

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC

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May 12, 2004

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*Via Hand Delivery*

I-25 Project Office  
c/o Wilson & Company  
455 East Pikes Peak Avenue, Suite 200  
Colorado Springs, Colorado 80903

**Re: I-25 Environmental Assessment**

Dear I-25 Project Office:

1..... This law firm represents the Old North End Neighborhood (the "Old North End"), a not for  
2 profit association of approximately 1,500 households located in a historic neighborhood near  
3....downtown Colorado Springs. The Old North End is generally bounded by Uintah Street to the  
4 south, Wahsatch Street to the east, Monroe Street to the north, and Monument Valley Park to the  
5....west. The Old North End has a long history of public involvement in matters concerning Interstate  
6 25 ("I-25").<sup>1</sup> These comments regarding the draft Environmental Assessment and Section 4(f)  
7....Evaluation ("EA") for the proposed expansion of I-25 are submitted on behalf of the Old North End  
8 in accordance with the National Environmental Policy Act ("NEPA") and its implementing  
9....regulations.

10

## 11. I. Introduction

12

13... The City of Colorado Springs ("the City") was founded in 1871 by General William  
14 Jackson Palmer. Located just north of Colorado College, many of the Victorian homes of the  
15...Old North End were constructed in the 1890s during the first mining boom. Later, residents built  
16 homes in other styles that have added to the attractive and distinctive residential character of the  
17...Old North End. Today, the Old North End is a diverse neighborhood with property owners and  
18 renters who encompass a wide range of incomes, age groups and demographics. The  
19...neighborhood also includes important historical properties and buildings, including several  
20 churches and schools. The Old North End includes also includes an area listed on the National  
21...Register of Historic Places--the North End Historic District, an area roughly bounded by  
22 Monument Valley Park to the west, Uintah to the south, Nevada to the east and Madison to the  
23...north, which was listed on December 17, 1982.<sup>2</sup> Further detail on the history of the Old North  
24 End is included in the Historic Resources Survey Report ("HRSR") prepared in connection with

<sup>1</sup> See, Attachments 1 to 3. The Old North End has found CDOT to be unresponsive to its concerns. For example, in March 2001 CDOT's Region 2 Director Robert Torres responded to a query sent by State Representative David Schultheis on behalf of neighbors by requesting a "generic" letter for his signature. See, Attachment 4.

<sup>2</sup> See, Attachment 5.

## RESPONSE

Line 20: Potential impacts to historic resources, including the North End Historic District, were examined and are reported in the EA.

Footnote 1: CDOT disagrees with the assertion that it has been unresponsive. CDOT has held numerous meetings with Old North End Neighborhood representatives, has listened to their input, provided materials, and prepared two studies that exclusively addressed Old North End Neighborhood concerns.

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ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 2

1.... this project.<sup>3</sup> In the fall of 2000, the Old North End Neighborhood was protecting by zoning  
2 under the City's Historic Preservation Overlay Zone.<sup>4</sup>  
3.....  
4 In 1907, General Palmer donated two linear miles of property along the banks of  
5.... Monument Creek to the people of Colorado Springs as an urban park, subject to the requirement  
6 that the land be kept as a public park and the express deed restriction "that no roads or streets  
7.... shall hereafter be opened either lengthwise or across Monument Valley Park."<sup>5</sup> In response to a  
8 past threat of encroachment from I-25, the League of Women Voters and the Springs Area  
9.... Beautiful Association successfully sued the City in 1974 to enforce this deed restriction.<sup>6</sup> Today,  
10 this natural city park borders the west side of the Old North End and contains ballfields and  
11.. playgrounds. Monument Valley Park is eligible for listing on the National Historic Register.  
12  
13... ..I-25 also parallels the thirteen-mile Pikes Peak Greenway trail that forms the spine of the  
14 City's multi-use trail system and is heavily used by runners, walkers and bicyclists. Moreover,  
15....the Pikes Peak Greenway will soon connect to a thirty-acre downtown park that the City is  
16 currently constructing on property adjacent to I-25. To be called Confluence Park due to its  
17....proximity to the confluence of Monument and Fountain Creeks, this public gathering place and  
18 adjacent properties will eventually include an outdoor sculpture and water feature, a pedestrian  
19....promenade, and a children's playground, among other amenities.<sup>7</sup> Infill residential development  
20 is also increasing in conjunction with downtown revitalization efforts; the City recently approved  
21....a 10-story high-end condominium project overlooking Monument Valley Park near the Colorado  
22 Springs Fine Arts Center.  
23.....  
24 The idea of protecting neighborhoods is a core value in Colorado Springs, according to  
25... the City's 2001 Comprehensive Plan.<sup>8</sup> Recognizing the importance of neighborhood identity  
26 and integrity, the City has adopted policies to protect the character of established and stable  
27....neighborhoods and mitigate transportation impacts on existing neighborhoods.<sup>9</sup> The  
28 Comprehensive Plan expresses a community desire to mitigate project impacts of proposed  
29....transportation improvements on neighborhoods using noise reduction measures, among others.<sup>10</sup>

<sup>3</sup> See also Attachment 6.

<sup>4</sup> See, Attachment 7.

<sup>5</sup> See, Attachment 8. See also Attachment 9, Finley, J., "A Little Taste of Country," Cheyenne Mountain Kiva, Vol. 8, No. 1 (Spring 2004).

<sup>6</sup> See Attachment 10 (District Court held that the City "has the fiduciary duty not violate the restrictions set forth in the deeds, nor to do or attempt to do anything which will cause loss of or diminish use of the park lands, solely as parks.").

<sup>7</sup> Non-profit development of adjacent properties pursuant to a downtown urban renewal plan will include space for artist studios, subsidized artist housing and an outdoor farm and art market.

<sup>8</sup> See, Attachment 11, Excerpts of Comprehensive Plan, at Chapter 2, page 55.

<sup>9</sup> Attachment 11, Policies N 201 & N401 & Strategy T 201g.

<sup>10</sup> Attachment 11, Strategy N 401b.

## RESPONSE

Lines 1-2: The purpose of the Historic Preservation Overlay Zone is to preserve the historic character of the North End Historic District. This is implemented through adherence to design standards that place restrictions on what changes can be made to properties within the overlay district, in terms of building modifications and uses. The Proposed Action would have no effect on these overlay zoning issues.

Lines 6-7: The Proposed Action includes no new roads, streets, or other encroachments onto park land. It should be noted, however, that city roads, streets, and other improvements currently exist on the deeded property.

Lines 7-9: The reference to "a past threat of encroachment from I-25" is incorrect. The lawsuit referenced in Footnote 6 (see Attachment 10) pertained to Palmer Park, several miles to the east of I-25, and was completely unrelated to Interstate 25.

Line 13: Much of the Pikes Peak Greenway trail was planned and constructed in the early 1990's, 30 years after the freeway was built. Thus it would be more accurate to say that the trail parallels I-25.

Line 15 and Footnote 7: Confluence Park was planned in the late 1990's and is under construction at this time. As stated in the EA at page 3-42, "Confluence Park was planned concurrently with the I-25 EA, and recognizing the urban setting of this site, noise-sensitive uses were not incorporated into the park concept." The Proposed Action will not require acquisition of land from the planned park, and would not substantially impair the function and use of activity areas in the park, as noted on EA page 3-44.

Lines 19-20: The proposed infill development cited here is sufficiently distant from I-25 that the proposed action would have no direct or indirect impact upon it.

Line 24: Neighborhood protection was recognized during the development of the EA (see EA p. 3-33, Neighborhoods). The I-25 proposed action is consistent with the City's Comprehensive Plan. The City has reviewed the EA and approved a resolution of support for the proposed action.

Line 27: To protect and minimize impacts to neighborhoods, the proposed action includes noise barriers, landscaping, aesthetic design features and other measures. As noted above, the proposed action is consistent with the City's Comprehensive Plan.

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MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 3

1.... Although easing traffic congestion is one goal of the Comprehensive Plan, it is clear that  
2 development of transportation facilities should minimize disruption to neighborhoods and  
3.... maintain livability.<sup>11</sup> The Comprehensive Plan contemplates “the precedence of neighborhoods  
4 over the automobiles that drive through them.”<sup>12</sup> The Transportation system should minimize  
5.... “noise impacts on residential areas.”<sup>13</sup>  
6  
7..... In November 1990, the Old North End commissioned preparation of the North End  
8 Neighborhood Plan to serve as an official guide for the conservation, preservation and  
9.... enhancement of the North End neighborhood.<sup>14</sup> One of the primary concerns identified in the  
10 Plan was excessive highway noise in the neighborhood and Monument Valley Park, and the Plan  
11.... specifically expressed a desire to mitigate the impacts of noise from I-25.<sup>15</sup> The Plan also  
12 addresses concerns over protecting mountain views and visual impacts from the highway,  
13... supporting landscaping and other enhancements between the highway and the western  
14 neighborhood boundary.<sup>16</sup> The Plan also identified concerns over the possibility of an extension  
15... of Fontanero Boulevard through the neighborhood and park to connect to I-25.<sup>17</sup>  
16  
17.... While the Old North End recognizes the importance of I-25 as a key connector among  
18 communities along the Front Range of Colorado, it is important to remember that the existence  
19... of the neighborhood pre-dates construction of the highway by over sixty years, and that there are  
20 individuals in the neighborhood who have lived there since before I-25 existed. Construction of  
21... Interstate 25 began in the late 1950s, and the highway was opened to the public in the 1960s. EA  
22 at 1-4. Old North End residents and members regularly hike, run, walk, pets, bicycle and enjoy  
23... quiet contemplation in the neighborhood, in Monument Valley Park and on the Pikes Peak  
24 Greenway. During the summer months, Old North End residents sit in their yards and on decks  
25... and keep their windows open for cooling breezes and fresh air.  
26  
27.... The final form of the I-25 widening project and associated mitigation will directly impact  
28 the quality of life in the Old North End and its members, and the decisions made during this  
29... process will influence land use, neighborhood stability, and environmental health in Colorado  
30 Springs for decades to come. It is with this in mind that the Old North End seeks additional  
31... study and mitigation of the significant impacts that will be caused by the expansion of I-25.

