

OLD NORTH END NEIGHBORHOOD

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

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Re: Comments re I-25 Environmental Assessment
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1..... All of these smaller projects have been proposed in the past ten years and they comprise
2 part of the larger plan to expand the I-25 corridor in El Paso County to eight lanes to serve
3....projected 2025 traffic demand; they are “interdependent parts of a larger action.” For example,
4 several of these projects involved the construction of additional acceleration and deceleration
5....lanes that now facilitate the proposed action here. At least one “safety improvement” involved
6 construction of a noise barrier on the west side of the highway with the effect of actually
7....magnifying and reflecting noise into Monument Valley Park and the surrounding neighborhoods
8 by a predicted average of 2 dBA.⁷² Earlier projects also involved raising the roadbed surface in
9....order to eliminate sight-line impacts, but this action too has had impacts on the quality of the
10 human environment that need to be taken into account.

11.....
12 CDOT and the FHWA cannot ignore the cumulative impacts that these smaller actions
13. have had when considered in light of the proposed action addressed in the EA. Similarly, CDOT
14 and the FHWA cannot simply incorporate the incremental impacts of these smaller projects into
15.. the “baseline conditions” against which the impacts of only future projects are compared. By
16 segmenting individual projects along the corridor from the overall plan to expand I-25, CDOT
17.. has thwarted a complete and full consideration of the environmental impacts of the overall
18 project. For this reason alone, an EIS is required under NEPA.

19.....
20 While FHWA regulations do permit state agencies to segment individual projects in
21...certain circumstances,⁷³ when viewed in the context of multiple actions proceeding as part of the
22 effort toward the common goal, the cumulative impacts of the proposed action clearly rise to the
23...level of significance requiring an EIS. The planning process will have served the purposes
24 intended by Congress if those cumulative impacts are considered together in one EIS that
25...evaluates the collective impacts on a broader range of reasonable alternatives.

26
27..... Despite the fact that CEQ regulations mandate consideration of “past, present and
28 reasonably foreseeable” cumulative impacts and warnings from EPA during scoping, the effects
29...of the earlier projects were not considered in the cumulative impacts analysis. Indeed, CDOT
30 did not actually perform a cumulative impacts analysis for the purposes of this EA. Rather, in
31...cooperation with “CDOT prepared a December 2003 report entitled, Sustaining Nature and
32 Community in the Pikes Peak Region (A Sourcebook for Analyzing Regional Cumulative
33...Effects)” that it intends to rely on as “a basis for analyzing cumulative effects in this EA and for
34 other transportation projects.” EA at 4-1. This document was buried in the technical appendices
35...to the EA, and the “cumulative impacts” section of the EA merely summarizes the report and
36 then provides a cursory discussion of the differences in cumulative impacts related to the no

⁷² See, Bijou to Fillmore Noise Wall Study—Final Report (June 2002) at 26.

⁷³ 23 C.F.R. § 771.111(f) (permitting segmentation of projects that “connect logical termini,” “have independent utility or independent significance,” and do “not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.”).

RESPONSE

Lines 1 to 11: FHWA disagrees with the statement that “all of these smaller projects...comprise a part of the larger plan to expand the I-25 corridor in El Paso County to eight lanes.” Leaving aside the various studies listed (which do not require NEPA evaluation), the safety projects were not interdependent parts of a larger action. The past projects were needed for safety reasons, independent of any future actions. Relief of I-25 traffic congestion, the purpose and need as stated in the EA, is the basis for the Proposed Action -- capacity improvements.

Lines 4-5: The previously inadequate acceleration/deceleration lanes were extended for safety purposes, and not to address capacity issues.

Lines 5-7: The noise barrier was constructed to mitigate traffic noise for residents in the Mesa Springs and Near West Side neighborhoods (immediately adjacent to I-25, west of the highway). In providing the barrier, it was understood that some reflectivity (e.g. 1 to 2 decibels) would occur. This was recognized in the EA (at Appendix 6, Noise Impacts Technical Memorandum, page 17). The elevation of the I-25 roadway surface was changed to improve sight distance for stopping, and to provide proper super-elevation for horizontal curvature. These elevation changes were taken into account in the environmental studies prepared for the categorical exclusion for the Bijou to Fillmore safety project, and the changes were also reflected in the EA.

Line 12: CDOT and FHWA evaluated the cumulative effects of the proposed action and impacts of these past actions and other current and reasonably foreseeable actions.

Lines 12-18: As stated above, each of the safety projects was an independent project, with independent utility, logical termini and appropriate NEPA evaluation. The safety projects did not restrict alternatives for a future capacity project. Therefore, segmentation did not occur. Each of the safety projects had its own purpose and need (which was safety improvement), as opposed to the current, proposed action, which addresses capacity needs of the I-25 corridor. Therefore, it is incorrect to characterize the safety projects and the proposed capacity improvements as one “overall project.” Each project has undergone “a complete and full consideration of the environmental impacts” and NEPA was not “thwarted” as asserted in this paragraph.

Lines 20-25: Segmentation did not occur. I-25 improvements were pursued in a logical sequence, based on their separate purposes and needs. They did not have “one common goal.” Safety was addressed first, then transportation system management (implementation of a freeway incident management plan), and now capacity.

Line 22: FHWA disagrees with the assertion that “the cumulative impacts clearly rise to the level of significance requiring an EIS.”

Lines 27-36: The regional cumulative effects analysis was included in the technical appendices, which were available to the public at libraries, government offices, and by internet. “Sustaining Nature and Community in the Pikes Peak Region” was prepared by CDOT to address the cumulative effects of the I-25 proposed action and reasonably foreseeable improvements to other transportation corridors. It provides a regional context of environmental trends for use in NEPA analysis of planned improvements including I-25, Powers Boulevard, Woodmen Road, Drennan Road, and other improvements included in the region’s long-range transportation plan. In their agency comments to the EA, EPA on May 13, 2004 stated that, “We support the concept of a regional cumulative impact analysis and think the RCEA for Colorado Springs was well done.”

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1....action alternative and the proposed action. Much of the information appears to have been simply
2 recycled from other portions of the EA and the other technical appendices. As a cumulative
3....impacts analysis, it is wholly insufficient and fails to satisfy the spirit, intent or letter of NEPA,
4 notwithstanding the evident longstanding pattern of illegal segmentation of connected actions.
5.....
6 The proposed action will individually have deleterious effects on surface water quality in
7....Monument and Fountain Creeks, which receive nearly all of the stormwater runoff generated in
8 the urban center of Colorado Springs. The widening of I-25 is projected to increase the annual
9....mass loading of pollutants by 57 percent, which might cause exceedances of the acute and
10 chronic standards for lead, copper and zinc. EA at 3-88 and 3-89. Surface water quality may
11..also be impacted by roadway deicing activities using magnesium chloride and sand. EA at 3-
12 89. The proposed action will likely cause an increase in surface water levels of nutrients,
13..petroleum products and heavy metals due to an increase in areas of impervious surfaces. Id. In
14 addition, an increase in highway use by trucks carrying toxic chemicals and transporters taking
15..nuclear waste to New Mexico and Nevada increases the likelihood of accidental spills. These
16 potential impacts were not discussed in the EA at all. Collectively, the proposed action's
17..potential impacts on water quality are significant and should be considered in an EIS.
18
19.....Generally, the Fountain Creek Watershed is characterized by highly erodible soils and
20 naturally high sediment levels that increase bank erosion. The Fountain Creek Watershed is
21..estimated to be losing up to 700 tons of sediment daily, and sediment is thought to be the leading
22 cause of stream water quality degradation in the area. The State of Colorado has listed Fountain
23..Creek as a high priority "Watershed in Need of Restoration" within the second list of Category 1
24 Watersheds.⁷⁴ Extensive development in Colorado Springs over the past decade has increased
25..the volume and intensity of stormwater runoff in Fountain Creek below Colorado Springs,
26 significantly affecting stream morphology. Downstream property owners have suffered
27..significant bank erosion and loss of riparian land along the creek because of high storm runoff
28 and inadequate stormwater drainage and control in the metropolitan area.
29.....
30 From April 29 to early May 1999, an unusually prolonged period of heavy rainfall in
31..southeast Colorado caused intense and severe flooding in the watershed. According to the
32 United States Army Corps of Engineers, "[t]he unusually large volume of runoff produced by the
33..storm resulted in more erosion damage along Fountain Creek than any previous flood." It
34 appears that the erosion damage is largely attributable to increased flows in Fountain Creek and
35..its tributaries caused by trans-mountain diversion of raw water and urbanization with its
36 corresponding increase in impervious surfaces. The Corps of Engineers predicts that the mean
37..annual flow of Fountain Creek will increase from its historic rate of 50 cubic feet per second to
38 600 cubic feet per second by the year 2040.

