review of the NPRM indicates that additional time is necessary to allow the State DOTs and AASHTO to provide more comprehensive and substantive comments, which we believe will lead to an enhanced rulemaking outcome.

Notwithstanding our request for additional time, AASHTO notes the following significant concerns with the NPRM:

- **Non-Federal Costs:** Proposed section 13.23(h) would require an OA to include the total cost (Federal and non-Federal) of the environmental impact statement (EIS) on the EIS cover page. The Council on Environmental Quality's (CEQ) updated NEPA regulations direct that agencies should include costs incurred by cooperating and participating agencies, applicants, and contractors if "practicable."[2] AASHTO strongly opposes requiring State DOTs to track and report their costs to prepare an EIS. This will impose a substantial administrative burden on State DOTs. In this regard, AASHTO disagrees with USDOT's determination that the proposed rule does not contain a collection-of-information requirement subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.[3] NEPA analysis is embedded throughout the project approval and delivery cycle. State DOTs complete numerous other project design, real estate, consultation, and early permitting activities concurrent with NEPA. Every project is unique, and it would not be meaningful to isolate the cost of NEPA review from all the other costs associated with project development. In sum, it is not practicable for State DOTs to track and report their costs incurred to prepare an EIS. USDOT's NEPA regulations should not require State DOTs to do so.

- **Extraordinary Circumstances:** Proposed section 13.17(b) would provide extraordinary circumstances that an OA must consider before applying a categorical exclusion (CE) listed in proposed Appendix A. The word "substantial" is used to describe threshold considerations for most of the extraordinary circumstances.[4] This term is ambiguous, and there is inadequate record support to clarify how OAs will or should interpret the term. AASHTO is concerned that this expanded list of extraordinary circumstances could create significant delays by requiring OAs to evaluate whether extraordinary circumstances are present even where an action has no potential for causing environmental impacts that may be significant. This list of extraordinary circumstances could prevent many routine actions from qualifying for CEs and could increase the risk of litigation when OAs rely on CEs. For example, some of the "unique" characteristics described in proposed section 13.17(b)(3)(iv)—e.g., park land, sole source aquifers, coastal zones, prime agricultural land, and historic and cultural resources—are common and widespread. AASHTO suggests USDOT work with State DOTs and other stakeholders to develop an appropriate list of extraordinary circumstances.

- **NEPA Assignment:** The Preamble to the NPRM states that "the definition of 'applicant' does not include States that are assigned environmental review responsibilities pursuant to a memorandum of understanding executed pursuant to statutory authority under 23 U.S.C. 326 and 327. States that carry out such assignments are deemed to be OAs for purposes of this part."[5] This is an important aspect of the proposed definition of applicant and should be included within the text of the definition in the final rule, with the following modifications:

  > "Applicant means an individual; Federal agency, State, Tribal or local government; corporation; company; or any other party seeking an approval, financial assistance, special permit, waiver, certification, or other action from an OA. <u>Applicant does not include a State to the extent that the State is implementing its assigned environmental</u>

review responsibilities pursuant to a memorandum of understanding executed pursuant to statutory authority under 23 U.S.C. 326, 23 U.S.C. 327, or both."

AASHTO recommends this change to proposed section 13.3(a) to more accurately reflect the roles and responsibilities of States with NEPA assignment. In addition, AASHTO is concerned that the proposed rule does not address adequately how it applies to States with NEPA assignment. The proposed rule contains Departmental procedural requirements that would be impractical or illogical for States with NEPA assignment to comply with—for example, approval from the Assistant Secretary or OA Administrator to exceed page and time limits,[6] Office of Policy notifications,[7] internal review and approval processes for EISs,[8] and development of implementing procedures.[9] Obtaining approval to exceed page limits or time limits from the Assistant Secretary for Transportation Policy could be a lengthy and cumbersome process that could cause project delays; it also would be inconsistent with fundamental goals of the NEPA assignment program. USDOT should clarify that these Departmental procedural requirements do not apply to States with NEPA assignment.