<sup>11</sup> Attachment 11, Chapter 3, Objective T2.

<sup>12</sup> Attachment 11, Policy T 201.

<sup>13</sup> Attachment 11, Strategy T 201b.

<sup>14</sup> See, Attachment 12.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 70.

<sup>17</sup> *Id.* at 63.

## RESPONSE

Lines 7-8: It should be noted that the North End Neighborhood Plan was prepared solely for the use of the North End Neighborhood residents, and has not been adopted by the City. Therefore, contrary to the implication in the statement (“to serve as an official guide...”), the plan has no official status.

Line 11: The EA includes mitigation to protect portions of Monument Valley Park. No mitigation is proposed for the Old North End Neighborhood, where predicted year 2025 traffic noise due to I-25 would not exceed the CDOT noise abatement criterion of 66 dBA. Noise levels in the Old North End Neighborhood were studied extensively. Existing levels were found to be 54 dBA and 57dBA at two Old North End locations, as stated in the EA on page 3-65. Noise levels were predicted to be 55 dBA and 59 dBA at the same locations in the year 2025, with implementation of the Proposed Action. Also, the cumulative impact of the Safety Improvements and Capacity Improvements was predicted to be an increase of 5 to 6 dBA between 1990 and 2025, which would not exceed CDOT’s 10 dBA increase criterion.. This information is provided in EA Appendix 3, on page 18 of the *Noise Impacts Technical Memorandum*.

Line 12: Neither the highway nor any mitigation proposed in the EA would block mountain views from the Old North End Neighborhood. There are few vantage points from the neighborhood where I-25 and the proposed noise barriers protecting Monument Valley Park would be visually apparent because the neighborhood is located more than 800 feet distant from the highway and the view is obscured by numerous mature trees in Monument Valley Park and along Monument Creek, located between the highway and the neighborhood. The proposed action is therefore consistent with this neighborhood goal.

Lines 14-15: The Proposed Action does not provide for the extension of Fontanero. That potential extension is not included in PPACG’s fiscally-constrained regional long-range transportation plan (*Destination 2025*) or the FY 2004-2009 Transportation Improvement Program.

Lines 18-19: The EA recognizes that the neighborhood predates I-25. This fact was considered in the evaluation of direct, indirect and cumulative impacts of the Proposed Action. Many of the homes in this neighborhood are 50 to 100 years old. The highway was opened in 1960 (EA at 3-5), and thus is only 44 years old. It has been determined, however that the Proposed Action would have no effect on historic properties of either the North End Historic District or any of the individual contributing elements within it.”

Lines 22-25: The statement is made that Old North End residents “regularly...enjoy quiet contemplation in the neighborhood.” But comments received from the President of the Old North End Neighborhood indicate that “Homes listed for sale in the neighborhood have had contracts pulled because of noise.” (S. Rodemer e-mail, April 28, 2004). It should be noted that this neighborhood is located at the center of the state’s second-largest metropolitan area, is near the main entryways to downtown, Colorado College, and many cultural sites, and does, therefore, experience noise levels consistent with a busy urban environment.

Lines 27-31: The Federal Highway Administration has determined that sufficient studies have been prepared to assess the proposed action’s direct, indirect and cumulative impacts to the Old North End Neighborhood. After a thorough, comprehensive and independent review of the EA, its associated studies and documentation, and all comments received during the 45-day public review period, FHWA has determined that there are no significant impacts associated with the implementation of the Proposed Action.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 4

1..... **II. An Environmental Impact Statement Must Be Prepared for I-25**  
2 **Improvements Through the Colorado Springs Urbanized Area**  
3.....

4 Section 102(2)(C) of the National Environmental Policy Act of 1969 (“NEPA”) requires  
5..... that all federal agencies include a detailed statement of environmental consequences — known  
6 as an environmental impact statement (“EIS”)— “in every recommendation or report on  
7..... proposals for legislation and other major Federal actions significantly affecting the quality of the  
8 human environment.” 42 U.S.C. § 4332 (2)(C). Congress intended that NEPA review would  
9..... help “prevent or eliminate damage to the environment and biosphere by focusing Government  
10 and public attention on the environmental effects of proposed agency action.” *Marsh v. Oregon*  
11...*Natural Resource Council*, 490 U.S. 360, 371 & n.14 (1989) (citations and quotations omitted);  
12 *see also Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 349 (1989). NEPA  
13...ensures that federal agencies elevate the consideration of the environmental effects of their  
14 proposed actions to the same level as other, more traditional, factors.  
15.....

16 Preparation of an EIS serves two primary purposes: (1) “to inject environmental  
17...considerations into the federal agency's decisionmaking process,” and (2) “to inform the public  
18 that the agency has considered environmental concerns in its decisionmaking process.”  
19...*Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981); *see also Sierra Club v.*  
20 *Hodel*, 848 F.2d 1068, 1088 (10<sup>th</sup> Cir. 1988). An EIS also enables critical evaluation of an  
21...agency's actions by those outside the agency. *Catron County Bd. Of Comm'rs v. U.S. Fish &*  
22 *Wildlife Serv.*, 75 F.3d 1429 (10<sup>th</sup> Cir. 1996); *Environmental Defense Fund, Inc. v. Froehlike*, 473  
23...F.2d.346, 351 (8<sup>th</sup> Cir. 1972). Federal agencies must comply with NEPA “to the fullest extent  
24 possible.” 42 U.S.C. § 4332.  
25.....

26 The EA in this case establishes that the expansion of I-25 is a “major federal action  
27...significantly affecting the quality of the human environment,” and therefore the Federal  
28 Highway Administration (“FHWA”) must direct the Colorado Department of Transportation  
29... (“CDOT”) to prepare an EIS before proceeding with the project.<sup>18</sup> The proposed action falls  
30 within or contains features similar to several categories of projects that the FHWA has  
31...determined normally require an EIS. The magnitude, geographic scope and projected cost of the  
32 actions contemplated in the EA, along with the unusual length of the EA, all support the  
33...conclusion that the environmental impacts are likely to be significant and an EIS should be  
34 prepared. CDOT itself has typically prepared EISs for projects of this magnitude in the past,  
35...while reserving EAs for projects with considerably fewer and less severe impacts. Moreover,  
36 careful consideration of the factors bearing on the significance determination demonstrates that  
37...the direct, indirect and cumulative impacts of the proposed action rise to a level where Congress  
38 contemplated preparation of an EIS. CDOT has proposed to mitigate some of the significant  
39...impacts of its proposal, but the mitigation measures are too speculative to remove this project

<sup>18</sup> See, e.g., *Davis v. Mineta*, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002).

## RESPONSE

Lines 4-24: The preparation of an EA for this project is consistent with 23 CFR 771, the Federal Highway Administration (FHWA) regulations that implement NEPA, and 40 CFR 1500 to 1508, the regulations of the Council of Environmental Quality. The decision to prepare an EA was made by FHWA. The case law, while accurately quoted, presents only a partial picture of NEPA’s purposes. It should be noted that NEPA does not mandate particular results but simply prescribes the necessary process. NEPA requires that the agency take a hard look at environmental consequences and ensure that environmental information is available to public officials and citizens before decisions are made. However, NEPA does not require an agency to elevate environmental concerns over other considerations. *All Indian Pueblo Council v. U.S.*, 975 F.2d 1437 (10th Cir. 1992).

Lines 26-27: The Federal Highway Administration disagrees with the statement that, “The EA in this case establishes that the expansion of I-25 is a ‘major federal action’ significantly affecting the quality of the human environment...” To the contrary: after a thorough, comprehensive, and independent review of the EA, its associated studies and documentation, and all comments received during the 45-day public review period, FHWA has determined that there are no significant impacts associated with the implementation of the Proposed Action.

Lines 29-31: In accordance with 23 CFR 771.115 (a) paragraphs (1) to (4), the proposed action does not fall into a category for which an EIS is normally required. The Proposed Action was not: “(1) A new controlled access freeway, (2) a highway project of four or more lanes on a new location, (3) new construction or extension of fixed rail transit facilities, or (4) new construction or extension of a separate roadway for buses or high occupancy vehicles not located with an existing highway facility.”

Line 31: The magnitude, geographic scope and projected cost of the action are not determinants of significant impacts. Significance is determined on a case-by-case basis, based on the context and intensity of the impacts (40 CFR 1508.27). For example, if two” identical actions were proposed in two locations, and one did irreparable harm to an endangered species while the other did not, the former would definitely have significant impacts, but the same cannot necessarily be said about the latter.