⁷⁴ The Colorado Unified Watershed Assessment (1998).

RESPONSE

Lines 1-4: Section 4 of the EA presents an assessment of the effects of I-25 Proposed Action in the context of other past, present and reasonably foreseeable actions (both public and private). Section 4 summarizes the information relevant for the reader to understand the complex interactions of the proposed action in relation to other developments in the region. Section 4 is not merely a summary of the regional cumulative effects report. FHWA has determined that Section 4 is sufficient to meet the cumulative effects analysis requirements of NEPA.

Line 4: FHWA disagrees with allegations of any "illegal segmentation" for all of the reasons provided in responses to related comments above.

Lines 6-17: Questions about water quality impacts were raised by EPA in their comments on the EA, and it is recognized by FHWA and CDOT that clarifications to the EA regarding these impacts are needed. The discussion of impacts of the Proposed Action on water quality was unclear (EA at pages 3-85 to 3-89), especially for the statement that "[t]he results of the FHWA model analysis show that pollutant loadings under the Proposed Action could cause acute and chronic standards to be exceeded for lead, copper and zinc" (EA at 3-88). That statement is incorrect. Please see the clarifications to EA pages 3-88 and 3-89 as contained in Section 7 of this FONSI.

The Proposed Action would not cause the standards to be exceeded because CDOT is legally required by its MS4 permit to treat roadway runoff prior to its discharge to receiving waters. Best management practices must be incorporated in project design in order to comply with federal stormwater regulations (40 CFR 122.26). The correct results of the full analysis conclude that the likelihood of exceeding water quality standards would NOT be greater as a result of the Proposed Action than it is today.

Lines 13-15: Regarding the use of magnesium chloride and other deicing agents, including sand, the required best management practices referenced above will trap and treat these materials along with other roadway runoff constituents. It is recognized that accidental spills may occur, but since spill locations cannot be predicted, there is no practical way to assure that such spills can always be contained. Federal, State and local governments all have hazardous-material response teams trained to contain spills and to assure proper cleanup.

Lines 16-17: With the above referenced clarifications regarding water quality, it is clear that the Proposed Action would not have significant impacts on water quality.

Lines 19-28: These characterizations of the area's watershed are not in dispute. They are recognized in the EA at page 3-77 as well as in Section 4 and Appendix 9 (regional cumulative effects analysis).

Lines 30-38: The information here regarding the 1999 flood and increased impervious surface is presented in the EA (at 3-81) as well as in Appendix 9. Discussion of the past, present and future water quality and quantity, including trends in increased impervious surface, is provided in the EA at 4-8 to 4-9. It is recognized that impervious surface due to regional development does indeed contribute to erosion and sedimentation, resulting in the need for the mitigation measures discussed at 4-9 and 4-10.

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1..... In 2001, EPA suggested that the NEPA analysis “should address the erosion and
2 sedimentation that is likely to occur from direct, indirect, and cumulative impacts associated with
3...the proposed actions.”⁷⁵ Whatever its individual effects, when viewed in the context of
4 cumulative impacts on hydrology, the I-25 expansion clearly rises to the level of significance. It
5...is unreasonable to claim that a project involving increasing the impervious surface of I-25 by
6 over 50%, in an area adjacent to the primary conduit for runoff, will have no effects on
7...downstream properties. An increase in impervious surfaces is likely to lead to further
8 sedimentation, erosion and water pollution.

9.....
10 The EA estimates that approximately fifty-two acres of the existing floodplain will be
11...impacted by disturbance during construction of the expanded roadway, and CDOT proposes to
12 build detention ponds to mitigate those impacts. EA at 3-83 to 3-84. However, the EA does not
13...quantify the number of acres for which mitigation measures will not be feasible and does not
14 estimate the effectiveness of mitigating direct and indirect impacts of the proposed action on
15...existing floodplain areas.⁷⁶

16
17..... Furthermore, tributary wetlands and other critical ecological resources in the riparian
18 zone will be degraded by direct, indirect and cumulative impacts of the proposed action. 40
19...C.F.R. § 1508.27(b)(3). Important wetlands are located near Tejon Street along the Pikes Peak
20 Greenway and in the Roswell neighborhood adjacent to the Old North End. Wetlands are
21...sensitive environments that serve important sediment trapping, nutrient retention, water
22 purification, flood storage, shoreline anchoring, groundwater recharge and discharge, and
23...recreational functions. The EA reports that the proposed action will directly impact a total of
24 10.22 acres of wetlands in the right of way and at stream crossings, which represents over 10%
25.. of the total wetlands present in the project area. EA at 3-91. Although CDOT intends to mitigate
26 unavoidable impacts to wetlands on a one-to-one basis, these impacts, when considered in light
27.. of the limited wetlands acreage and when viewed with other reasonably foreseeable impacts, are
28 significant. Moreover, the EA fails to address indirect impacts associated with the use of borrow
29.. and fill material taken from sand and gravel quarries that may impact wetland and riparian areas.

30
31..... The EA reports that direct impacts to existing vegetation communities will occur under
32 the proposed action as a result of clearing and grading associated with the construction activities.
33.. EA at 3-105. Over 1000 acres of vegetation will be impacted by the proposed action, including
34 922 acres of disturbed grassland, 27 acres of shortgrass prairie, 25 acres of riparian deciduous,
35.. 10.2 acres of wetlands, 4.9 acres of forested ponderosa pine and 1.5 acres of shrubland gamble
36 oak. Id. The EA estimates that between 700 and 900 trees will be removed over the length of
37.. the 26-mile corridor. Id. Vegetation will also be significantly affected by future activities
38 required to maintain the highway, including the application of herbicides for noxious weeds, the
39.. sidelasting of material during shoulder widening, and impacts from snow plowing and the use of

⁷⁵ See, Attachment 13.

⁷⁶ The EA's failure to properly analyze proposed mitigation measures will be addressed *infra*.

RESPONSE

Lines 1-3: The actual letter sent to FHWA by EPA (rather than the draft letter referenced here) states that, “The NEPA document should consider direct impacts from the highway to drainage routes, stormwater runoff, erosion and sedimentation problems, and mitigate where necessary to prevent environmental impacts.” The scoping comments from EPA were carefully considered, and the direct, indirect and cumulative impacts associated with the Proposed Action are described in the EA at pages 3-75 to 3-89, and at 4-7 to 4-10.

Line 4: Again, FHWA disagrees with the statement that “the I-25 expansion clearly rises to the level of significance” due to effects on hydrology. Impervious surface area would increase under the Proposed Action, but implementation of legally required Best Management Practices would provide effective mitigation of water quality impacts.

Lines 10-15: The EA states that the design of the improvements will be based on avoidance and minimization of impacts to floodplains. CDOT must and will comply with federal floodplains regulations, as well as FEMA regulations and City and County floodplain ordinances. Floodplain encroachments and associated base flood elevations would be limited as allowed by FEMA floodplain management regulations (that is, resulting in an increase of less than one foot), and at some locations, base flood elevations and associated floodplain boundaries would likely be decreased (EA at pages 3-82 through 3-84). An evaluation of the floodplains in the corridor indicates that mitigation measures are feasible, and will be provided as required. Before development in any floodplain, a permit will be obtained from the Regional Floodplain Administrator.

