SAFETEA-LU’s Environmental Streamlining: Missing Opportunities for Meaningful Reform

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On August 10, 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), the largest public works bill in U.S. history. SAFETEA-LU provides almost $300 billion to fund six years of highway and public transit projects sponsored by the U.S. Department of Transportation, and it includes the planning, technological, environmental, and safety policy goals for the U.S. transportation system. SAFETEA-LU also represents the successful culmination of the push to “streamline” the environmental review process for transportation projects. “Streamlining” supporters claim the new procedures will speed the often-lengthy time from project initiation to project completion without compromising environmental protection. While some of the streamlining changes enacted in SAFETEA-LU may improve efficiency while still protecting the environment, this Comment argues that most of the changes will either sacrifice the environment and public participation to move projects faster, or fail to improve timeframes and environmental protection by ignoring the true reasons for delay.

Streamlining impacts the procedures transportation agencies use to comply with the National Environmental Policy Act (NEPA), which requires all federal agencies to document the environmental impacts of their projects, and section 4(f), a law specific to transportation agencies for protection of historic sites and parklands. Changes that create new limits on judicial review, redefine how transportation agencies interact with natural resource agencies, and limit the involvement of the public in determining project alternatives all undercut the goals of environmental

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protection. Overall, the streamlining in SAFETEA-LU reflects the largely negative attitude toward environmental review prevalent among project developers, who feel that the NEPA and section 4(f) review processes add little to a project. This stance ignores the positive effects environmental review can provide, such as increased public support and a more environmentally-sensitive project.

SAFETEA-LU was an opportunity for Congress to mandate streamlining changes to environmental review that would make environmental review more meaningful for project developers and more beneficial for communities. Techniques such as context sensitive solutions, adaptive management, and environmental management systems all have the potential to improve the process from both a development and an environmental perspective. Integrating planning and environmental review would address potential areas of conflict early in the processes, allowing projects to move forward with less opposition and with more built-in environmental mitigation. While Congress missed the chance to advance these procedures in SAFETEA-LU, some transportation agencies have already begun to implement them. This Comment concludes by advocating that future streamlining efforts focus on making environmental review a useful instrument for both developers and the public: a tool that protects the environment without causing unnecessary delays.
Transportation advocates have long complained that environmental review causes unnecessary delays in the completion of transportation infrastructure projects. The American Association of State Highway and Transportation Officials (AASHTO) has accused the environmental review process of creating "procedural gridlock," and a 2003 study by the General Accounting Office found that transportation stakeholders believe the requirements of environmental review cause the greatest delay in carrying out a project receiving federal highway funds. However, officials with federal and state environmental resource agencies and environmental non-profits champion environmental review for the alternatives analysis and public comment it engenders. These stakeholders worry that changes in recently enacted transportation legislation will reduce the quality of available environmental information regarding a project's impacts.
The actions of the U.S. Department of Transportation (DOT) and state Departments of Transportation (state DOTs) too often escape the attention of environmentalists, who tend to concentrate on the activities of the Environmental Protection Agency or Department of the Interior. Yet the environmental impacts, both positive and negative, of transportation and DOT-funded programs should not be ignored. The transport sector has been cited as the largest contributor to urban air pollution, and roads and road construction are responsible for endangering wildlife, filling and dredging wetlands, and non-point source water pollution. At the same time, however, DOT and the state DOTs have led several environmental initiatives dealing with concerns such as historic preservation, air quality improvement, and wetlands banking.

Environmental goals are just one interest to which DOT must respond. The American economy requires an efficient, safe, and reliable transportation system. The tension inherent in building projects quickly

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6. DOT oversees national transportation policy and coordinates the development of the national transportation network. DOT receives an appropriation from Congress, which it then distributes to the state DOTs. DOT also provides research assistance and technical guidance to state DOTs. DOT includes the Federal Highway Administration (FHWA), the Federal Transit Agency (FTA), the Federal Aviation Agency (FAA), the Federal Railroad Administration (FRA), the Maritime Administration, the National Highway Traffic Safety Administration (NHTSA), and the Federal Motor Carrier Safety Administration (FMCSA). See U.S. Dep't of Transp., http://www.dot.gov/summary.htm (last visited July 9, 2006).


to meet these needs and building projects that are sensitive to the environment forms the catalyst for the push to streamline environmental review. The recent six-year transportation authorization legislation, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), contains many provisions designed for this mission. SAFETEA-LU applies to highway projects, public transportation capital projects, or "multimodal" projects. DOT and the Federal Highway Administration (FHWA), the DOT agency most affected by the changes collectively known as "streamlining," maintain that streamlining will expedite project delivery while still providing for full and complete review of transportation projects' potential environmental impacts.