Line 32: The Council on Environmental Quality in 1981 published a list of 40 most frequently asked questions (published at 46 Fed Reg 18026) including Question 36b which asked: “Under what circumstances is a lengthy EA appropriate?” The CEQ answer was that, “Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects.” The I-25 EA is unusual not because it was complex, but because it involved several issues that each required extensive discussion, including a programmatic biological opinion, a programmatic agreement regarding Native American consultation, a draft Section 4(f) evaluation, and documentation of U.S. Air Force Academy issues.

Lines 34-38: FHWA and CDOT prepare the appropriate NEPA documentation based upon the probable impacts of specific projects. The level of documentation is not arbitrarily driven by what may be “typical,” but by the context and intensity of impacts likely to be associated with an action.

Line 39: Specified mitigation measures contained in the EA are not “speculative”, but are legally binding obligations that must be incorporated into a federal action. All EA mitigation commitments were made available for public and agency review.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 5

1.... from the significance category. For these and the other reasons detailed in these comments, the  
2 Old North End requests that the FHWA direct CDOT to issue a Notice of Intent to prepare an  
3.... EIS before implementing the proposed action.

4  
5..... **A. The Proposed Action Qualifies as a Major Federal Action under Federal**  
6 **Highway Administration Regulations**

7.....  
8 FHWA regulations identify examples of actions that normally require preparation of an  
9.....EIS. *See*, 23 C.F.R. § 771.115(a). Two of the examples identified by the regulations apply here.  
10 First, the proposed action qualifies as a “highway project of four or more lanes on a new  
11....location.” 23 C.F.R. § 771.115(a)(2). Currently, I-25 is a four-lane highway through most of its  
12 length in the Colorado Springs area.<sup>19</sup> Although widening of the highway will occur over many  
13....years,<sup>20</sup> eventually the proposed action calls for widening I-25 to eight lanes from Briargate to  
14 Highway 24 and at least six lanes between the Town of Monument and the South Academy  
15....Boulevard interchange. EA at 2-2. Therefore, the project contemplates, at a minimum, doubling  
16 the lanes from Briargate south to Fillmore and from Bijou south to South Academy. *Id.*  
17....Increasing the number of lanes from four to eight arguably meets the definition of a “highway  
18 project of four or more lanes on a new location.”

19.....  
20 In addition, projects that involve “[n]ew construction or extension of a separate roadway  
21....for buses or high occupancy vehicles not located within an existing highway facility” normally  
22 require preparation of an EIS. *See*, 23 C.F.R. § 771.115(a)(4). The EA considers two  
23....alternatives in addition to the required “no action” alternative—one alternative with a “high  
24 occupancy vehicle” (“HOV”) or carpool lane and one without such a lane. EA at 2-2. The  
25....proposed action specifically includes an HOV lane as part of regional efforts to offset increases  
26 in regional mobile air emissions. During scoping, the U.S. Environmental Protection Agency  
27.... (“EPA”) interpreted the FHWA regulations to require preparation of an EIS if an HOV lane was  
28 proposed, and expressed its concern that the HOV lanes might be opened to non-HOV traffic in

<sup>19</sup> The stretch from Bijou to Fillmore could be characterized as a six-lane highway due to the recent construction of additional acceleration and deceleration lanes. However, CDOT characterized these additional lanes as “safety improvements” rather than “capacity improvements” when seeking approval for these lanes pursuant to a Categorical Exclusion under NEPA. *See, e.g.*, EA at 1-6 to 1-7. This circumstance will be discussed more fully, *infra*.

<sup>20</sup> According to CDOT, the first phase of the I-25 widening project, and the only portion of the project with currently available funding, is scheduled for construction between 2004 and 2008. The first phase is projected to cost \$120 million out of a total estimated project cost of approximately \$500 million. Thus, it is reasonable to assume that construction of the entire project could last more than a decade without any further environmental review required under NEPA.

## RESPONSE

Lines 17-18: The Federal Highway Administration disagrees with this assertion. The Proposed Action is not a highway project of four or more lanes ‘on a new location.’” The Proposed Action is clearly on an existing location, not a new one. Adding four lanes to the existing Interstate highway within its existing right-of-way is not even “arguably” the same as constructing a “highway project of four or more lanes on a new location.” [emphasis added] If the regulations had intended to apply to the adding of four new lanes to an existing roadway on an existing location, they would have been written to clearly indicate that.

Lines 23-27: The Proposed Action does include the provision for HOV lanes. However, these lanes are part of the proposed lane structure of I-25 and are therefore “within an existing highway facility.” The Federal Highway Administration disagrees with the interpretation of FHWA’s regulations that an EIS is required if an “HOV lane was proposed.” The regulations clearly associate the requirements for an EIS when HOV lanes are “not located within an existing highway facility.” The proposed HOV lanes on I-25 would comprise the leftmost lanes of the highway facility. They would not constitute “a separate roadway,” and they would clearly be located “within an existing highway facility.” [emphasis added]. Therefore, the Proposed Action does not have the characteristics that are cited for projects that normally require an EIS.

Line 25: The comment indicates that the proposed HOV lanes are “part of regional efforts to offset increases in regional mobile air emissions.” HOV lanes are not a committed strategy in the region’s Carbon Monoxide Plan, a part of Colorado’s air quality State Implementation Plan that has been approved by the U.S. Environmental Protection Agency. No emissions reduction credit has been taken for such a strategy, and the plan demonstrates continued attainment of the carbon monoxide standard without depending on any benefits accruing from HOV lanes. In fact, the EA indicates that the use of the seventh and eighth lanes for HOVs only is expected to result in higher pollutant emissions than if the same lanes were open to general purpose traffic (EA at page 2-10), although the resulting emissions still were within the regional carbon monoxide emission budget, and did not result in a modeled hotspot exceedance. If HOV lanes were converted to general-purpose lanes, this would not likely result in a carbon monoxide exceedance.

Line 28: Regarding EPA’s “concern that the HOV lanes might be opened up to non-HOV traffic in the future,” the EA states that there is considerable uncertainty regarding the ultimate success and acceptability of the HOV lanes. For this reason, the EA states that to maintain flexibility regarding the ultimate use of these lanes, they will not be physically separated from the adjacent general purpose lanes.

Footnote 19: Acceleration/deceleration lanes were provided between Bijou and Fillmore due to the short weaving distances between interchanges. This is documented in the CDOT’s I-25 Safety Study (1997). The lanes were not constructed for capacity reasons.

Footnote 20: While it may take many years to complete construction of the improvements, all applicable environmental requirements will be followed at the time of construction, consistent with CDOT procedures and the Environmental Stewardship Guide provisions. This will include obtaining any needed permits and clearances, and responding to evolving conditions such as the listing of a newly endangered species, or changes in the region’s air quality attainment status. Generally, an informal or formal reevaluation of the EA will occur prior to initiation of any construction of the Proposed Action.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 6

1..... the future due to lack of demand.<sup>21</sup> Insofar as the proposed action involves construction of a  
2 new HOV lane, it is the type of project that would normally require an EIS.  
3.....  
4 Finally, the federal Department of Transportation (“DOT”) has adopted a procedure  
5..... providing that “[a]ny action having more than a minimal effect on lands protected under section  
6 4(f) of the DOT Act will normally require the preparation of an environmental statement.” Order  
7..... 5610.1C § 12(a). The EA considered three historic properties subject to the section 4(f) analysis:  
8 (1) the U.S. Air Force Academy; (2) the Works Progress Administration Flood Wall in  
9..... Monument Valley Park; and (3) St. Mary’s Church. The EA does not include a section 4(f)  
10 analysis for Monument Valley Park itself because CDOT summarily determined that proximity  
11..... impacts would cause substantial impairment of park resources. The EA fails to include any  
12 section 4(f) analysis of or discussion of impacts to the North End National Historic District.  
13.....  
14 Monument Valley Park is eligible for listing under the National Register of Historic  
15..... Places “as an important resource in the history of Colorado Springs for its association with  
16 General William Jackson Palmer, founder of Colorado Springs and of the Denver & Rio Grande  
17..... Railroad.” EA at 3-112. The EA concedes that there will be noise and visual impacts to  
18 Monument Valley Park, Dorchester Park and Confluence Park and along the Pikes Peak  
19..... Greenway multi-use trail, and that in places noise levels will exceed the threshold where  
20 abatement is required. EA at 6-2 & 3-67 to 3-69. The EA also includes (with the concurrence  
21.... of the State Historic Preservation Officer) an “adverse effect” determination for the Air Force  
22 Academy, Monument Valley Park, the WPA Wall and the Bijou Street Entrance Gate in  
23..... Monument Valley Park. EA at 3-112. Although the EA summarily concludes that the impacts to  
24 Monument Valley Park will be “not so severe” as to cause substantial impairment, EA at 6-2,  
25..... there are clearly more than minimal impacts to section 4(f) that necessitate preparation of an EIS.  
26  
27..... The Old North End disputes the findings of the section 4(f) analysis, including the  
28 determination that the North End National Historic District will suffer no adverse impacts caused  
29..... by the proposed action. Residents of the Old North End will experience increased noise levels as  
30 a result of the expansion that will interfere with the quiet enjoyment of their homes. Noise will  
31..... also interfere with use of the Colorado Springs Fine Arts Center balcony overlooking Monument  
32 Valley Park<sup>22</sup> and disturb students and faculty at the Colorado College.<sup>23</sup> Increased noise levels

<sup>21</sup> See, Attachment 13. The attachment was received by e-mail and is unsigned and undated. Upon information and belief, CDOT has in its possession the original letter received from the EPA. The Old North End expressly incorporates herein all points made by EPA in Attachment 13.