Lines 19-20: The two wetlands cited would not be impacted by the Proposed Action (See Wetland Finding, Section 7 of the EA). CDOT's wetlands policy follows FHWA policy and guidance that is based on Executive Order 11990, Protection of Wetlands. This order specifies no net loss of wetlands for any Federally sponsored or supported transportation projects. Direct and indirect impacts to wetlands are detailed in EA Section 7, Wetland Finding. The EA contains a detailed discussion of best management practices for wetlands (on pages 7-8 to 7-10) to ensure that wetland functions and values are maintained.

Lines 25-26: The EA has considered the direct, indirect and cumulative impacts to wetlands in compliance with the Clean Water Act and Executive Order 11990, Protection of Wetlands.

In accordance with the provisions of the Clean Water Act and its implementing regulations, impacts to jurisdictional wetlands by both public and private actions may only occur after avoidance and minimization measures are demonstrated. For any unavoidable impacts a plan must be prepared and approved by the U.S. Army Corps of Engineers that demonstrates that wetland replacement is achievable (i.e., available hydrology), that the functions and values of the impacted wetlands must be replaced, and that there is a long-term plan to assure that the wetlands will remain in perpetuity. A Section 404 Permit will not be issued to any public or private party unless these conditions can be met. In addition, under Executive Order 11990, FHWA and CDOT must assure no net loss of all wetlands, either jurisdictional or non-jurisdictional.

As stated in the Wetland Finding on page 7-3, the wetland plant communities present within the study corridor are palustrine emergent, palustrine scrub-shrub, forested needle-leaf or broad-leaf deciduous wetlands. These are all wetland types that are typical for this region of Colorado. None are fens, springs, designated critical resource waters, or other rare or unique aquatic resources. CDOT has identified locations where the impacted wetlands can be successfully replaced (i.e., there is sufficient hydrology to support the appropriate wetland vegetation) and the essential functions and values can be achieved. Therefore, neither individually nor cumulatively will the wetlands or their functions and values be substantially diminished.

RESPONSE to Page 27 comments continues on next sheet...

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2 sedimentation that is likely to occur from direct, indirect, and cumulative impacts associated with
3...the proposed actions.”⁷⁵ Whatever its individual effects, when viewed in the context of
4 cumulative impacts on hydrology, the I-25 expansion clearly rises to the level of significance. It
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6 over 50%, in an area adjacent to the primary conduit for runoff, will have no effects on
7...downstream properties. An increase in impervious surfaces is likely to lead to further
8 sedimentation, erosion and water pollution.

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11...impacted by disturbance during construction of the expanded roadway, and CDOT proposes to
12...build detention ponds to mitigate those impacts. EA at 3-83 to 3-84. However, the EA does not
13...quantify the number of acres for which mitigation measures will not be feasible and does not
14...estimate the effectiveness of mitigating direct and indirect impacts of the proposed action on
15...existing floodplain areas.⁷⁶

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18...zone will be degraded by direct, indirect and cumulative impacts of the proposed action. 40
19...C.F.R. § 1508.27(b)(3). Important wetlands are located near Tejon Street along the Pikes Peak
20 Greenway and in the Roswell neighborhood adjacent to the Old North End. Wetlands are
21...sensitive environments that serve important sediment trapping, nutrient retention, water
22...purification, flood storage, shoreline anchoring, groundwater recharge and discharge, and
23...recreational functions. The EA reports that the proposed action will directly impact a total of
24...10.22 acres of wetlands in the right of way and at stream crossings, which represents over 10%
25...of the total wetlands present in the project area. EA at 3-91. Although CDOT intends to mitigate
26 unavoidable impacts to wetlands on a one-to-one basis, these impacts, when considered in light
27...of the limited wetlands acreage and when viewed with other reasonably foreseeable impacts, are
28 significant. Moreover, the EA fails to address indirect impacts associated with the use of borrow
29...and fill material taken from sand and gravel quarries that may impact wetland and riparian areas.

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32...the proposed action as a result of clearing and grading associated with the construction activities.
33... EA at 3-105. Over 1000 acres of vegetation will be impacted by the proposed action, including
34...922 acres of disturbed grassland, 27 acres of shortgrass prairie, 25 acres of riparian deciduous,
35...10.2 acres of wetlands, 4.9 acres of forested ponderosa pine and 1.5 acres of shrubland gamble
36...oak. Id. The EA estimates that between 700 and 900 trees will be removed over the length of
37...the 26-mile corridor. Id. Vegetation will also be significantly affected by future activities
38 required to maintain the highway, including the application of herbicides for noxious weeds, the
39...sidecasting of material during shoulder widening, and impacts from snow plowing and the use of

⁷⁵ See, Attachment 13.

⁷⁶ The EA's failure to properly analyze proposed mitigation measures will be addressed *infra*.

RESPONSE

See other Responses to page 27 on preceding sheet...

Lines 28-29: Under 23 CFR 635.407(a), “[c]ontracts for highway projects shall require the contractor to furnish all materials to be incorporated in the work, and shall permit the contractor to select the sources from which the materials are to be obtained.” Contractors that supply materials would be required to obtain any necessary permits and clearances. For example, any sand and gravel extraction must comply with requirements of the Clean Water Act, including Section 404, which requires avoidance and minimization of impacts to wetlands.

Lines 31 to end of paragraph: The small amount of vegetation being impacted by the Proposed Action over its 26-mile length is due to the fact that it is a long-existing freeway corridor. Any disturbance of one acre or more requires a National Pollutant Discharge Elimination System permit from the Colorado Department of Public Health and Environment, which requires a stormwater management plan, erosion control measures and revegetation. Revegetation will be consistent with the vegetation disturbed. For example, trees and shrubs that are lost will be replanted and grasslands restored. As the figures indicate, more than 90% of the land to be impacted is currently considered “disturbed grassland.” Maintenance of the roadway under the Proposed Action will be in accordance with CDOT policy and Federal, State and local regulations and ordinances. Thus vegetation would not be “significantly affected” as suggested by the comment.

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1.... magnesium chloride, sand and salt. Disturbance of over 1000 acres of vegetation and removal
2 of nearly 1000 trees are significant impacts to the quality of the human environment that
3.... necessitate preparation of an EIS.

4
5..... Another likely significant environmental impact from the proposed action is the spread
6 and development of noxious weeds due to large-scale earth disturbance. The EA identifies
7.... numerous noxious weeds found in the I-25 study area, including five species that are listed on
8 Colorado's State Noxious Weed top-ten priority list that are acknowledged to be the most
9.... widespread and to cause the greatest economic impact in the State of Colorado. EA at 3-107.
10 Construction of the I-25 expansion will create an ideal condition for the spread of existing
11... noxious weeds as well as the infestation of new weed species. EA at 308. These impacts also
12 add to the total significance of the impacts of the overall project.

13.....
14 In determining significance, CEQ regulations mandate consideration of "the degree to
15... which the action may adversely affect an endangered or threatened species or its habitat that has
16 determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. §
17... 1508.27(b)(9). Two animal species that are listed under the Endangered Species Act will be
18 negatively impacted by this project: the Preble's meadow jumping mouse (a threatened species)
19... and the black-tailed prairie dog (a candidate species). EA at 3-101. The proposed action's
20 impacts to the Preble's Mouse will be significant and severe—21.1 acres of critical habitat will
21... be permanently impacted and an additional 26 acres temporarily impacted. EA at 3-103.
22 Although CDOT has proposed to mitigate these impacts through habitat enhancement activities,
23... the severity of the impacts still weigh in favor of an EIS. The widening of I-25 will directly
24 affect wildlife including mule deer, Gunnison's prairie and species that rely upon the
25... Monument Creek riparian corridor for water and movement. EA at 3-9 to 3-98 Although these
26 species are currently impacted by I-25, the proposed action will contribute to a further decline
27... in species diversity and quantity in the general vicinity of the highway and materially harm
28 critical wildlife habitat. The expansion also may impact predators and sensitive species that
29... rely upon prey found in the I-25 corridor, such as the Swift Fox, Bald and Golden Eagles,
30 Ferruginous Hawk and Burrowing Owl. 40 C.F.R. § 1508.27(b)(9).