Unfortunately, SAFETEA-LU will satisfy neither of these goals. While some provisions of the bill may make reviews more efficient without compromising environmental values, others will stifle opportunity for public involvement, do little to significantly reduce project delivery time, and could result in environmental degradation. By simply responding to transportation advocates' desires to have a less rigorous environmental review process, Congress and the Bush Administration bypassed the chance to reform the review process in ways that would truly expedite projects while still protecting the environment.

This Comment evaluates the environmental streamlining sections of SAFETEA-LU. The Comment explains the strategies Congress created that improve the environmental review process for transportation projects, points out instances where Congress chose transportation interests to the detriment of the environment and public participation, and notes foregone opportunities where Congress could have effected changes that would have successfully balanced the concerns and interests of transportation and environmental advocates. Part I explores what streamlining hopes to accomplish. It looks at the statutes and legal opinions producing what transportation officials see as the mire facing them in the environmental review of a transportation project. Part II


10. "Multimodal" refers to projects funded either under Title 23 (Highways) or Chapter 53 of Title 49 (Public Transportation) and involving input of multiple DOT agencies. SAFETEA-LU § 6002, 23 U.S.C. § 139(a)(5)-(6) (2006). Therefore, SAFETEA-LU does not apply to projects involving marine shipping, rail, or aviation.

surveys the myriad streamlining efforts prior to SAFETEA-LU. Part III examines SAFETEA-LU itself, asking what implementation of the streamlining sections will mean; which provisions damage the process for the public and resource agencies; and which will simply be futile efforts because the real causes of delay in the project delivery process were not addressed. The Comment concludes by observing what Congress and DOT could and should have done with the statutory opportunity to both improve project review and maintain the "environmental" characteristics of environmental review.

I. WHAT IS STREAMLINING?

"Environmental streamlining" refers to changing environmental review requirements with the hope that transportation projects will undergo environmental review with greater cooperation from natural and historic resource agencies on a quicker timeframe. More specifically, streamlining attempts to address transportation advocates' frustration with the environmental review process. To these advocates, environmental reviews mandated by the National Environmental Policy Act of 1969 (NEPA) and section 4(f) of the Department of Transportation Act of 1966 are duplicative and present avoidable obstacles. Environmental review under these statutes becomes necessary when a transportation project sponsor, typically a state DOT, receives approval for federal funding. Federal funding begets federal oversight and involvement in all stages of the project, such as planning, environmental review, design, right-of-way acquisition, and construction. NEPA and section 4(f) mandate an environmental review process for federally-funded projects that members of Congress, acting in part in response to the frequent complaints from the state DOTs, have called "cumbersome" and have accused of causing unnecessary delays and requiring too much paperwork.

15. See FHWA, Streamlining, supra note 10.
16. Id.
17. Hearing on TEA-21, supra note 8 (statement of Sen. Baucus). For an explanation of the NEPA process, see infra Part I.A. For an explanation of the section 4(f) process, see infra Part I.B. Conversely, many environmental non-profits have praised these statutes for forcing transportation agencies to examine the impacts of their projects, consider alternatives, and in some cases mitigate detrimental effects. See, e.g., SIERRA CLUB, THE ROAD TO BETTER TRANSPORTATION PROJECTS: PUBLIC INVOLVEMENT AND THE NEPA PROCESS 2-3 (2003) [hereinafter SIERRA CLUB, NEPA PROCESS], available at http://www.sierraclub.org/sprawl/nepa/sprawl_report.pdf; National Trust for Historic Preservation, Transportation: Section 4(f), http://www.nationaltrust.org/issues/transportation/transportation_4f.html (last visited July 9, 2006).
Besides SAFETEA-LU, streamlining supporters have succeeded in other arenas. For example, the Healthy Forests Restoration Act of 2003 sets forth an expedited environmental review process for removing brush, trees, and organic materials near "at-risk communities," and the Energy Policy Act of 2005 contains procedures to accelerate the permitting, approvals, and authorization of energy development projects. Various task forces and committees have examined streamlining the environmental review process for all agencies by passing major overhauls to NEPA. This Comment is limited to discussing streamlining in the context of SAFETEA-LU and transportation projects, but recognizing the existence of ongoing and broad streamlining efforts underscores the importance of understanding the ways in which streamlining may weaken environmental protection and public involvement.