In addition to these top priority concerns, AASHTO offers the following comments on other parts of the NPRM:

APPLICABILITY (SECTION 13.1)

AASHTO suggests USDOT revise proposed section 13.1 to identify and describe actions that do not meet the CEQ definition of "major Federal action" and, therefore, would not be subject to NEPA.

Explanation and Details: The Preamble states that proposed section 13.1 is intended to be consistent with the CEQ definition of "major Federal action,"[10] particularly by clarifying that loans and loan guarantees may be actions subject to NEPA when the OA exercises sufficient control and responsibility over the effects of such assistance.[11] The CEQ definition cites examples of loan guarantee programs administered by the Farm Service Administration and the Small Business Administration,[12] but does not address USDOT loan or loan guarantee programs. Therefore, under the CEQ provisions for agency-specific implementing procedures,[13] the USDOT NEPA procedures should identify specific loan and loan guarantee programs and other USDOT actions that are excluded from the CEQ definition of "major Federal action."

Aside from its example of Transportation Improvement Plans and Statewide Improvement Plans, which are statutorily exempt from review under NEPA pursuant to 23 U.S.C. 134(q) and 23 U.S.C. 135(k), USDOT does not identify any authorities or decisions that are exempt from NEPA under any of the seven possible bases identified by CEQ's definition.[14] Instead, USDOT recommends that OA NEPA procedures identify any specific additional activities or decisions to which NEPA does not apply, consistent with 40 CFR 1501.1 and 1507.3(d). This approach indicates that all exemptions from NEPA are based in OA-specific authorities, does not comply with the CEQ regulations, and fails to disclose USDOT exemptions from NEPA. In its comments on the CEQ's proposed NEPA regulations, AASHTO explained that its ability to comment on the proposed definition of "major Federal action" was limited by the generality and vagueness of the proposed language.[15] AASHTO had hoped that the USDOT NEPA procedures would resolve

this issue in favor of clarity with regard to the applicable authorities. Instead, USDOT has made the situation less clear by deferring action to future OA-specific NEPA procedures.

ENVIRONMENTAL REVIEW POLICY (SECTION 13.5)

AASHTO supports the environmental review policies described in proposed section 13.5. AASHTO suggests USDOT incorporate section 101 of NEPA into its environment review policies to be consistent with the statute as a whole.

Explanation and Details: Under the current USDOT NEPA Order, USDOT has maintained a policy "to integrate national environmental objectives into the mission and programs of the Department and to," *inter alia*, "avoid or minimize adverse effects wherever possible" and "restore or enhance environmental quality to the fullest extent practicable."[16] In proposed section 13.5(a), USDOT proposes to replace this longstanding statement of policy with a more concise statement that "the Department will integrate Federal environmental objectives into the programs of USDOT to ensure the safest, most efficient and modern transportation system in the world, while considering measures to avoid, minimize, or compensate for adverse environmental effects wherever practicable, consistent with other essential considerations of national policy." While AASHTO supports maintenance of the safety and efficiency of our transportation system, USDOT's environmental policy should support more than the mere consideration of measures to avoid, minimize, or compensate for adverse environmental effects. Rather, to be consistent with NEPA as a whole, USDOT's environmental review policy should be read together with NEPA section 101.

AASHTO supports the Department's policy of conducting a single environmental review process, to the maximum extent possible, to meet all applicable requirements for environmental studies, reviews, and consultations.

AASHTO supports the use of sound science, reliable data, and a systematic interdisciplinary approach to the environmental review process, including the use of geographic information systems. AASHTO appreciates USDOT's policy of support for "meaningful, proactive, open, and transparent public participation and collaboration with affected and interested stakeholders, including Federal agencies, States, Tribes, localities, and the public in its environmental decision-making process to avoid, minimize, and compensate for impacts."[17]

SENIOR AGENCY OFFICIAL (SECTION 13.7(A))

AASHTO recommends that USDOT further delegate the "senior agency official" duties from the Assistant Secretary for Transportation Policy to other senior officials in the Office of Policy and OA leadership.