<sup>22</sup> The Fine Arts Center was listed on the National Register of Historic Places on July 3, 1986 and features a balcony overlooking Monument Valley Park that serves as a location for outdoor receptions and dining. The use of this balcony will be unquestionably affected by increased noise from the highway.

<sup>23</sup> The Colorado College is also eligible for listing on the National Register of Historic Places. EA at 3-121. Among numerous other buildings and facilities, the Colorado College track and athletic fields are located on the eastern edge of Monument Valley Park between Cache La Poudre Street and Uintah Street.

## RESPONSE

Line 5: The requirements of DOT Order 5610.1C were superseded by the regulations at 23 CFR 771 in 1987, as stated in the Preamble to the regulations. FHWA regulations at 23 CFR 771.135(i) state that Section 4(f) evaluations “...should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document.” Therefore, clearly a 4(f) evaluation may be part of an Environmental Impact Statement, an Environmental Assessment or a Categorical Exclusion. “Minimal effects” on Section 4(f) resources is not the criterion for deciding if an EIS is required.

Line 8: It is asserted that the 4(f) evaluation addresses three numbered items, of which number 2 is “the Works Progress Administration Flood Wall in Monument Valley Park.” The statement is incorrect. The portion of the WPA wall to be affected by the Proposed Action is located further south, outside the park boundaries.

Lines 10-11: It appears the comment inadvertently omitted the word “not” and that the sentence was intended to read, “... CDOT summarily determined that proximity impacts would NOT cause substantial impairment of park resources.” This statement is incorrect. FHWA determined that direct impacts to Monument Valley Park had been avoided so there was not a 4(f) use. FHWA also determined that the proximity impacts to the park were not so severe that the functions of the park would be substantially impaired. Therefore, Section 4(f) was not an issue.

Section 4(f) was also not an issue for the North End Historic District, since the Proposed Action would not result in a 4(f) “use” of the District or any of its contributing elements. While there will be noise increases to parks and trails, FHWA has determined that the noise would not substantially impair the use of these facilities. No land from any park or trail will be physically taken. Under 23CFR771.135(p)(2), only if there were a substantial impairment of protected activities, features or attributes of a resource would a “constructive use” occur. Therefore, FHWA has determined Section 4(f) is not applicable with respect to these facilities. An adverse effect under Section 106 does not equate to a “taking” or “use” under Section 4(f). In the case of Monument Valley Park, while the Proposed Action would result in an adverse effect to the Bijou Street Entrance Gate under Section 106, it would not use nor substantially impair this resource and therefore would not result in a Section 4(f) use.

Line 23: The statement that the EA “summarily” made conclusions about Monument Valley Park is not accurate. FHWA’s conclusions were made only after thorough evaluation of the potential impacts to all historic, park and recreation resources, including Monument Valley Park. Impacts and mitigation for Monument Valley Park were determined in consultation with the Colorado Springs Parks and Recreation Department and the Colorado Springs Parks and Recreation Advisory Board. For all historic properties, including Monument Valley Park, Colorado’s State Historic Preservation Officer (SHPO) concurred with the determination of effects. FHWA notified the Advisory Council on Historic Preservation of its adverse effect determinations, and the Council chose not to participate in the consultation, pursuant to 36 CFR 800.6(a)(1)(iii).

The SHPO’s letter of February 2, 2004 stated the following regarding the “adverse effect” to Monument Valley Park: “The National Historic Preservation Act does not provide for language such as ‘minimal adverse effect,’ severe adverse effect,’ and the like. Only ‘no adverse effect’ and ‘adverse effect’ are acceptable. However, in practice this leads to a wide variety of projects being grouped together under the heading of ‘adverse effect.’ In the case of the Bijou Street Bridge and Monument Valley Park/Bijou Street Entrance, the effect is adverse but relatively minor. Clearly it is not in the realm as the demolition of an historic building or structure. However, we feel that the qualities that make the park and the entrance gate eligible are being diminished by this project. In the case of Monument Valley Park itself, only a small portion of the park is being affected by this project. The law still requires us to declare a finding of ‘adverse effect’ on the entire Park even though only a component of the Park is being adversely affected by the proposed project.”

Line 25: Regarding the assertion that “there are clearly more than minimal impacts to section 4(f) [resources]”, please see response to line 5, above.

Line 27: The I-25 Proposed Action would not diminish the architectural characteristics which made the North End eligible for listing as an historic district. Therefore FHWA’s determination of effect for this resource, found in EA Appendix 6, Volume 2, pages 37-38, is “no historic properties affected.” The State Historic Preservation Office concurred with this finding (see February 2, 2004 SHPO letter in EA Section 12).

RESPONSE to Page 6 comments continues on next sheet...

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 6

1..... the future due to lack of demand.<sup>21</sup> Insofar as the proposed action involves construction of a  
2 new HOV lane, it is the type of project that would normally require an EIS.  
3.....  
4 Finally, the federal Department of Transportation (“DOT”) has adopted a procedure  
5..... providing that “[a]ny action having more than a minimal effect on lands protected under section  
6 4(f) of the DOT Act will normally require the preparation of an environmental statement.” Order  
7..... 5610.1C § 12(a). The EA considered three historic properties subject to the section 4(f) analysis:  
8 (1) the U.S. Air Force Academy; (2) the Works Progress Administration Flood Wall in  
9..... Monument Valley Park; and (3) St. Mary’s Church. The EA does not include a section 4(f)  
10 analysis for Monument Valley Park itself because CDOT summarily determined that proximity  
11 impacts would cause substantial impairment of park resources. The EA fails to include any  
12 section 4(f) analysis of or discussion of impacts to the North End National Historic District.  
13.....  
14 Monument Valley Park is eligible for listing under the National Register of Historic  
15..... Places “as an important resource in the history of Colorado Springs for its association with  
16 General William Jackson Palmer, founder of Colorado Springs and of the Denver & Rio Grande  
17..... Railroad.” EA at 3-112. The EA concedes that there will be noise and visual impacts to  
18 Monument Valley Park, Dorchester Park and Confluence Park and along the Pikes Peak  
19 Greenway multi-use trail, and that in places noise levels will exceed the threshold where  
20 abatement is required. EA at 6-2 & 3-67 to 3-69. The EA also includes (with the concurrence  
21 of the State Historic Preservation Officer) an “adverse effect” determination for the Air Force  
22 Academy, Monument Valley Park, the WPA Wall and the Bijou Street Entrance Gate in  
23 Monument Valley Park. EA at 3-112. Although the EA summarily concludes that the impacts to  
24 Monument Valley Park will be “not so severe” as to cause substantial impairment, EA at 6-2,  
25 there are clearly more than minimal impacts to section 4(f) that necessitate preparation of an EIS.  
26  
27..... The Old North End disputes the findings of the section 4(f) analysis, including the  
28 determination that the North End National Historic District will suffer no adverse impacts caused  
29..... by the proposed action. Residents of the Old North End will experience increased noise levels as  
30 a result of the expansion that will interfere with the quiet enjoyment of their homes. Noise will  
31..... also interfere with use of the Colorado Springs Fine Arts Center balcony overlooking Monument  
32 Valley Park<sup>22</sup> and disturb students and faculty at the Colorado College.<sup>23</sup> Increased noise levels

<sup>21</sup> See, Attachment 13. The attachment was received by e-mail and is unsigned and undated. Upon information and belief, CDOT has in its possession the original letter received from the EPA. The Old North End expressly incorporates herein all points made by EPA in Attachment 13.

<sup>22</sup> The Fine Arts Center was listed on the National Register of Historic Places on July 3, 1986 and features a balcony overlooking Monument Valley Park that serves as a location for outdoor receptions and dining. The use of this balcony will be unquestionably affected by increased noise from the highway.

<sup>23</sup> The Colorado College is also eligible for listing on the National Register of Historic Places. EA at 3-121. Among numerous other buildings and facilities, the Colorado College track and athletic fields are located on the eastern edge of Monument Valley Park between Cache La Poudre Street and Uintah Street.

## RESPONSE

See other Responses to Page 6 comments on preceding sheet...

Line 30: Merely experiencing increased noise levels does not constitute a use under Section 4(f). Section 4(f) applies when there is a physical use of a resource protected under Section 4(f), or there is a substantial impairment of the resource which would constitute a “constructive use”. As stated in Answer B to Question #1 in FHWA’s Section 4(f) Policy Paper, “A constructive use of a Section 4(f) site can occur when the capability to perform any of the site’s vital functions is substantially impaired by the proximity impacts from a transportation project. Such substantial impairment would occur when the proximity impacts to Section 4(f) lands are sufficiently serious that the value of the site in terms of its prior significance and enjoyment are substantially reduced or lost.” Constructive use pertains, as stated in the policy, when the “vital functions” are so greatly impaired that the “value of the site ... [is] substantially reduced or lost.” In accordance with 23 CFR 771.135(p)(5), a constructive use (substantial impairment) does not occur when “(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772 ...”.