A. National Environmental Policy Act

The National Environmental Policy Act of 1969 sets forth broad goals for the nation’s environmental quality. The statute requires that before a federal agency undertakes an action “significantly affecting the quality of the human environment,” it must engage in a review process that provides information about environmental effects for use by the agency and the public. NEPA envisions a federal government where all agencies respond to environmental interests and consider environmental concerns in their decision-making. James Connaughton, President Bush’s Chair of the Council on Environmental Quality (CEQ), has called NEPA the “first sustainable development statute,” praising it for providing a “backstop for good government planning and decision-making.”


22. Id. § 4332(2).

23. See id. § 4333.

If a state DOT or other project sponsor chooses to use federal funding from DOT for a transportation project, the funding triggers a NEPA environmental review. Depending on the project's expected scope and environmental impacts, DOT has three options for complying with the required "hard look" at environmental consequences. In increasing order of stringency, they are: categorical exclusions, environmental assessments, and environmental impact statements.

For the vast majority of federally funded highway projects, DOT concludes that a categorical exclusion (CE) is appropriate because an examination of the project demonstrates that it will have limited, if any, environmental impacts. Projects receiving CEs typically do not add miles to the road system, and often are routine and involve little construction. In a given year, typically 91 percent of projects receive CEs. It can take as little as a few days to complete the environmental review for a project that will receive a CE, although the average time is six months. Not surprisingly, projects receiving a CE are the least expensive on a per-project basis, accounting for 76 percent of highway project funding in 2001.

When DOT does not have enough information to determine if a project will produce significant environmental impacts, it must produce an Environmental Assessment (EA). EAs require the agency to consider alternatives to the proposed project, including taking no action.

25. See Council on Envtl. Quality (CEQ) Regulations, 40 C.F.R. § 1508.18(a) (2006) (defining "Major Federal action" under NEPA to include "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies"). Thus, if a state finances a project entirely with state funds, no "federal action" occurs and no NEPA review must be done.

26. See Natural Res. Def. Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972) (describing the "hard look" standard courts apply to gauge the agency's examination of environmental impacts). NEPA famously does not require that the agency pursue the most "environmental" outcome; the agency merely must document the impacts its actions will create. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-52 (1989).


29. U.S. GEN. ACCOUNTING OFFICE, supra note 3, at 11-13. For example, bus rehabilitation, landscaping, and improvements to rest areas have been categorical exclusion preapproved by FHWA. Id.

30. Id. at 10–11 (finding approximately ninety-one percent in 2001).

31. Id. at 11.


34. Id.
If the EA reveals that no significant impact will occur, or that impacts can be addressed with mitigation efforts, DOT can issue a Finding of No Significant Impact (FONSI) and proceed with the project development. In 2003, six percent of projects received an EA, and the median completion time was twenty-six months.\textsuperscript{35} EA projects represented about fifteen percent of federal highway funding given to states in 2001.\textsuperscript{36}

If the results of the EA determine that the project will have significant impacts, or if the agency anticipates from the beginning that a project will have impacts, DOT must prepare an Environmental Impact Statement (EIS).\textsuperscript{37} Projects that require an EIS are typically those that add miles to the road system.\textsuperscript{38} Approximately three percent of projects receive an EIS, and the median time for EIS completion in 2003 was sixty-eight months.\textsuperscript{39} Projects that require an EIS are, as would be expected, the most expensive and the most time-consuming, representing about nine percent of federal highway funding distributed to states.\textsuperscript{40}

Transportation improvement advocates blame the five-year plus timeframe for an EIS for “draw[ing] heat and attention to NEPA.”\textsuperscript{41} The magnitude of projects requiring an EIS often engages the expertise and permitting jurisdiction of several agencies, which advocates contend contributes to the longer timeframe. The different agencies participating in the NEPA documentation serve as either the “lead agency” or as a “cooperating agency.”\textsuperscript{42} For the transportation projects affected by SAFETEA-LU, the federal lead agency will be either FHWA or the Federal Transit Administration (FTA) on behalf of DOT. Cooperating agencies have jurisdiction or expertise related to the anticipated environmental consequences of a project, and they must provide input or comments to the lead agency during the NEPA process.\textsuperscript{43} For example, a highway project might affect the habitat of an endangered species, requiring the participation of the Department of the Interior as a cooperating agency because the Department of the Interior’s Fish and Wildlife Service has jurisdiction and permitting power regarding the Endangered Species Act.\textsuperscript{44} The streamlining debate has drawn attention

\textsuperscript{35} FHWA, Congressional Report, \textit{supra} note 32. Projects like lane widening or interchange construction typically receive EAs. See \textbf{U.S. GEN. ACCOUNTING OFFICE}, \textit{supra} note 3, at 14.