31.....
32 In addition to direct impacts to environmental resources such as air and water, NEPA
33... recognizes "the profound impact of man's activity on the natural environment, particularly the
34 profound influences of population growth, high-density urbanization and industrial expansion."
35... 42 U.S.C. § 4331(a). NEPA has been interpreted to require consideration of impacts to the
36 quality of urban life as well as impacts to the natural environment. *See, Hanly v. Mitchell (I)*,
37... 460 F.2d 640 (2d Cir. 1972). FHWA regulations require consideration of the "social,
38 economic and environmental impacts of the proposed transportation improvement." 23 C.F.R.
39... § 771.105(b).

RESPONSE

Lines 1-3: FHWA disagrees with the interpretation of these vegetation impacts as being "significant impacts to the quality of the human environment." Also, the number of trees to be removed is estimated to be 700 to 900, not "nearly 1,000." The comment also fails to acknowledge that some of the trees to be removed are undesirable non-native species, and that native trees would be planted where feasible in proximity to locations where trees are removed (EA at 3-106).

Lines 5 to 12: The EA at 3-108 indicates that CDOT, in accordance with State law, will implement a weed management plan in conjunction with the Proposed Action, including long-term maintenance and re-establishment of native vegetation. A variety of weed control methods (i.e. herbicides, mechanical removal, and potential biological controls) would be considered for use in different areas, as appropriate. Roadside weed management along State highways is an ongoing practice in accordance with Colorado requirements. The Proposed Action would not result in significant impacts regarding noxious weeds.

Lines 17-19: The assertion that the Proposed Action would negatively impact the black-tailed prairie dog is incorrect. As noted in the EA at page 3-103, "[t]his colony is located near the I-25 Interchange at Exit 132 (State Highway 16), several miles outside the southernmost extent of the Proposed Action."

Lines 20-21: FHWA disagrees with the assertion that "impacts to the Preble's Mouse will be significant and severe." The Biological Opinion issued by the U.S. Fish and Wildlife Service, which has jurisdiction over the Preble's meadow jumping mouse in accordance with the Endangered Species Act, shows that the Proposed Action would not cause jeopardy to mouse populations in northern El Paso County. USFWS stated that, "neither the direct nor indirect effects of the proposed action (which includes implementation of conservation measures agreed to during informal consultation and outlined in this biological opinion) nor the cumulative effects will jeopardize the continued existence of Preble's." With respect to "critical habitat," which is a term with specific legal meaning, USFWS also stated that, "[c]ritical habitat was not designated in the project area, therefore, none will be affected."

Lines 23-27: The EA contains several mitigation measures (EA at 3-98 and 3-99) including improvement of drainage crossings to facilitate wildlife passage, revegetation of disturbed areas to replicate wildlife habitats, and using appropriate plant species to discourage attraction of wildlife to the roadway edge. Much of the mitigation required for wetlands and for the Preble's meadow jumping mouse will also benefit other wildlife (EA at 3-99 and 7-5). Potential impacts to wildlife habitat received extension examination in the Regional Cumulative Effects Analysis (EA Appendix 9, beginning at 2-35).

Lines 28-30: As noted in the EA at 3-95, these species may be present in the general vicinity of the I-25 corridor, but no individuals, nor their nests or dens, were observed in the field surveys conducted for the EA. Prior to construction, additional field surveys will be conducted, and any required permits will be obtained from the U.S. Fish and Wildlife Service (EA at 3-99).

Lines 25-30: The regulation cited, 40 C.F.R. 1508.27(b)(9), addresses adverse impacts to habitat "that has been determined to be critical under the Endangered Species Act." No designated "critical habitat" would be affected by the Proposed Action. Therefore, the Proposed Action would not "materially harm critical wildlife habitat" as alleged.

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1..... The Old North End will suffer significant economic and social impacts as a result of the
2 proposed action, over and above the direct environmental impacts discussed above. Even
3...though CDOT's modeling predicts that noise levels in the Old North End will not quite reach the
4 threshold where mitigation is mandatory,⁷⁷ an increase in neighborhood highway noise caused by
5...an additional 60,000 cars per day is significant. Residents of the Old North End will suffer a
6 decline in property values and decreased quality of life because the constant roar of traffic from
7...I-25 will make the area a less desirable place to live. The EPA has recognized that noise levels
8 of 55 dBA and higher can affect quality of life,⁷⁸ and CDOT's modeling predicts that this level
9...will be exceeded in the area. Ultimately, 391 trucks per hour (on average) will pass through
10 Colorado Springs, or one truck every nine seconds. The EA fails to consider social impacts on
11...motorists using I-25, and contains no discussion of noise levels that will be experienced by
12 interstate truck drivers with open windows in relation to requirements of the Occupational Safety
13...& Health Administration.

14
15..... The idea of protecting neighborhoods is a core value in Colorado Springs, according to
16 the City's 2001 Comprehensive Plan.⁷⁹ Recognizing the importance of neighborhood identity
17..and integrity, the City has adopted policies to protect the character of established and stable
18 neighborhoods and mitigate transportation impacts on existing neighborhoods.⁸⁰ An EIS should
19..consider development patterns and rates for those neighborhoods on both sides of I-25 and
20 examine the potential impacts related to segregation of Colorado Springs by an ever widening
21..interstate. The proposed action will significantly affect neighborhood stability in the Old North
22 End and areas adjacent to and served by I-25 expansion. Although these social and economic
23..impacts are difficult to measure and quantify, they are significant impacts that warrant full and
24 thorough consideration in an EIS. According to Dr. Louis Cohn, a nationally recognized expert
25.. in the field of the study of highway noise.⁸¹

26
27..... Even though its noise predictions do not quite rise to the level of
28 impact according to CDOT's definition, ONEN deserves some
29..... consideration, if the City's Comprehensive Plan is to be taken
30 seriously. The I-25 project greatly diminishes the quality of life in
31..... this historic and unique neighborhood, yet CDOT is doing nothing
32 to mitigate these impacts. Instead, CDOT falls back on the
33..... argument that the citizens in ONEN must not be affected by I-25

⁷⁷ According to CDOT's modeling as reported in the I-25 Corridor Feasibility Study, noise levels in the Old North End will rise to 64 dBA by 2020. See, Attachment 42. Considering statements by CDOT to the effect that a 3 dBA difference is not detectable by humans, the Old North End is effectively at the threshold trigger where abatement is required.

⁷⁸ See, Attachment 43.

⁷⁹ See, Attachment 11 at Chapter 2, page 55.

⁸⁰ See, Attachment 11, Policies N 201 and N401 and Strategy T 201g.

⁸¹ See footnote 54, *supra*.

RESPONSE

Lines 1-2: FHWA disagrees with the assertion that the "Old North End will suffer significant economic and social impacts as a result of the proposed action." The EA evaluation of the economic and social impacts of the Proposed Action did not identify any significant impacts to any neighborhood, including the Old North End.

Lines 2-4: It is incorrect to suggest that there is a level of noise where mitigation is "mandatory." Rather, when Federal and State noise abatement criteria are met, analysis is conducted to determine whether or not mitigation would be feasible and reasonable. The noise abatement guidelines are explained in the EA at 3-63 and 3-66, as well as in Appendix 3, *Noise Impacts Technical Memorandum*.

Lines 4-5: FHWA disagrees with the statement that an increase in noise caused by additional traffic is significant. Traffic noise in the Old North End Neighborhood would increase by less than 2 decibels (barely perceptible to the human ear), and by 2025 still will not reach Federal and State noise abatement criteria. These criteria were developed in accordance with 23 CFR 772.1, for the purpose of helping to protect the public health and welfare.

Line 6: Although different people perceive noise differently, most would probably not characterize noise levels in the Old North End Neighborhood as a "constant roar." Regarding the alleged adverse effect on property values, see response to lines 5-8 on page 17.

Lines 7-8: The EPA noise "Levels Document" referenced here contains very strong disclaimers and limitations regarding its use. For example, it states that, "[d]ecisions about how much noise is too much noise for whom, for how long, and under what conditions demand consideration of economic, political, and technological matters far beyond the intent of the Levels Document. Such decisions are properly embodied in formal regulations, not informational publications such as the Levels Document." The Federal Highway Administration developed its noise regulations, found in 23 CFR 772, through a formal, public rulemaking process. The EA was prepared in compliance with these applicable FHWA regulations.