Since there are no receivers within the North End National Historic District which experience noise levels in excess of the noise abatement criteria due to the Proposed Action, Section 4(f) is not relevant. Dr. Louis Cohn, a nationally recognized noise expert and consultant to the Old North End Neighborhood, in his letter dated May 7, 2004 (attachment #24 to this letter of May 12, 2004), confirms FHWA’s finding that receivers in the Old North End do not exceed the noise abatement criteria. He states that the noise predictions for the Old North End Neighborhood “do not quite rise to the level of impact according to CDOT’s definition.”

Additionally, FHWA regulations at 23 CFR 771(p)(5)(i) state that “a constructive use does not occur when... 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 effect’ or ‘no adverse effect’.” As stated in the EA at page 3-122, the determination of effects from the Proposed Action on the Old North End Historic District (5EP333) was “no historic properties affected.” The SHPO agreed with this determination.

Line 31: Regarding the Fine Arts Center, the Proposed Action would not diminish the characteristics of this resource that make it historic. Therefore FHWA’s determination of effect for this resource, found in EA Appendix 6, Volume 2, page 44, is “no historic properties affected”. The State Historic Preservation Office concurred with this finding (see February 2, 2004 SHPO letter in EA Section 12). The Colorado Springs Fine Arts Center, including its balcony, and Colorado College buildings and facilities such as the track and athletic fields do not exceed the applicable FHWA noise abatement criteria due to the Proposed Action. The Proposed Action includes mitigation for some recreation trails within Monument Valley Park, but other trail segments will exceed the noise abatement criteria. However, FHWA has determined that traffic noise from the Proposed Action will not be so severe that the use of those sections of trail are so substantially impaired that their use would be diminished.

Line 32: Regarding Colorado College, the SHPO letter of February 2, 2004 (in Section 12 of the EA) states, “[W]e concur with CDOT’s assessment that the project shall result in a finding of ‘no historic properties affected’ for... Colorado College...” This determination of effects is due to the fact that the Proposed Action would not diminish the characteristics that make Colorado College eligible for listing on the National Register of Historic Places.

Footnote 21: CDOT did receive from EPA a letter similar to the unsigned, undated e-mail version here. There are many important differences between the two versions, and it is obvious that EPA intended only the signed version to represent its official position.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 7

1.....resulting from the proposed action will negatively impact the experiences of trail users and park  
2 users in section 4(f) properties located along the I-25 corridor. Moreover, construction of a berm  
3.....and noise barrier along I-25 will have more than a minimal effect on historic Monument Valley  
4 Park by: (1) obstructing park user views of Pikes Peak and the mountains; and (2) preventing  
5.....visitors traveling through the City on I-25 from views of the park as General Palmer intended.<sup>24</sup>  
6 Clearly, section 4(f) historic properties will suffer more than minimal effects from the proposed  
7.....expansion.  
8  
9..... Thus, by the standards articulated by the DOT and the FHWA regulations, the proposed  
10 action qualifies on several fronts as a project that normally requires preparation of an EIS. At the  
11.....very least, the FHWA should make any draft Finding of No Significant Impact available for  
12 public review and comment for at least thirty days before making its final determination  
13.....regarding whether to prepare an EIS because the proposed action “is, or is closely similar to, one  
14 which normally requires the preparation of an environmental impact statement under the  
15.....procedures adopted by the agency.” 40 C.F.R. § 1501.4(e)(2)(i).  
16  
17..... **B. The Proposed Action Meets the Threshold Criteria of Significance under**  
18 **NEPA that Requires Preparation of An Environmental Impact Statement**  
19.....  
20 It is undisputed that the proposed action qualifies as a “federal action” because CDOT  
21.....intends to use federal funding. The EA forms the basis for determining whether this project will  
22 be considered “major” in that it could “significantly affect the quality of the human  
23.....environment.” 42 U.S.C. § 4332(2)(C). If so, CDOT and the FHWA are obliged by law to  
24 prepare a “detailed statement on the environmental impact of the proposed action,” or an EIS.  
25.....Id. Council on Environmental Quality (“CEQ”) regulations define “effects” broadly to include  
26 “ecological, aesthetic, historic, cultural, economic, social and health effects.” 40 C.F.R. §  
27.....1508.8. NEPA requires consideration of direct, indirect and cumulative impacts. *See*, 40 C.F.R.  
28 §1508.25(c).  
29.....  
30 The CEQ regulations provide that the term “major” in NEPA simply reinforces the  
31.....phrase “significantly affecting” and does not have any independent meaning of its own. 40

<sup>24</sup> *See*, Attachment 14. In 2001, a “Century Chest” containing letters and other items dating back to 1901 was opened at the Colorado College. Among the articles in the chest was a letter from General Palmer dated August 1, 1901 which states “Before the year is over, I hope to put into effect my original plan of setting aside the ground for a frontal park along the immediate Monument Valley, from near the Antler’s Hotel northward to the upper confines of the town some two miles or more. When undisturbed, shrubbery and wild flowers grow naturally in these creek bottoms without irrigation – making it easier to carry out the purpose of affording an open and verdurous space removed from the dust and noise of the streets and roads, yet readily accessible from all parts of the town – where the citizens can come to walk (not ride or drive as that means dust) and his children to play – and all be refreshed by a little taste of country, without going too far afield.”

## RESPONSE

Line 1: Regarding noise impacts to “the experiences of trail users and park users,” FHWA has determined that the increase in noise and the proximity impacts to trails and parks are not so severe that the functions of the trails and parks would be substantially impaired. Since there is no physical taking and no constructive use, there is no section 4(f) use.

Line 4: It is asserted that a proposed berm and noise barrier will obstruct “park user views of Pikes Peak and the mountains”. Page 3-42 of the EA indicates that the proposed noise mitigation measures would block mid-range views to the west, predominantly of the Interstate,” and that “from most vantage points, these noise barriers would not block the longer views to Pikes Peak and mountains to the west.” FHWA, with the concurrence of the SHPO, determined that visual impacts from the Proposed Action would not result in an adverse effect to any historical property, including Monument Valley Park, because the Proposed Action would not affect the qualities that caused these resources to be listed on, or eligible for, the National Register.

Line 5: The concern about “preventing visitors traveling through the City on I-25 from views of the park as General Palmer intended,” is flawed because I-25 was not planned or constructed for fifty years after Palmer died in 1909. At that time, visitors to the region arrived on Palmer’s Denver and Rio Grande Railroad. This railroad line, still in use today, runs north-south along the park’s western edge and is a source of intense noise that affects both the park and nearby residential areas.

Line 9: FHWA disagrees with the assertion that “the proposed action qualifies on several fronts as a project that normally requires preparation of an EIS.” The three supporting arguments for this statement were all previously refuted: (1) that the project is a new highway of four or more lanes; (2) that the project involves a separate roadway for buses and carpools, NOT located within an existing highway; and (3) that there would be “use” of lands protected under section 4(f) of the DOT Act.

Lines 10-15: There is no basis for requesting a 30-day comment period for a FONSI. No FONSI comment period is required under 40 CFR 1501(4)(e)(2) because the Proposed Action is not, nor is it similar to, one that normally requires an EIS.

Line 20: FHWA agrees that the Proposed Action is a “federal action.”

Lines 21-23: FHWA agrees with the statement that “the EA forms the basis for determining...” whether impacts would be significant or not. During the EA process, it was indicated to the public on many occasions that if significant impacts were determined, an EIS would be prepared. This approach is in accordance with 23 CFR 771.119(i). However, FHWA has determined that the Proposed Action would not “significantly affect the quality of the human environment.”

Lines 25-27: FHWA agrees with the comment regarding what constitutes effects, including direct, indirect and cumulative. The EA examined all of these aspects, in full compliance with NEPA requirements and FHWA regulations at 23 CFR 771.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
A<sup>c</sup> MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 8

1..... C.F.R. § 1508.18. The District Court of Colorado has adopted an interpretation of “major” that  
2 is consistent with the CEQ regulations, holding that a “federal action is ‘major’ where it has a  
3..... significant impact upon the environment.” *City & County of Denver v. Bergland*, 517 F. Supp.  
4 15 (D. Colo. 1981), *aff’d & rev’d in part on other grounds*, 695 F.2d 465 (10<sup>th</sup> Cir. 1982). In  
5..... addition to direct impacts, the significance determination must also take into account indirect and  
6 past, present and reasonably foreseeable future cumulative impacts. 40 C.F.R. § 1508.7. During  
7..... scoping for this project, the EPA advised CDOT that “[n]ormally, widening a congested  
8 interstate highway through a rapidly-growing metropolitan area has required  
9..... preparation of an EIS, to allow all stakeholders to be involved and provide for a broad range of  
10 transportation planning alternatives to be presented and commented on by all affected publics.”<sup>25</sup>  
11.....  
12 In response to an April 12, 2004 Open Records Act request, CDOT identified only two  
13..... previous EAs that have been prepared for highway projects in Region 2<sup>26</sup> since 1990.<sup>27</sup> No EIS  
14 has ever been prepared for any highway project in Region 2. In contrast, CDOT prepared EISs  
15..... for similarly-sized or smaller projects elsewhere in the State of Colorado.<sup>28</sup> Review of data  
16 including the Executive Summaries and Table of Contents of all EISs and EAs that have been  
17..... performed by or on behalf of the Colorado Department of Transportation since 1990  
18 demonstrates that the decision to prepare an EA for a project of the magnitude of the I-25  
19..... expansion is unprecedented. All previous EAs have been prepared for projects that are  
20 considerably smaller with demonstrably less significant environmental impacts. This view is  
21..... also supported by CDOT’s recent decision to prepare an EIS for a remarkably similar project in  
22 northern Colorado, which will evaluate “interchange reconstruction, highway widening and  
23..... capacity improvements that will accommodate multi-modal transportation improvements well  
24 into the future” for a 26-mile stretch of I-25 between Denver and Fort Collins.<sup>29</sup>

<sup>25</sup> See, Attachment 13. The Old North End expressly incorporates by reference all arguments made by EPA herein.