Explanation and Details: Proposed section 13.7(a) would identify the Assistant Secretary for Transportation Policy as USDOT's "senior agency official" and would provide for accountability for agency NEPA compliance to senior agency officials, consistent with the updated CEQ regulations.[18] When a lead agency determines that an environmental review milestone will be missed, the lead agency must elevate issues to the Assistant Secretary for resolution.[19] The

Assistant Secretary would be solely responsible for approving time and page limit extension requests for EISs.[20] For environmental assessments (EAs), time and page limit extensions must be approved by the Assistant Secretary or the OA Administrator when the Administrator has been designated as a senior agency official for the OA.[21]

AASHTO does not support the CEQ regulations' requirement that an agency obtain written approval from a senior agency official to exceed page and time limits. While AASHTO recognizes that page and time limits are appropriate as benchmarks, AASHTO remains concerned that appeal to the Assistant Secretary presents an additional procedural step that is an unnecessary administrative burden and will cause project delay. CEQ has indicated that multiple individuals may carry out senior agency official responsibilities in agencies that have subunits with their own agency procedures or NEPA compliance programs.[22] Therefore, AASHTO recommends that the scheduling, page limitation, and issue resolution duties of the senior agency official be further delegated to appropriate senior officials who are tasked with managing efficient, effective environmental review processes for USDOT.

OA PROCEDURES (SECTION 13.7(E))

AASHTO requests USDOT revise proposed section 13.7(e) to identify the USDOT and OA NEPA procedures that are inconsistent with the CEQ regulations.

Explanation and Details: In response to CEQ's proposed update of its NEPA procedures, AASHTO requested clarification that existing rules would remain in place until federal agencies finalize their own NEPA rules and implementing guidance.[23] Instead, CEQ's final rule provided that CEQ's regulations "apply to any NEPA process begun after September 14, 2020."[24] Moreover, where "existing agency NEPA procedures are inconsistent with" the CEQ regulations, those inconsistent CEQ regulations "shall apply . . . unless there is a clear and fundamental conflict with the requirements of another statute."[25] Proposed section 13.7(e)(5) would "authorize OAs, subject to 40 CFR 1507.3(a), to rely on their existing procedures until their new procedures are reviewed and revised, and to use, on a discretionary basis, portions of the Department's procedures to the extent such direction has not been incorporated into the OA's procedures."[26] This provision does not provide necessary clarification regarding the regulations that USDOT has found are applicable to environmental reviews begun after September 14, 2020. This lack of clarity could cause confusion and delay in the environmental review process and could create legal risk for project approvals. To alleviate potential confusion and legal risk, AASHTO recommends the Department clarify which, if any, of the existing OA NEPA procedures are inconsistent with the CEQ regulations and identify any clear and fundamental conflicts with applicable statutes.

CATEGORICAL EXCLUSIONS (SECTION 13.17 AND APPENDIX A)

AASHTO supports the list of Departmental CEs in proposed Appendix A, especially CE 5. AASHTO suggests USDOT bolster the administrative record supporting the new and modified CEs to reduce legal risk and uncertainty for OAs and project sponsors.

Explanation and Details: Proposed Appendix A contains new and modified CEs. AASHTO supports proposed CE 5, which would expressly allow one OA to apply the CE of another OA where the OA with the CE provides a written determination that the CE applies to the action and provides expertise in reviewing the action. AASHTO encourages USDOT to consider creating regional or location-specific CEs, analogous to regional general permits under the Clean Water Act Section 404 permitting program.

USDOT requested comments on whether it should create a process for using other agencies' CEs and on the design of any such process.[27] If USDOT creates such a process, in a subsequent rulemaking, it should be designed to facilitate streamlined environmental review and decision-making consistent with the purposes of a CEs. If the process is too burdensome or complicated, it will not be used to its fullest potential. AASHTO also wants to encourage other federal agencies, such as the Departments of Agriculture and the Interior, to make use of USDOT's CEs for transportation-related actions.