Lines 10-13: It is unclear what is meant by "social impacts on motorists." Regarding the comment about noise impacts to Interstate truck drivers, FHWA is not aware of any regulations or OSHA requirements pertaining to ambient traffic noise on drivers with open windows.

Lines 15-18: The EA did evaluate the impacts of the Proposed Action on neighborhoods (pages 3-33 to 3-35), and cites the importance of neighborhoods as a core value in the Comprehensive Plan. The EA includes appropriate mitigation for transportation impacts (EA at 3-35), including noise barriers (3-70 to 3-71) and aesthetic design treatments (3-54 to 3-55).

Lines 18-21: Both sides of Interstate 25 through Colorado Springs, especially in the vicinity of the Old North End Neighborhood, are highly developed. Therefore FHWA does not understand the statement that "development patterns and rates for those neighborhoods" should be considered.

Line 20: The EA thoroughly examined environmental justice impacts of the Proposed Action, and found there would be no significant impacts. The Proposed Action would not have disproportionate adverse impacts to minority and low-income populations (EA at 3-22). The Proposed Action does not divide or fragment neighborhoods, nor introduce new streets in residential neighborhoods. (EA at 3-23). Since the Interstate highway has been in place for more than 40 years, it is difficult to understand what "segregation" the commenter expects to occur.

Lines 21-22: FHWA disagrees with the assertion that, "[t]he proposed action will significantly affect neighborhood stability in the Old North End." See previous response to lines 5-8 on page 17.

Line 28: CDOT's definition referred to here is the "approach criterion" for noise abatement. This approach criterion was set at 66 dBA, which is one decibel below FHWA's criterion of 67 dBA for the residential land use category. CDOT's approach criterion was accepted by the Federal Highway Administration and is similar to what other States use. Adherence to the CDOT criteria assures fair and equitable treatment for all citizens.

Lines 28-29: FHWA disagrees that with the suggestion that consideration was not given to the Old North End's concerns. The EA fairly and comprehensively evaluated the Proposed Action's impacts, including noise, to all neighborhoods. The City has reviewed the EA and adopted a resolution of support. The City did not find the Proposed Action to be inconsistent with the Comprehensive Plan.

Lines 32 to end of sentence, next page: The noise abatement criteria were developed by FHWA and incorporated into CDOT's noise abatement guidelines in order to assure equity for all affected neighborhoods and other noise receptors. It is not arbitrarily applied in order to avoid noise abatement.

Footnote 77: See response to lines 2-4 regarding the noise abatement requirements. In accordance with FHWA regulations (23 CFR 772) and State noise regulations, a noise level of 64 decibels does not meet the criterion for consideration of mitigation for a residential area.

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1.....noise, because their levels are a little below the CDOT abatement
2 criteria.
3.....
4 The facts are that more than 30 years ago the US EPA identified 55
5.....dBA (Leq) as the threshold for impacts on quality of life. It must
6 be remembered that the CDOT 66 dBA Leq value is an abatement
7.....
8 criterion, based on the assumption that noise levels are such that
9.....
10 residents are severely impacted and warrant serious mitigation
11.....
12 consideration. My recent experience with neighborhoods all over
13.....
14 the country indicates that Americans are very bothered by highway
15.....
16 noise levels that are not considered high enough for abatement in a
17.....
18 traditional sense.
19.....
20 *See, Attachment 24.*
21.....
22 CEQ regulations require consideration of indirect effects and their significance. 40
23.....
24 C.F.R. § 1502.16 (b). Indirect effects are effects that are “caused by the action and are later in
25.....
26 time or farther removed in distance, but are still reasonably foreseeable.” Indirect effects may
27.....
28 include “growth-inducing effects related to induced changes in the pattern of land use,
29.....
30 population density, or growth rate, and related effects on air and water and other natural systems,
31.....
32 including ecosystems.” 40 C.F.R. § 1508.9(b); *City of Carmel-by-the-Sea v. United States Dep’t*
33.....
34 *of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997).
35.....
36 I-25 is the central north-south traffic corridor through Colorado Springs, and the
37.....
38 capacity of its highway infrastructure will greatly influence the location, intensity, timing of
39.....
40 future land uses and amount of economic and population growth that will occur in and around
41.....
42 Colorado Springs. Recently The Road Information Program released a study finding that
43.....
44 Colorado Springs suffers from the highest levels of congestion among comparably-sized United
45.....
46 States cities.⁸² Adequate transportation infrastructure is essential to economic and population
47.....
48 growth. In other words, inadequate or stagnant transportation infrastructure can slow or
49.....
50 perhaps stifle economic and population growth. Whether you believe that continued growth is
51.....
52 good for the community or bad for the community, growth has a significant impact, and the
53.....
54 rate of growth is inextricably linked to transportation infrastructure. Research has proven that
55.....
56 “highway capacity additions can induce new trips, longer trips, and diversions from transit.”⁸³
57.....
58 According to scoping comments submitted by the EPA, “[n]ew highway construction that

⁸² See, “Making the Grade in Colorado: An Analysis of the Ability of Colorado’s Transportation System to Meet the State’s Need for Safe and Efficient Mobility” (May 2004), available on-line at <http://www.tripnet.org/ColoradoStudyMay2004.PDF>.

⁸³ Transportation Research Board, “Expanding Metropolitan Highways: Implications for Air Quality and Energy Use” (1995). http://trb.org/news/blurb_detail.asp?id=2678

RESPONSE

Line 5: This apparently is referencing the EPA “Levels Document.” See response to lines 7-8 on page 29 for EPA’s disclaimers and limitations regarding the intended use of their report.

Line 6: It should be noted again that the Old North End Neighborhood does not experience traffic noise at a level that would warrant consideration of abatement under the CDOT or FHWA criteria.

Line 16: Indirect effects are addressed throughout Section 3 of the EA and specifically at pages 3-159 to 3-163.

Lines 24 to 27: This comment about the location, intensity and timing of future land use deals with the topic of “induced growth”. The I-25 corridor from South Academy (Exit 135) to Briargate (Exit 151) is already developed, and no substantial areas remain undeveloped along the corridor or reasonably close to the corridor. Therefore any growth effects from the Proposed Action would be confined to the northern I-25 corridor segment from Briargate to Monument (Exit 163), and limited primarily to the east of I-25 because of the Air Force Academy on the west side. In this large area, growth patterns have already been determined by previous land use decisions. Approved master plans, plats and annexation agreements are in place today for much of this area, and development in accordance with approved local and regional plans is already occurring at a rapid pace. In summary, most of the remaining vacant land along the corridor is slated for development in the near future.

As described in the EA at 3-47, future development (both its location and intensity) in the I-25 corridor is already accounted for in the City of Colorado Springs Comprehensive Plan and PPACG’s *Destination 2025* regional transportation plan. The additional capacity provided by the Proposed Action is unlikely to result in population and employment growth beyond what is included in these adopted plans. This is discussed in the EA at page 3-50.

Lines 27 to end of paragraph, next page: This comment about new trips, longer trips, and diversions from transit deals with the topic of “induced travel demand”. FHWA agrees that in certain cases, induced travel demand may occur. By increasing capacity, the Proposed Action will improve travel speeds over existing conditions, thereby influencing people to:

- Change their route to the improved highway from slower parallel routes,
- Change the time of their trip from peak shoulder to peak period,
- Change their trip mode from transit or carpool to drive alone
- Travel to a more distant destination to replace a trip to a closer destination
- Make additional trips that were previously avoided because of traffic congestion.

Of these five, the first four are accounted for in the PPACG regional travel model that was used in the development of PPACG’s *Destination 2025* regional transportation plan. These are factors normally addressed by the model’s internal algorithms. The fifth effect, choosing to make more trips, is generally considered by researchers to be an indeterminate but a relatively small component of increased traffic on an improved facility. These additional trips are highly discretionary, and generally would diminish again in response to future congestion along the corridor. Therefore this is a small, short-term effect. The traffic-related impacts evaluated for I-25 are based on year 2025 conditions, which involve higher traffic volumes than these short-term traffic effects.