<sup>26</sup> Region 2 includes El Paso, Teller, Fremont, Pueblo, Custer, Huerfano, Las Animas, Crowley, Otero, Bent, Kiowa, Prowers, and Baca Counties.

<sup>27</sup> See, Attachment 15. EAs were issued for the Powers Boulevard Extension North (on the east side of Colorado Springs) on August 18, 1997, and for the juncture of I-25 and State Highway 50 in Pueblo on October 16, 1997.

<sup>28</sup> Attachment 15. Specifically, EISs were prepared by CDOT for the following projects: Region 1: South I-25 Corridor and US 85 Corridor May 1, 2001 FEIS/4(f) and State Highway 9 from Frisco to Breckenridge March 4, 2004 FEIS/4(f). Region 3: State Highway 82- East of Basalt to Buttermilk Ski Area October 5, 1993 FEIS/4(f) and State Highway 82 Entrance to Aspen July 18, 1997 FEIS/4(f). Region 6: I-25, 49<sup>th</sup> & 58<sup>th</sup> Avenue Interchanges November 29, 1990 FEIS, Parker Road/ I-225 Interchange August 9, 1996 FEIS/4(f) and the Southeast Corridor Project December 13, 1999 FEIS/4(f). The undersigned law firm has requested photocopies of records documenting these matters but CDOT has not yet provided the photocopies. This information, which is already in the possession of CDOT, will be submitted to supplement these comments in the near future.

<sup>29</sup> <http://www.i25northforty.com/>.

## RESPONSE

Lines 9-10: It should be noted that the language contained in the signed EPA letter dated July 30, 2001 differs from the language quoted from the unsigned, dated version. The signed letter states that, “Based on our experience, in terms of intensity, widening a congested interstate highway through a rapidly-growing metropolitan area usually facilitates preparation of an EIS to allow stakeholders to be involved and provide for a broad range of transportation planning alternatives to be presented and commented on by all affected publics” [emphasis added]. This distinction is important.

The NEPA process followed by FHWA (an EA, to be followed by EIS if it is determined that the Proposed Action would result in significant impacts) provided full participation by stakeholders and ensured that a broad range of transportation planning alternatives was considered. This process was coordinated extensively with the Pikes Peak Area Council of Governments, which is the designated regional transportation planning agency. Alternative modes, alternative routes, and alternative design configurations were all presented to the public for input at numerous public meetings, and were available on the EA website that was maintained throughout the process.

Line 12: The FHWA is responsible for NEPA and assures that all decisions related to NEPA are carried out uniformly, both throughout the state as well as nationwide. CDOT Region 2 is not given the sole discretion to determine the level of NEPA documentation for Federal-Aid projects, consistent with the process outlined in the Environmental Stewardship Guide. For the record, however, in addition to the two EAs cited, plus this I-25 EA completed in March 2004, Region 2 is currently preparing four more EAs and two EISs.

The determination of whether to prepare an EA or an EIS should be based on the expected project impacts, and not based on geographical area. Therefore it is not pertinent for I-25 in Colorado Springs what NEPA documents were prepared for the Denver metro area.

Line 13-19: The statement that “No EIS has ever been prepared for any highway project in Region 2” is incorrect. In fact, an EIS was prepared for the US 24 Bypass project in Colorado Springs (prior to 1990). FHWA is responsible for the appropriate NEPA documentation for all CDOT projects throughout Colorado, thus assuring a uniform application of NEPA. The appropriate level of NEPA documentation is determined for each project based on the anticipated context and intensity of impacts.

Line 20: The sentence is incorrect. If the referenced projects had resulted in any “significant” impacts, they would have resulted in EISs.

Lines 21-24: Characterization of the North Front Range EIS as a remarkably similar project is incorrect. Included in the North Front Range study are two alternatives that would normally require an EIS: passenger rail service between Fort Collins and the Denver metro area, and a new highway on a new location.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 9

1.....The need for an EIS should come as no surprise to CDOT. The Old North End has  
2 maintained for years that the highway expansion is likely to cause significant impacts to the  
3.....quality of the human environment.<sup>30</sup> Two years ago, during the scoping period for this project,  
4 the EPA also warned that “the I-25 widening project in El Paso County is likely to cause  
5.....substantial environmental impacts that warrant preparation of an Environmental Impact  
6 Statement (EIS).”<sup>31</sup> While it is true that NEPA “requires agencies preparing environmental  
7.....impact statements to consider and respond to the comments of other agencies, not to agree with  
8 them,” *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1038 (10<sup>th</sup> Cir. 2001), it is also  
9.....true that a reviewing court “may properly be skeptical as to whether an EIS’s conclusions have a  
10 substantial basis in fact if the responsible agency has apparently ignored the conflicting views of  
11.....other agencies having pertinent expertise.” *Sierra Club v. United States Army Corps of Eng’rs*,  
12 701 F.2d 1011, 1030 (2d Cir. 1983).

13.....  
14 Although the significance determination is made on a case-by-case basis, the  
15....magnitude and geographic scope of an action are often indicators of the potential for impacts to  
16 the quality of the human environment. The proposed action here clearly qualifies as a “major”  
17....federal action. CDOT officials candidly acknowledge that the proposed action is “one of the  
18 largest transportation construction projects in Colorado Springs’ history.”<sup>32</sup> The proposed action  
19....will increase vehicle capacity on I-25 by 60%, by 2025 accommodating up to 170,000 vehicles  
20 per day as compared with today’s maximum capacity of 110,000 vehicles. EA at 1-6. The  
21....project affects thousands of acres of property along twenty-six miles of highway, including  
22 historic resources and public parks. The project will require the removal of close to 1000 trees  
23....and shrubs, over and above trees removed pursuant to the Bijou to Fillmore safety improvements  
24 performed pursuant to a Categorical Exclusion. CDOT intends to reconstruct seven  
25....interchanges, relocate homes and businesses and build eight noise barriers. The projected cost of  
26 the expansion is estimated at a half a billion dollars, although to date CDOT has only secured  
27....funding for the first phase--one-quarter of the overall project which is expected to last at least  
28 four years.

29.....  
30 The size of the EA itself—400 pages with nearly two thousand pages of technical  
31....appendices--is an indication that an EIS should be prepared. According to CEQ guidance:

32  
33.....Agencies should avoid preparing lengthy EAs except in unusual  
34 circumstances, where a proposal is so complex that a concise  
35.....document cannot meet the goals of Section 1508.9 and where it is

<sup>30</sup> See, Attachments 1 to 3. Indeed, a citizen’s organization formed in the winter of 1990-91 made many of the points raised in comments on the current EA in “A Citizen Researched Assessment of Transportation Issues in Colorado Springs” published in June 1992. See, Attachment 16, which is hereby incorporated by reference herein.

<sup>31</sup> See, Attachment 13, incorporated by reference herein.

<sup>32</sup> See, Attachment 17, February 3, 2004 E-mail.

## RESPONSE

Lines 2-4: FHWA has been aware for some time that the Old North End thinks that an EIS would be appropriate. As stated previously, the significance of the impacts resulting from the Proposed Action was unknown at the start of the environmental analysis, and that is why an EA was prepared.

Line 4: FHWA took EPA’s scoping comments under advisement, but after considering the likely project impacts, determined that it was appropriate to proceed with an EA (to be followed by an EIS if significant impacts were identified in the NEPA process). The reference, and throughout, refers to a draft EPA letter apparently from May 2001. The actual EPA letter to FHWA and CDOT in July 2001 is different, and does not include the statement quoted here. EPA’s official statement did not say that the likely impacts “warrant preparation of an Environmental Impact Statement,” but instead that they would “warrant consideration of preparing an EIS.” [emphasis added]. It should be noted that there is a substantial difference in the meaning of these two statements, and that EPA chose to use the latter statement.

Line 16: The statement that “the proposed action here qualifies as a ‘major’ federal action” assumes that the action would have significant impacts, and it has been noted that FHWA disagrees with that conclusion. On page 7, line 3, it was acknowledged that the word ‘major’ in this context has no other independent meaning.

Line 21: The direct, indirect and cumulative impacts of the Proposed Action have been evaluated in the EA; it is the significance of impacts -- not the number of acres affected -- that is relevant to the decision.