AASHTO recommends that USDOT reexamine the administrative record to ensure that it provides adequate support for the CEs in proposed Appendix A. USDOT should ensure the CEs are substantiated consistent with CEQ's Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (75 Fed. Reg. 75628 (Dec. 6, 2010)). For example, while the administrative record lists a number of other agencies' similar CEs, it does not consistently and comprehensively explain other agencies' experiences with those CEs, nor their supporting administrative records. In addition, the administrative record should explain how USDOT professional staff arrived at their conclusions based on their expertise, experience, and judgment.

We also note that the administrative record is stamped "Draft"; USDOT should review the document to ensure all information is complete, accurate, and current. Ultimately, an inadequate administrative record could create litigation risk and uncertainty for OAs and project sponsors, which would undermine USDOT's goal of expediting project delivery.

FINDINGS OF NO SIGNIFICANT IMPACT (SECTION 13.21)

AASHTO supports recognizing that OAs may rely on mitigated findings of no significant impact (FONSIs). However, USDOT should delete proposed section 13.21(b)(2), which would require an OA to ensure that sufficient legal authority and an adequate commitment of resources exist to execute the mitigation measures for a mitigated FONSI.

Explanation and Details: Proposed section 13.21(b) would set forth requirements for mitigated FONSIs. AASHTO supports encouraging OAs to rely on mitigated FONSIs. The process and requirements for a mitigated FONSI should not be so stringent that they unnecessarily limit opportunities for OAs to rely on a mitigated FONSI when a proposed action with mitigation incorporated will not have significant effects.

AASHTO does not support the language in proposed section 13.21(b)(2), which would require an agency to "ensure" that sufficient legal authority and an adequate commitment of resources exist to execute the mitigation measures, including funding as necessary. This information often

is not available at the time of FONSI approval. Nor is it necessary to ensure mitigation actually will be implemented, because proposed sections 13.13(g)(1) and 13.21(b)(3) would require implementation of the mitigation measures. This section also imposes additional requirements beyond those set forth in the CEQ regulations,[28] in violation of 40 CFR 1507.3(b).

AASHTO supports proposed section 13.21(b)(4), which allows for monitoring strategies to be adopted "when the OA deems them appropriate for the particular action and set of mitigation measures." This provides flexibility to OAs to tailor monitoring requirements based on the particular action and mitigation.

NOTICES OF INTENT (SECTION 13.23(B))

USDOT should revise proposed section 13.23(b) to delete the statement that publication of a notice of intent (NOI) initiates an EIS, which is inconsistent with the CEQ regulations.

Explanation and Details: Proposed section 13.23(b) provides that, to "initiate an EIS, the OA must publish a notice of intent (NOI) to prepare an EIS in the Federal Register," and cites 40 CFR 1501.9(d) and 1508.1(u). This is an error that could undermine a significant improvement in the CEQ's updated regulations on scoping. While the 1978 CEQ regulations required the publication of a NOI "[a]s soon as practicable after its decision to prepare" an EIS and "before the scoping process,"[29] the 2020 CEQ regulations provide for a broader scoping process that begins "as soon as practicable after the proposal for action is sufficiently developed for agency consideration."[30] Under the updated CEQ regulations, the NOI does not initiate the development of an EIS. Rather, it serves as formal public notification of a scoping process for a proposal that is "sufficiently developed to allow for meaningful public comment and requires an environmental impact statement," and provides the public with more detailed information regarding that proposal than was previously required.[31] Publication of a NOI should not be described as a pre-condition to initiation of an EIS.

COMPLIANCE WITH OTHER REQUIREMENTS (SECTION 13.27(D))

AASHTO opposes exclusion of Section 4(f) compliance from USDOT's proposed regulations. Section 4(f) compliance should be integrated with the NEPA process, consistent with congressional direction and the CEQ regulations.