It should be pointed out that diversion of trips to I-25 by users of slower-speed parallel routes may have positive benefits. The proposed I-25 capacity improvements would entice regional commuters away from neighborhood streets that they have been increasingly using to avoid I-25 congestion (EA at 3-34).

Lines 31-33: Future land use in the Pikes Peak region has been planned based upon the assumption that a reasonable level of mobility will be available in the I-25 corridor, consistent with the approved PPACG *Destination 2025* regional transportation plan. The existing Interstate highway 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.

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1.... improves traffic flow and eliminates congestion increases access and contributes to induced
2 residential, commercial, and industrial growth.”⁸⁴
3.....
4 According to FHWA’s secondary and cumulative impacts guidance, an EIS should be
5.....prepared when a project is likely to have growth-inducing effects in fast-growing metropolitan
6 areas. The proposed project may make future development more likely by easing congestion
7....and enabling a greater number of motorists to use the highway for commuting purposes. Much
8 of this development will come in the form of urban sprawl, with workers residing in outlying
9....areas and commuting into the city center for work. The I-25 expansion will establish a
10 precedent that determines many transportation and non-transportation actions that will occur in
11...the coming decades. 40 C.F.R. § 1508.27(b)(6). Ongoing transportation projects throughout the
12 City will be affected.
13.....
14 In developing alternatives, CDOT relied on 1990 demographic data and information that
15...is obsolete and has been superseded by more recent census data in 2000. Colorado was the third-
16 fastest growing state in the nation between 1990 and 2002, with its population increasing by 37%
17... while vehicle miles traveled by 60%, from 27 billion miles annually to 44 billion miles
18 annually.⁸⁵ Easing of congestion makes it more likely that people will drive as opposed to
19... alternative forms of transportation, resulting in more use of fossil fuels and air quality impacts.⁸⁶
20 “Expansion of highway capacity on the edge of metropolitan Colorado Springs provides
21...disincentives to dense urban development that would conserve energy through greater incentives
22 for transit ridership, location decisions of workers in relation to their places of employment, and
23...other incentives for urban development that conserve fossil fuel energy and resources such as
24 land and water.”⁸⁷ The EA fails to adequately discuss all of the growth-inducing impacts of the
25...proposed action, and instead simply assumes that the projected growth will occur with or without
26 the I-25 expansion. See *Laguna Greenbelt, Inc. v. United States Dep’t of Transp.*, 42 F.3d 517,
27... 526 (9th Cir. 1994).
28
29.....CDOT and the FHWA are obligated to consider the cumulative impacts of all reasonably
30 foreseeable future actions, including the likelihood that the City will develop an east-west
31...transportation corridor through the Old North End and Monument Valley Park to link to the
32 Fontanero interchange. CDOT recently made improvements to the Fontanero interchange that
33...make it more suitable for such a connection. In 1999, the Colorado Springs City Council formed
34 a citizen’s group to work with staff on an East-West Mobility Study. Recommendations coming
35...out of the study were presented to City Council on November 26, 2001. City Transportation
36 Planning staff recommended that Constitution Avenue be reconstructed and expanded as a four-

⁸⁴ See Attachment 13.
⁸⁵ See, footnote 82 *supra*.
⁸⁶ See, Attachment 13.
⁸⁷ *Id.*

RESPONSE

Lines 4-6: FHWA believes that the EA adequately addresses the direct, indirect, and cumulative effects of the Proposed Action on land use and growth and development. The cumulative effects of the Proposed Action together with the effects of development on land use are discussed both in Section 4 of the EA and at length in the Regional Cumulative Effects Analysis in Appendix 9. As discussed above, the Proposed Action is not likely to “make future development more likely” as asserted in the comment. The I-25 corridor from South Academy (Exit 135) to Briargate (Exit 151) is already developed, and no substantial areas remain undeveloped along the corridor or reasonably close to the corridor. Therefore any growth effects from the Proposed Action would be confined to the northern I-25 corridor segment from Briargate to Monument (Exit 163), and limited primarily to the east of I-25 because of the Air Force Academy on the west side. In this large area, growth patterns have already been determined by previous land use decisions. Approved master plans, plats and annexation agreements are in place today for much of this area, and development in accordance with approved local and regional plans is already occurring at a rapid pace. In summary, most of the remaining vacant land along the corridor is slated for development in the near future.

Lines 10-11: I-25 expansion would represent not “a precedent” but instead implementation of regional transportation and land use plans.

Lines 14-15: Regional planning assumptions used in the *Mode Feasibility Alternatives Analysis* (EA Appendix 1) were based on available socioeconomic and traffic data, which included commuter mode use data from the 1990 Census as well as more recent socioeconomic projections and traffic modeling parameters from PPACG, the regional planning agency. After results from the 2000 Decennial Census became available in 2002 and 2003, they were examined and it was determined that the conclusions of the MFAA remained valid. Up-to-date socio-economic data and forecasts were also used in the EA traffic analysis (also found in EA Appendix 1), and for the analysis of related environmental impacts including air quality, water quality and noise.

Lines 20-21: The City of Colorado Springs completed its Comprehensive Plan in 2001, which reflects local policy and decisions regarding land use patterns and transportation infrastructure for the next two decades, and beyond. *Destination 2025*, the PPACG regional long-range transportation plan, is consistent with the City’s *2001 Comprehensive Plan*. Both plans include I-25 capacity improvements, as well as regional transit improvements. Both plans reflect denser development both downtown and elsewhere. The Proposed Action includes High Occupancy Vehicle lanes to provide incentives for energy conservation through the use of carpooling and transit, especially to the downtown area.

Lines 24-27: As pointed out in the response to line 24 on page 30, growth is expected to occur in accordance with the adopted regional forecasts, and consistent with adopted land use plans. To date, congestion on I-25 and on most other major roadways in the region has not resulted in an appreciable change in transportation mode choice, regional growth, or development patterns. The purpose of the Proposed Action is to address existing capacity problems. These problems on I-25 would remain even if there were no future growth in the region.

Lines 29 to end of paragraph: Because the potential east-west corridor described would have many adverse impacts on parks and historic resources, it seems highly improbable that the City of Colorado Springs would develop an east-west transportation corridor that goes “through the Old North End and Monument Valley Park”. The Fontanero interchange was not designed to accommodate such a connection.

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1.... lane arterial parkway between I-25 and Academy Boulevard in order to reduce congestion on
2 Fillmore Street, an action that would likely more than double the existing traffic on
3....Constitution.⁸⁸ An EIS should also take into account reasonably foreseeable changes in transit
4 services in the Pikes Peak region in light of CDOT's recognition that the City is just starting such
5....a process.

6
7..... NEPA intended that an EIS be prepared for just this sort of project—a major federal
8 action significantly affecting the quality of the human environment. The direct, indirect and
9....cumulative impacts of the proposed action are significant and must be evaluated in an EIS.

10
11.....C. **The EA's Proposed Mitigation Measures Do Not Justify a Finding of No
12 Significant Impact**

13.....
14 At this point, it should be clear that expanding 26 miles of an existing highway to
15..accommodate 60% more motor vehicles and reconstructing seven interchanges will significantly
16 affect the quality of the human environment and an EIS should be prepared. However, the EA
17..discusses various general mitigation measures that are designed to compensate for and minimize
18 the project's significant impacts to below the threshold level of significance. While the CEQ
19..regulations contemplate that an EIS should include "means to mitigate adverse environmental
20 effects," the regulations do not address mitigation measures in cases where an agency decides
21..not to prepare an EIS. 40 C.F.R. § 1502.16(h).⁸⁹ However, federal courts have repeatedly held
22 that mitigation measures and their likely environmental consequences must be analyzed in detail
23..as part of the NEPA process.⁹⁰ NEPA does not distinguish among impacts that require
24 mitigation, and the regulations concerning mitigation apply to indirect and cumulative effects as
25..well as direct effects.

26
27..... While in some circumstances mitigation measures may be relied upon to make a
28 Finding of No Significant Impact, the CEQ advises that those circumstances are extremely

⁸⁸ See Attachment 44.