Line 25: The statement that “CDOT intends to... relocate homes...” fails to specify that the number of households being relocated is *five*, over the entire 26-mile corridor. The direct impacts of the Proposed Action were considered in the EA, but none were found to be significant, including the ones listed.

Line 30: FHWA disagrees with the statement that “The size of the EA itself... is an indication that an EIS should be prepared.” The length of the document and of the technical appendices does not indicate that an EIS should be prepared for the specific improvements included in the Proposed Action. Significance of impacts, based on their context and intensity, is instead the appropriate basis for determining whether an EIS is warranted. The length of the EA is indicative, however, of FHWA’s contention that the impacts of the Proposed Action were thoroughly evaluated and fully disclosed. Please see the response to line 32 on page 4.

The size of this EA is due in part to the fact that it was written to be user-friendly, and includes numerous photos, charts and graphs, as well as a summary of impacts to the U.S. Air Force Academy. Also, the Biological Opinion of the U.S. Fish and Wildlife Service accounts for 35 pages by itself. Due to the length of the I-25 corridor, it also took 33 pages to show maps of the corridor at a user-friendly scale. Section 7 (Wetland Findings) and Section 10 (Floodplain Reference Maps) each include at least 33 pages of maps included for the reader’s benefit.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 10

1.....extremely difficult to determine whether the proposal could have  
2 significant environmental effects. In most cases, however, a  
3.....lengthy EA indicates that an EIS is needed.  
4  
5.....CEQ, “Memorandum: Questions and Answers About the NEPA Regulations,” 46 Fed. Reg.  
6 18026 (Mar. 23, 1981), *as amended*, 51 Fed. Reg. 15618 (April 25, 1986). The length of time  
7.....taken to prepare the EA (5 years) also signals this was a project complex enough to demand an  
8 EIS. While the length and complexity of an EA does not mandate preparation of an EIS,<sup>33</sup> these  
9.....factors certainly suggest in this case that the proposed action is a “major federal action  
10 significantly affecting the quality of the human environment.”  
11.....  
12 “Significantly” is defined in regulations implementing NEPA to encompass elements of  
13.....both “context” and “intensity.” 40 C.F.R. § 1508.27. The regulations require that an action be  
14 analyzed in several contexts, considering the geographic setting (such as the affected region and  
15.....the locality) and temporal setting (including both short- and long-term effects). 40 C.F.R. §  
16 1508.27(a). The setting for this project encompasses both the rapidly-growing region in El Paso  
17.....County as well as the many homes, churches, historic structures, and parks adjacent to the  
18 highway along the I-25 corridor. In addition, the proposed action will affect interstate motorists  
19.....traveling north and south through Colorado Springs to other destinations. The selection of an  
20 action to address the purpose and need identified in the EA will have far-reaching implications  
21.....for hundreds of thousands of people, if not millions, for decades to come.  
22  
23.....Intensity generally refers to the severity of the impact. The CEQ regulations set forth  
24 eleven aspects of intensity that should be considered by an agency in determining whether a  
25.....project “significantly affects” the human environment. 40 C.F.R. § 1508.27(b). Importantly, the  
26 significance criteria may be met even if CDOT and FHWA believe that on balance the effects of  
27.....the proposed action will be beneficial. 40 C.F.R. §§ 1508.27(b)(1) & 1508.8. For example, the  
28 easing of traffic congestion itself is an effect of the project on the quality of the human  
29.....environment that can demonstrate the need for an EIS.<sup>34</sup> However, the proposed action is likely  
30 to cause numerous direct adverse impacts including excessive noise in established

<sup>33</sup> *Citizens Advisory Committee on Private Prisons, Inc. v. U.S. Dept. of Justice*, 197 F. Supp.2d 226 (W.D. Pa. 2001).

<sup>34</sup> However, research suggests that easing of traffic congestion will only occur in the short term because “[m]etro areas that invest heavily in road capacity expansion fared no better in easing congestion than metro areas that did not. Since the 1940s, dozens of traffic studies have found that traffic inducement does indeed occur. The most notable of these covers 30 urban areas in California from 1973 to 1990. The authors, UC Berkeley researchers Mark Hansen and Yuanlin Huang, found that at the metropolitan level, every 1% increase in new lane-miles generated a 0.9% increase in traffic in less than five years, which led them to conclude that ‘With so much induced demand, adding road capacity does little to reduce congestion.’ See, Attachment 13 (citing November 1998 Surface Transportation Policy Project study) (see also <http://www.transact.org/report.asp?id=88>).

## RESPONSE

Lines 6-10: Significance of impacts, based on their context and intensity, is the appropriate basis for determining whether an EIS is warranted, not the length of time needed to prepare NEPA documentation.

Lines 9-10: FHWA disagrees with the statement that the Proposed Action is a “major federal action significantly affecting the quality of the human environment.” See previous comment.

Lines 12 to 30: FHWA’s finding that the I-25 Proposed Action would result in no significant impacts is based on the context and intensity of those impacts, consistent with the provisions of 40 CFR 1508.27. During the development of the EA, FHWA and CDOT evaluated the context and intensity of impacts associated with the Proposed Action to determine if it would result in any significant impacts. After a thorough, independent evaluation of the impacts and all agency and public comments, FHWA concluded that the Proposed Action would not result in significant impacts. The decision was not based on a concept that the benefits of the Proposed Action outweigh significant impacts, but rather that no significant impacts were found.

Lines 26-27: FHWA finds that the impacts themselves are not significant and did not engage in a balancing test to reach this conclusion.

Lines 29-30: The direct impacts of the Proposed Action were considered in the EA, including the impacts listed here, but none were found to be significant.

Footnote 34: The discussion of induced demand in the footnote has little to do with the definition of “significantly.” FHWA agrees that in certain cases, induced travel demand may occur. However, studies show that this phenomenon is less pronounced in mature, developed corridors than in newly developing areas. The City of Colorado Springs Comprehensive Plan and the PPACG long-range regional transportation plan both reflect the provision of additional capacity on Interstate 25. Future land use has been planned based upon the assumption that a reasonable level of mobility will be available in the I-25 corridor. The existing facility is inadequate to meet current demand, and cannot accommodate additional demand generated by projected regional population growth of over 200,000 new residents by 2025.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, LLC  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 11

1.... neighborhoods, increases in local smog and air pollution, polluted runoff in Monument and  
2 Fountain Creeks and noise encroachment in Monument Valley Park, the Pikes Peak Greenway  
3..... and Confluence Park.

4  
5..... One factor to be considered in determining significance is “the degree to which the  
6 proposed action affects public health or safety.” 40 C.F.R. § 1508.27(b)(2). Perhaps the most  
7..... significant impacts to public health related to the proposed action are air quality impacts. The  
8 widening of I-25 will enable an additional 60,000 cars per day to travel the highway by 2025.  
9..... EA at 1-6. Motor vehicles are major contributors to ambient levels of airborne carbon  
10 monoxide, nitrogen oxides, particulates and ground-level ozone, all of which are identified as  
11.....criteria pollutants and subject to stringent controls under the federal Clean Air Act. In addition,  
12 motor vehicles emit carbon dioxide, a greenhouse gas thought to be partly responsible for global  
13.....climate change. Residents living near I-25 are likely to be severely impacted by an increase in  
14 ambient air pollution and are entitled to consideration of the health risks posed by toxic air  
15.....constituents emitted from motor vehicles. Despite the importance of air quality, the EA  
16 summarily concludes that there will be “no adverse air quality impacts” with scant attention to  
17.....anything other than carbon monoxide emissions. EA at 3-62.

18  
19.....The EA projects that total mobile source carbon monoxide emissions will rise by 60 tons  
20 per day between 2007 and 2025 as a result of the proposed action, close to the current regional  
21.....emissions budget of 270 tons per day.<sup>35</sup> Colorado Springs is currently in attainment with the  
22 National Ambient Air Quality Standard (“NAAQS”) for carbon monoxide. Although the EA  
23.....predicts that the area’s regional emissions budget will be increased by EPA to accommodate  
24 additional carbon monoxide emissions, an increase of 60 tons of carbon monoxide emissions per  
25.....day, standing alone, is significant. In the absence of an expanded north-south interstate, it is  
26 reasonable to assume that some motorists would choose not to travel by automobile or would  
27.....choose alternatives such as carpooling, transit or other means to avoid congested areas.

28  
29.....Moreover, the expected increase in vehicle miles traveled associated with the highway  
30 widening will likely lead to a significant increase in ground-level ozone. Ozone is formed  
31.... through the reaction of volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”) in  
32 the presence of heat and sunlight; cars and gasoline-burning engines are large sources of both  
33.....VOCs and NOx. Ozone is the prime ingredient of smog and can cause acute respiratory  
34 problems in humans, particularly in children, asthmatics and people exercising in close proximity  
35.....to automobile traffic. Even healthy adults who exercise moderately can experience 15 to over 20  
36 percent reductions in lung function from exposure to low levels of ozone over several hours.<sup>36</sup>

<sup>35</sup> The Colorado Air Quality Control Commission (“CAQCC”) approved a revised plan in December 2003 that increases the carbon monoxide mobile sources emissions budget from 270 tons per day to 531 tons per day, though as of February 2004 this revised plan has not received approval from the EPA.