Explanation and Details: Proposed section 13.27(d) provides that "the FEIS should reflect compliance or plans for compliance with the requirements of other applicable environmental laws, regulations, and orders, such as those listed in Appendix C of this part." While this provision applies to the "fullest extent possible," in accordance with 40 CFR 1502.24, the Preamble notes that the proposed rule "would not include section 12 of the 1985 procedures, 'Determinations Under Section 4(f) of the DOT Act,' as discussion of determinations under Section 4(f) is outside the scope of the Department's NEPA implementing procedures."[32] AASHTO opposes this exclusion of Section 4(f) compliance from the NEPA process, as it is inconsistent with 40 CFR 1502.24 and other provisions of the updated CEQ regulations that emphasize integration of the NEPA process with related authorizations.[33] It is also inconsistent with direction from Congress, which emphasizes the efficient integration of compliance with

NEPA, Section 4(f), and other applicable authorities. For example, section 1301 of the Fixing America's Surface Transportation (FAST) Act amended Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303) by directing USDOT to align to the maximum extent practicable the procedures to satisfy the requirements of Section 4(f), NEPA, and Section 106 of the National Historic Preservation Act in coordination with the Department of the Interior and the Advisory Council on Historic Preservation for the purpose of accelerating project delivery.

OFFICE OF POLICY NOTIFICATION (SECTION 13.27(F))

AASHTO requests USDOT remove the proposed requirement of additional policy and legal review at the Department level for many EISs.

Explanation and Details: Proposed section 13.27(f) would require OAs to notify the Office of Policy of Final EISs for "actions involving novel or emerging technology, methodology, or science; actions opposed on environmental grounds by a Federal, State, Tribe, or local government or agency; or, [*sic*] actions opposed by a substantial number of the persons affected by such action or actions." The Office of Policy would then coordinate with the USDOT Office of the General Counsel to ensure compliance with legal requirements, as provided in proposed section 13.7(b). This would be in addition to legal sufficiency review required by the OA's chief counsel or designee.[34]

AASHTO is concerned that the proposed regulations would create too many coordination requirements with the Office of Policy and the USDOT Office of the General Counsel. Project sponsors already face a challenge in coordinating with multiple levels of review within an individual OA. Moreover, USDOT officials are always able to ask the Department's lawyers to look at issues when they consider that to be appropriate. OAs have been largely successful in managing the environmental review process and producing legally defensible NEPA documents under USDOT's existing procedures. Requiring additional policy and legal review at the Department level for many EISs is contrary to USDOT's stated goals of improving efficiency and streamlining the environmental review process. It will also make it more difficult for OAs to meet the new two-year time limit for publication of an EIS.[35]

RE-EVALUATION AND SUPPLEMENTATION (SECTION 13.33)

AASHTO supports the re-evaluation and supplementation provisions in proposed section 13.33.

Explanation and Details: AASHTO supports proposed section 13.33(a), which would change the interval for preparing a re-evaluation from three years to five years. AASHTO also supports proposed section 13.33(b), which would align USDOT's supplementation criteria with the CEQ regulations.[36] Confusion about the applicable supplementation criteria has been an issue in litigation.[37]

EMERGENCY ACTIONS (SECTION 13.35)

AASHTO recommends USDOT clarify its proposal for emergency alternative arrangements for NEPA compliance, including allowing for emergency EA/FONSIs.

Explanation and Details: Proposed section 13.35 would establish procedures for taking emergency actions. Alternative arrangements to comply with NEPA for emergency actions are provided for by 40 CFR 1506.12, which CEQ updated to clarify that any alternative arrangements for NEPA compliance must comply with section 102(2)(C) of NEPA.[38] Section 1432 of the FAST Act provides that alternative arrangements for an emergency under 40 CFR 1506.11 (as in effect on the date of enactment of the FAST Act) shall apply to reconstruction of transportation facilities under section 1432(a), and the reconstruction shall be considered necessary to control the immediate impacts of the emergency. Proposed section 13.35(b) would allow for alternative arrangements for actions with significant or potentially significant environmental effects. Consistent with CEQ's update to its provision for emergencies, USDOT should clarify that alternative arrangements are still meant to comply with the requirement in NEPA section 102(2)(C) for a "detailed statement."