⁸⁹ CEQ regulations implementing NEPA also require that the agency analyze possible mitigation measures in defining the scope of the EIS, 40 C.F.R. § 1508.25(b), in discussing alternatives to the proposed action, 40 C.F.R. § 1502.14(f), and in explaining its ultimate decision, 40 C.F.R. § 1505.2(c).

⁹⁰ See, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) ("[M]itigation [must] be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated"); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) ("mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA") (setting aside EIS in part on grounds that the USFS's mitigation analysis contained only "broad generalizations and vague references"); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998) ("Without analytical detail to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a 'mere listing' of good management practices").

RESPONSE

Lines 1-3: As noted earlier, an extension of Constitution Avenue is not reflected in the fiscally-constrained and air quality-conforming PPACG *Destination 2025* long-range transportation plan. It is also not reflected in the City's Comprehensive Plan (Chapter 7 – 2020 Land Use Map).

Lines 3-5: The EA did indeed consider reasonably foreseeable changes in transit service, including the provision for express bus service on I-25. Other transit proposals, such as fixed guideway transit, are in an initial feasibility study process, being led by the City of Colorado Springs. Once the City completes its transit study, it may have identified a proposed action for transit improvements. At such later time as the City may wish to proceed toward implementation, that proposal will be subject to NEPA requirements, including assessment of cumulative effects, if federal funding is sought. However, there is no current source of funding for the fixed guideway transit. One initial concept in the City's study suggests a north-south transit corridor in a wide study area to the east of I-25. It should be noted that the I-25 Proposed Action does not preclude transit alternatives (EA at 2-10 and 2-11), and also that the implementation of transit alternatives would not change the need for I-25 capacity improvements (EA at 2-9).

Lines 7-19, and 14-16: FHWA disagrees with this statement that recaps earlier arguments. Earlier responses have addressed all aspects of this statement.

Lines 17-18: FHWA disagrees with the assertion that the mitigation measures in the EA "were designed...to minimize the project's significant impacts to below the threshold of significance." FHWA has determined that the Proposed Action would not result in significant impacts. Where mitigation has been committed for adverse effects, it was for the purpose of mitigating those effects to the full extent required by applicable laws and regulations. Mitigation was not developed for the purpose of bringing impacts to just "below the threshold of significance."

Lines 18-25: Mitigation is related to the impacts, and not to the level of documentation (e.g. EIS versus EA), as suggested.

Line 22 and Footnote 90: These comments seem to suggest that the mitigation measures in the EA are not sufficiently detailed. FHWA has determined that the mitigation measures contained in the EA are specific, and detailed, and are not a "mere listing" or "broad generalizations and vague references." For example, proposed noise mitigation measures identified on page 3-71 include a noise wall approximately 1,060 feet long and 20 feet high that would protect a Monument Valley duck pond area and 8 residences, reducing noise by an average of 5 decibels, and costing approximately \$636,000.

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1.... limited. CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy
2 Act Regulations,” Question 39, 46 Fed. Reg. 18026, 18037 (1981) (“Mitigation measures may be
3.... relied upon to make a finding of no significant impact only if they are imposed by statute or
4 regulation, or submitted by an applicant or agency as part of the original proposal.”); *see also*
5.... *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (citing CEQ guidance). As a general rule,
6 agencies “should not rely on the possibility of mitigation as an excuse to avoid the EIS
7.... requirement.” *Id.*; *see National Audobon Soc’y v. Hoffman*, 132 F.3d 7 (2nd Cir. 1997) (requiring
8 substantial evidence to support mitigation measures to prevent temptation to federal agencies to
9.... rely on mitigation measures in order to avoid preparing impact statements). No federal cases in
10 which mitigation measures have been held to justify a finding of no significance have
11... approached the magnitude or scope of the proposed action described in the I-25 EA.
12
13..... Cases in which mitigation measures have been relied upon to justify a FONSI and avoid
14 the need for an EIS generally involve instances “where the proposal itself so integrates
15...mitigation from the beginning that it is impossible to define the proposal without including the
16 mitigation.” Mitigation measures have also been held to justify a finding of no significance
17...where proposed mitigation measures “compensate completely” for any adverse effects of the
18 proposal. *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d
19...678 (D.C. Cir. 1982). Courts have held that mitigation measures not analyzed in sufficient
20 detail cannot excuse the requirement to prepare an EIS. *See, e.g., Joseph v. Adams*, 467 F. Supp.
21...141 (E.D. Mich. 1978) (environmental effects of highway expansion not sufficient mitigated to
22 avoid EIS); *Siskiyou Reg. Educ. Project v. Rose*, 87 F. Supp.2d 1074 (D. Or. 1999) (mitigation
23...measures not explained in detail, no explanation of effectiveness, not backed by analytical data).
24
25..... In the EA, CDOT describes various mitigation measures, ranging from “a noxious weed
26 management plan” to “best management practices” to creation of detention ponds to wetlands
27...creation to habitat enhancement. These mitigation measures do not change the fact that the
28 proposed action is likely to result in significant environmental impacts and that an EIS should be
29...prepared. Indeed, the fact that CDOT has proposed such extensive mitigation is itself an
30 indicator of the significance of the impacts of the proposed action. Reliance on mitigation
31...measures cannot justify a FONSI in this instance because the mitigation measures fail to totally
32 or substantially eliminate the impacts of the proposed action; even if all the mitigation measures
33...proposed by CDOT were implemented effectively, the project would still result in significant
34 direct, indirect and cumulative impacts. Moreover, the mitigation measures have been proposed
35...late in the process—rather than at the time of submission of the original proposal—and therefore
36 they are self-serving and not entitled to consideration in the FHWA’s significance determination.
37.....
38 The proposed mitigation measures also cannot be used to justify a FONSI because the EA
39...fails to analyze or disclose the effectiveness of proposed mitigation measures. The EA describes
40 mitigation measures in a general manner without estimating the effectiveness of these
41...mitigation measures to maintain or improve water quality. It is not clear whether any of the

RESPONSE

Lines 1-11: This comment seems to imply that mitigation was proposed to reduce significant impacts to a non-significant level. This is clearly not the case. FHWA did not rely upon mitigation measures to make a finding of no significant impacts, and mitigation was not used as a strategy to avoid preparation of an EIS. For most of the resources affected by the Proposed Action, mitigation measures are mandated by Federal or State law, regulation or Executive Order. These mitigation requirements are not discretionary and must be implemented regardless of the significance of the impacts. Examples include wetlands, water quality, and endangered species. However, the EA identified no impact that was determined to be significant prior to mitigation. In accordance with CEQ regulations, the determination of significance was based on the context and intensity of impacts, not on the fact that mitigation may have been required.

Lines 9-11: The I-25 EA did not rely on mitigation as asserted. Therefore the cases cited are not pertinent.

Lines 13-23: See both responses above.

Lines 27-29: As previously noted in earlier responses, FHWA disagrees with the assertion that “the proposed action is likely to result in significant impacts.”

Lines 29-30: The extent of mitigation is not an indicator of significance, as discussed above.

Lines 30-34: FHWA has not relied on mitigation to determine that a Finding of No Significant Impact is appropriate for the I-25 Proposed Action.

Lines 34-36: This statement is unclear. Mitigation measures were proposed as part of the Proposed Action and incorporated in it.

Lines 38 to end of paragraph: Only mitigation measures that are known to be effective were proposed. For example, 48-hour detention of stormwater has known rates of effectiveness for treating various water pollutants. These known effectiveness rates will be used in the design of drainage facilities. As plans are developed, FHWA is responsible for ensuring that effective mitigation measures are incorporated in the plans.

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1....planned mitigation would reduce or prevent the 57 percent increase in annual mass loading for
2 pollutants from the highway or reduce or prevent the predicted exceedance of acute and
3....chronic standards for lead, copper and zinc. The EA does not attempt to quantify or estimate
4 the effectiveness of re-vegetating impacted areas to replicate or enhance native vegetative
5....communities, implementing construction best management practices or vague measures such as
6 “enhancing and restoring the existing condition of the local vegetation communities, especially
7....at bridge crossings over riparian corridors.”
8

9..... Under these circumstances, the mitigation measures proposed do not obviate the need
10 for an EIS because the fact remains that the expansion of I-25 is a major federal action
11...significantly affecting the quality of the human environment.
12

13..III. Conclusion

14
15..... The time of preparation and length of the I-25 are more appropriate for an EIS, and
16 raise the question of why CDOT did not elect to prepare an EIS in the first place. If CDOT
17..had spent the last five years preparing an EIS instead of an EA, the central issue would simply
18 be whether the EIS adequately disclosed all of the direct, indirect and cumulative impacts
19..related to the proposed action. Instead, the central issue is whether a federally-funded project
20 that charts the future of transportation projects for the next 20 years along a 26-mile stretch of
21..urban highway qualifies as a major federal significantly affecting the quality of the human
22 environment.
23.....