<sup>36</sup> Information about the health effects caused by ground-level ozone is taken from the EPA’s Fact Sheet located on-line at <http://www.epa.gov/airnow/health/>.

## RESPONSE

Lines 1-3: These issues were evaluated in the EA, and FHWA has determined that the impacts resulting from the Proposed Action would not be significant.

Line 5-17: The EA provided quantitative evaluation of emissions for carbon monoxide, and ozone’s precursor emissions -- hydrocarbons and oxides of nitrogen. Other than carbon monoxide, the Pikes Peak Region has not violated National Ambient Air Quality Standards for criteria pollutants. All six criteria pollutants are monitored in the region’s air but none currently exceed federal air pollution standards. These standards were developed by EPA based on the protection of human health, safety, and the environment. The EA discussed CO at length as is mandated by federal conformity regulations because the region was previously in nonattainment for CO. The most recent violation of the CO standard in the region was about 15 years ago. Carbon dioxide (CO<sub>2</sub>) is not a criteria pollutant. There are no standards for its ambient concentration and no federal requirements for its analysis or emission reductions.

The subject of air toxics was discussed at length in the EA at pages 3-61 to 3-62. To date, the U.S. Environmental Protection Agency has not established health-based standards for ambient air quality concentrations of these pollutants. However, recognizing that there are health risks associated with air toxins from mobile sources, EPA issued regulations in March 2001 establishing a wide range of pollution reduction requirements applicable to vehicle and fuel manufacturers. These regulations establish target dates for reducing various mobile source air toxics over the next two decades. As noted in the EA on page 3-61, national mobile source control programs include “the reformulated gasoline program, a new cap on the toxics content of gasoline, the national low-emission vehicle standards, the Tier 2 motor vehicle emission standards and gasoline sulfur control requirements, and the heavy-duty engine and vehicle standards and on-highway diesel fuel sulfur control requirements.” With these requirements in place, emissions of air toxins in the I-25 corridor will decline over time.

Lines 14-23: Trends in ambient concentrations of particulate matter are presented in EA Appendix 9 at page 2-81. Measured concentrations of PM<sub>10</sub> peak in 1992 at about 80% of the 24-hour standard, and have trended significantly downward since then. In recent years have been no higher than 60 percent of the standard. Concentrations of the finer particles (PM<sub>2.5</sub>), have been measured in the region since 1999 and have not gone over 60 percent of the standard. These issues were not raised in the EA because there is no reason to anticipate a problem in meeting these PM standards for the foreseeable future. The EA at page 3-62 states that “[I]mplementation of dust control practices during construction will be required, in accordance with Colorado Air Quality Control Commission Regulation No. 1 regarding fugitive emissions.

Line 19: The statement that mobile source emissions “will rise by 60 tons per day... as a result of the proposed action” is incorrect. The carbon monoxide (CO) increase of 60 tons per day (EA at 3-58) is due not to the Proposed Action alone, but instead to the cumulative contributions of increased motor vehicle use throughout the region. PPACG, the regional planning agency, projects that total daily traffic regionwide will increase by 81% between the years 2000 and 2025 (EA at 4-15). Mobile source CO emissions on freeways are expected to decline as a portion of total mobile source emissions (EA at 4-12). While daily carbon monoxide emissions in the I-25 corridor are higher for the Proposed Action than for the No Action, total daily carbon monoxide emissions within the Colorado Springs Urbanizing Area are less than the region’s approved CO emissions budget.

Footnote 35: The EA does not rely on any pending EPA approval, but merely reported that the Carbon Monoxide Plan is working through the approval process. The Proposed Action would meet conformity requirements under both the existing and the proposed CO budgets.

# OLD NORTH END NEIGHBORHOOD

MERRILL, ANDERSON, KING & HARRIS, I.L.C.  
ATTORNEYS AT LAW

I-25 Project Office  
Re: Comments re I-25 Environmental Assessment  
May 12, 2004  
Page 12

1..... Based on the air quality data that has been collected since monitoring began in 1996,  
2 Colorado Springs appears to be in compliance with the NAAQS for ground-level ozone.<sup>37</sup>  
3..... However, monitoring has shown that levels of ozone have increased steadily in the region since  
4 1996. According to the Pikes Peak Area Council of Governments (“PPACG”), “[o]zone levels  
5..... in our urbanized area have increased from 69% of the standard in 1998 to 85% of the standard in  
6 2003,” a substantial rise in only five years.<sup>38</sup> PPACG predicts that the Colorado Springs area  
7..... may exceed the 8-hour NAAQS for ozone within three years (by 2007) even if current inspection  
8 and monitoring requirements remain in place.<sup>39</sup> Any violation of the ozone standard would  
9..... require development of an emissions inventory of hydrocarbons and nitrogen oxides and a plan  
10 to reduce emission levels of these pollutants.<sup>40</sup> The EA includes only a cursory, two-sentence  
11...paragraph addressing ozone that clearly does not constitute consideration of potential impacts of  
12 the proposed action.<sup>41</sup>

13....  
14 Particulate matter is categorized by size. Coarse particles (larger than 2.5 micrometers,  
15...or PM<sub>10</sub>) originate from fugitive dust and traffic,<sup>42</sup> while fine particles (less than 2.5  
16 micrometers, or PM<sub>2.5</sub>) often arise from fuel combustion and trucks. Particulate pollution has  
17... been linked to significant health problems, including premature death, acute respiratory  
18 symptoms, aggravated asthma, chronic bronchitis, and decreased pulmonary function.  
19... Particulate pollution is also responsible for visibility impairment. In the past decade, hundreds of  
20 significant new scientific studies have been published on the health effects caused by small  
21... particulate pollution. Despite the fact that automobiles are a major source of particulate  
22 pollution, the EA only fleetingly refers to the issue in the context of fugitive dust from  
23... construction activities. EA at 3-60.

24  
25.....The Colorado Springs area is increasingly close to non-attainment with NAAQS  
26 established pursuant to the federal Clean Air Act, and the proposed action will affect ambient  
27...levels of carbon monoxide, ground-level ozone and particulates. An increase in motor vehicle

<sup>37</sup> On July 16, 1997, the EPA issued revised final National Ambient Air Quality Standards for two criteria air pollutants designated pursuant to the federal Clean Air Act: particulate pollution and ozone (O<sub>3</sub>). 62 Fed. Reg. 38,652; 62 Fed. Reg. 38,856. The NAAQS for ground-level ozone includes a one-hour standard of 0.12 parts per million and a new eight-hour standard of 0.08 parts per million that is more stringent than the one-hour standard.

<sup>38</sup> See, Attachment 18, PPACG Draft Ozone White Paper.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> EA at 3-59 (“Additionally, the region has experienced increasing ozone concentrations within the past decade, and trend analysis strongly suggests the likelihood of an ozone violation before 2010. Stop-and-go traffic results in substantially higher emissions of ozone precursor pollutants (hydrocarbons and oxides of nitrogen) than traffic at moderate, free-flow speeds.”).

<sup>42</sup> Information about the health effects caused by particulate pollution is taken from the EPA’s Fact Sheet located on-line at <http://www.epa.gov/air/urbanair/pm/index.html>.

## RESPONSE

Lines 1-12: The trend of increased ozone concentrations monitored since 1996 clearly has not been caused by the Proposed Action. The region’s air quality planning agency is the Pikes Peak Area Council of Governments (PPACG). PPACG has developed and distributed an informational brochure to elicit public cooperation with voluntary measures that may help to reduce emission of ozone precursors. PPACG is pursuing planning grants for the purpose of doing initial research into this region’s precursor source inventory, to prepare for the possibility that the region may someday need to prepare an ozone plan for incorporation into Colorado’s air quality State Implementation Plan. Additionally, the sale of lower vapor pressure gasoline in the Denver area during the summer months also benefits the Colorado Springs area because refineries and gasoline companies supply the same fuel to both areas.”

It can be seen from Table 4-2 on page 5 of the *Air Quality Impacts Technical Memorandum* (in EA Appendix 3) that emissions of hydrocarbons (HC) and oxides of nitrogen (NO<sub>x</sub>) will decline over time due to improved vehicle technology, even while total VMT increases. With respect to ozone precursors, hydrocarbon emissions in the I-25 corridor are projected to decrease by more than 50% between 2007 and 2025 in both the No-Action and Proposed Action Alternatives, and NO<sub>x</sub> emissions are projected to decrease by more than two-thirds, even while VMT increases by up to 47 percent.

Lines 14-23: Trends in ambient concentrations of particulate matter are presented in EA Appendix 9 at page 2-81. Measured concentrations of PM<sub>10</sub> peak in 1992 at about 80% of the 24-hour standard, and have trended significantly downward since then. In recent years PM<sub>10</sub> concentrations monitored in the Pikes Peak Region have been no higher than 60 percent of the standard. Concentrations of the finer particles PM<sub>2.5</sub>, have been measured in the region since 1999 and have not been higher than 60 percent of the standard. These issues were not raised in the EA because there is no reason to anticipate a problem in meeting these PM standards for the foreseeable future because federal motor vehicle emission control programs applicable to diesel engines are expected to result in substantial decreases in emission rates for this type of pollutant.