Proposed section 13.35(c) would provide that the OA should prepare a focused EA when the emergency action's environmental impacts are not significant and the action cannot be categorically excluded. To provide greater flexibility in emergency circumstances, USDOT should allow OAs to follow alternative arrangements for preparing an EA. To reflect the CEQ provision for alternative arrangements for compliance with NEPA section 102(2)(C), the Office of Policy could be tasked with developing alternative arrangements for emergency EA/FONSIs in consultation with the OAs.

To conclude, thank you for the opportunity to provide comments on USDOT's proposed updates to its NEPA procedures. Please note that this comment letter reflects the consensus among AASHTO's membership and that individual State DOTs may submit separate comments on the NPRM. If you have any questions or would like additional information, please contact Melissa Savage, Director of the AASHTO Center for Environmental Excellence at (202) 624-3638.

Sincerely,

Victoria F. Sheehan
President, American Association of State Highway and Transportation Officials
Commissioner, New Hampshire Department of Transportation

[1] 85 Fed. Reg. at 74651. See also 49 CFR 5.13(i)(3) (requiring a minimum 45-day comment period for significant rules).
[2] 40 CFR 1502.11(g).
[3] 85 Fed. Reg. at 74653.
[4] See proposed section 13.17(b)(2)–(5).
[5] 85 Fed. Reg. at 74644.
[6] Proposed sections 13.19(c), 13.19(d), 13.23(f), 13.23(g).
[7] Proposed sections 13.15(d), 13.23(k)(2), 13.27(f), 13.33(b), 13.35(b).
[8] Proposed section 13.27(e).
[9] Proposed section 13.7(e).
[10] 40 CFR 1508.1(q).
[11] 85 Fed. Reg. at 74644.
[12] 40 CFR 1508.1(q)(1)(vii).
[13] 40 CFR 1507.3(d).
[14] See 40 CFR 1508.1(q)(1)(i)–(vii).
[15] See AASHTO Comments on Proposed Rulemaking (Docket No. CEQ-2019-0003, March 4, 2020) ("The language can be read to be quite expansive, such that many federal decisions would no longer be supported by the analytical and public involvement features of NEPA."). AASHTO's comments on CEQ's Advanced Notice of Proposed Rulemaking and Notice of Proposed Rulemaking regarding revisions to its NEPA implementing regulations are attached to this letter.
[16] USDOT Order 5610.1C § 2.a.
[17] 85 Fed. Reg. at 74644.
[18] See 40 CFR 1508.1(dd).
[19] Proposed section 13.11(a)(8).
[20] Proposed section 13.23(f), (g).
[21] Proposed section 13.19(c), (d).
[22] 85 Fed. Reg. at 43315 (July 16, 2020).
[23] See AASHTO Comments on Proposed Rulemaking (Docket No. CEQ-2019-0003, March 4, 2020).
[24] 40 CFR 1506.13.
[25] 40 CFR 1507.3(a).
[26] 85 Fed. Reg. at 74645.
[27] 85 Fed. Reg. 74647–48.
[28] See 40 CFR 1501.6(c).
[29] 40 CFR 1501.7 (1978).
[30] 40 CFR 1501.9(a).
[31] 40 CFR 1501.9(d).
[32] 85 Fed. Reg. at 74650.
[33] See 40 CFR 1501.2(a), 1501.7(i), 1501.9(f), and 1508.1(c).
[34] See proposed section 13.27(e).
[35] See 40 CFR 1501.10(b)(2) and proposed section 13.23(g).
[36] See 40 CFR 1502.9(d)(1).
[37] See, e.g., *Friends of the Capital Crescent Trail v. Federal Transit Administration*, 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.").
[38] 85 Fed. Reg. at 43339.