24 Although the agency must be afforded some latitude in deciding whether to prepare an
25..impact statement, the scope of this judgment is limited in that the agency's decision must be
26 reasonable in light of the requirements and standards set by NEPA. *Wyoming Outdoor*
27..*Coordinating Counsel v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973). An EIS provides greater
28 disclosure of environmental impacts and greater opportunity for public comment and
29..involvement in the process. NEPA requires an EIS for projects of this magnitude in order to
30 insure full public input and participation. Since the impacts of the proposed action are likely to
31..be significant and severe, CDOT and FHWA should have proceeded directly to an EIS before
32 proceeding with piecemeal improvements.
33.....

34 However, it is instructive to note that one of the key differences between the analysis
35..required in an EIS and the analysis required in an EA is the consideration of alternatives to the
36 proposed action. In this case, the decision to prepare an EA rather than an EIS prevented full
37..consideration of a range of reasonable alternatives as required by NEPA. CDOT will argue
38 that it did consider a range of reasonable alternatives, without mentioning that it did so in a
39..separate planning process not subject to the procedural requirements of NEPA. Those
40 alternatives were only considered in a conclusory manner in the EA, because CDOT had

RESPONSE

Lines 1-3: As noted earlier, this water quality issue is being clarified in response to questions raised by EPA. Please see the response to lines 6-17 on page 26.

Lines 3-7: It should be noted that there are legally binding commitments and monitoring requirements for mitigation effectiveness. These are included in permits, plans and specifications. For example, the Biological Opinion issued by the U.S Fish and Wildlife Service requires surveys of revegetated areas “following planting until the success standards stated in the site-specific consultation documents are met. These monitoring actions will be reported to the Service in an annual report.” (EA at Section 8, page 12). Similarly, NPDES permits require monitoring of erosion control measures throughout construction and vegetation monitoring until the permits are inactivated.

Lines 9-11: FHWA has reviewed the EA and its associated documentation, together with all comments received, including this letter, and has determined that the Proposed Action would not result in significant impacts. Therefore an EIS is not required.

Lines 15-22 and lines 24-26: FHWA takes its NEPA responsibilities seriously and has taken action accordingly.

Lines 27-32: FHWA and CDOT have afforded ample opportunity for public involvement in the EA process.

Lines 30-32: For the reasons stated above, FHWA disagrees with the assertion that “the impacts of the proposed action are likely to be significant and severe” and that any part of the Proposed Action would constitute “piecemeal improvements.”

Lines 34 to end of paragraph: The *Mode Feasibility Alternatives Analysis* explored a reasonable range of alternatives as required by NEPA, and was a part of alternatives development for the EA. The MFAA was not prepared through “a separate planning process” outside of the procedural requirements of NEPA, as alleged.

OLD NORTH END NEIGHBORHOOD

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1....already pre-determined the course of action that it deemed wisest to meet the transportation
2 needs of the Pikes Peak region. As a result, the impacts of only two alternatives were
3....compared in the EA, the proposed action and the no action alternative.⁹¹
4
5.....I think it is safe to assume that CDOT never seriously considered adopting the no action
6 alternative; indeed, the EA succinctly defines the purpose of this “proposed corridor
7....improvement project” to “relieve existing traffic congestion and address projected future
8 congestion on I-25 within the Colorado Springs Urbanized Area.” EA at 1-4. Clearly, the no
9....action alternative would not have met this purpose; it was merely included because it is a
10 requirement of NEPA.⁹² The result is that the public has been deprived of an opportunity to
11 consider the relative merits of a broader range of regional transportation solutions which might
12 have met the long-term transportation needs of Colorado Springs and adjacent communities, with
13...potentially less severe environmental, social and economic impacts. This is the governmental
14 philosophy that led to the passage of NEPA, and it is why the FHWA should do the right thing
15...and decline to issue the Finding of No Significant Impact that CDOT seeks.
16
17..... A final factor to be considered in determining significance is “the degree to which the
18 action may establish a precedent for future actions with significant effects or represents a
19...decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(6). The EA is
20 troubling because it seeks federal endorsement of a single plan of action that can be used to
21...justify any number of future projects along a 26-mile stretch of highway. The Old North End is
22 concerned that CDOT will attempt to rely on the EA and FONSI to justify other future projects
23...and avoid the requirement of a comprehensive EIS indefinitely by simply tiering future NEPA
24 analyses (in the form of additional Ces or EAs) to this EA. This fear seems to be justified in
25...light of CDOT’s stated intention to rely on a general cumulative impacts report “for analyzing
26 cumulative effects in this EA and for other transportation projects.” EA at 4-1. In this event, the
27...people of Colorado Springs area will never have the benefit of the environmental review and
28 reasoned consideration of alternatives contemplated by NEPA.
29.....
30 For the reasons stated in these comments, and in the attachments hereto and materials
31...cited herein, all of which are hereby expressly incorporated by reference herein, the Old North
32 End respectfully requests that the FHWA find that the proposed action is likely to “significantly
33...affect the quality of the human environment” and that an Environmental Impact Statement must
34 be prepared before the project may be implemented. If the FHWA instead determines that a
35...Finding of No Significant Impact may be appropriate for this project, then I request that the
36 revised EA and all responses to comments be made available for public review and comment for
37...at least thirty days before a final determination is made regarding whether to prepare an EIS

⁹¹ The two “build” alternatives vary only in that the proposed action designates two of its lanes as HOV lanes.

⁹² In fact, a chart prepared by CDOT projected the issuance of a FONSI in April 2003 and Design/Build in May 2004. See, Attachment 45.

RESPONSE

Lines 1-3: FHWA disagrees that the Proposed Action was “pre-determined” in any way. Instead it was the outcome of a rigorous evaluation of a range of reasonable alternatives, as documented in the MFAA (EA Appendix 1). The Proposed Action and the No-Action Alternatives were evaluated in the EA after it was determined that all other alternatives did not meet the purpose and need.

Lines 5-15: These comments are incorrect and irrelevant. The No-Action Alternative provides a baseline against which other courses of action are evaluated. The range of alternatives considered in the MFAA was made available to the public for comment, and the public was not deprived of an opportunity to consider the merits of alternative solutions.

Lines 17-28: The Proposed Action is one action, with logical project termini and independent utility, that has been comprehensively evaluated in a single NEPA document. While the Proposed Action may be implemented in phases over time, this FONSI cannot be used to “justify other future projects.”

Lines 24-28: This comment seems to misinterpret the intended use of the Regional Cumulative Effects Analysis (EA Appendix 9). That report does not relieve any transportation project from its normally applicable NEPA requirements. Instead, it provides a source of information about important environmental issues and trends in the region, based on an examination of past, present and reasonably foreseeable future actions. This information may be useful in improving consistency in cumulative effects analysis for other projects in the NEPA stage of development.

Lines 30-37: This FONSI represents a thorough and independent evaluation by the Federal Highway Administration of the Environmental Assessment, its supporting documentation, and all comments received, including this letter. These materials provide sufficient evidence and analysis to determine that an EIS is not required.

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1....because the proposed action "is, or is closely similar to, one which normally requires the
2 preparation of an environmental impact statement under the procedures adopted by the agency."
3.....40 C.F.R. § 1501.4(e)(2)(i).

4
5..... Thank you for your consideration and please don't hesitate to contact me directly if you
6.....have any questions about these comments.

7.....
8
9.....
10

Very truly yours,


Stephen D. Harris

11. Attachments as stated

RESPONSE

Lines 1-3: See the earlier response to lines 10-15 on page 7.