\textsuperscript{36} \textbf{U.S. GEN. ACCOUNTING OFFICE}, \textit{supra} note 3, at 13; FHWA, Congressional Report, \textit{supra} note 32.

\textsuperscript{37} \textit{See NEPA, 42 U.S.C. § 4332(C) (2006).}

\textsuperscript{38} \textbf{U.S. GEN. ACCOUNTING OFFICE}, \textit{supra} note 3, at 15.

\textsuperscript{39} FHWA, Congressional Report, \textit{supra} note 32.

\textsuperscript{40} \textit{Id.; see also} \textbf{U.S. GEN. ACCOUNTING OFFICE}, \textit{supra} note 3, at 15.

\textsuperscript{41} Connaughton, \textit{supra} note 24, at 5.

\textsuperscript{42} 40 C.F.R. §§ 1501.5–1501.6 (2006) (defining “Lead Agencies” and “Cooperating Agencies,” respectively).

\textsuperscript{43} \textit{Id. § 1501.6}.

to the often-sequential nature of the review and approval process of these multiple agency processes.

In addition to addressing the protracted process of multiple agency involvement in the NEPA process, streamlining advocates also turned their attention to the procedures requiring DOT to work with the state DOTs in the preparation of NEPA documentation. The NEPA regulations provide that federal "[a]gencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication" including conducting joint planning, environmental studies, public hearings and EAs. Supporters intended for SAFETEA-LU to clarify and expand the state agency role in this process.

Another aspect of NEPA that streamlining seeks to change is the required alternatives analysis. All NEPA documents must explain the purpose of a project and what public needs it will serve. This "Purpose and Need" section determines the alternatives the project sponsor must consider in the analysis of potential impacts. The agency must examine all "reasonable alternatives," meaning those that are practical or feasible, even if the actions required to achieve those alternatives are outside the lead agency's jurisdiction. The NEPA documents must also include taking no action as an alternative. The Purpose and Need section forms a frequent target for litigation, as environmental groups can argue that the agency improperly defined the project's purpose and thus limited the alternatives considered during the environmental review.

Streamlining advocates see changes to requirements for the Purpose and Need section and the corresponding alternatives analysis as a useful means to simplify the NEPA process.

B. Historic Preservation: Section 4(f) and Section 106

Two separate statutes charge DOT with reviewing whether its projects will affect parklands or historic sites. All federal agencies, including DOT, must also comply with section 106 of the National Historic Preservation Act, which stipulates a review process for projects

45. 40 C.F.R. § 1506.2(b)-(c) (2006).
46. Id. § 1502.13 (explaining the "Purpose and Need" of the EIS).
47. Id.
48. Id. § 1502.14.
49. Id. § 1502.14(d).
50. Compare Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C Cir. 1991) (allowing an agency to use a narrow Purpose and Need to limit the consideration of alternatives), with Van Abbema v. Fornell, 807 F.2d 633, 639 (7th Cir. 1986) (requiring the agency to examine alternatives that met the general goal of a project).
51. See H. COMM. ON RESOURCES, TASK FORCE ON IMPROVING NEPA, supra note 20, at 25-29.
that may impact a historic resource. Section 106 specifies that all federal agencies must "take into account" the impacts of their actions on historic resources but does not demand substantive protection.

The other, section 4(f), applies only to DOT. Section 4(f) refers to the combination of requirements originating in the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1966. These statutes charge DOT with using "maximum effort to preserve... parklands and historic sites" and forbidding the approval of a project "which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm." The federal Advisory Council on Historic Preservation and the State Historic Preservation Office of each state work with DOT and the state DOTs to fulfill the historic preservation requirements. Ending the dual review of

52. National Historic Preservation Act of 1966 § 106, 16 U.S.C. § 470f (2006). While section 4(f) sets a high substantive bar for DOT, the requirements of section 106 are procedural. See id. A historic resource is a place of cultural, historic, or archeological importance with significance for American history, architecture, culture, engineering, and archeology. For more information, visit National Park Service, National Register of Historic Places, http://www.cr.nps.gov/nr/about.htm (last visited July 9, 2006).


55. Section 4(f) entered federal law as part of the original Department of Transportation Act of 1966. Since then it has been amended and recodified numerous times. However, given the familiarity of federal, state, and local transportation officials with the term "Section 4(f)," historic preservation review as mandated by these statutes continues to go by the name "Section 4(f)." U.S. DEPT. OF TRANSP., FED. HIGHWAY ADMIN., FHWA SECTION 4(F) POLICY PAPER 1 (2005), available at http://environment.fhwa.dot.gov/projdev/4fpolicy.pdf.


both section 4(f) and section 106 for historic resources was one of streamlining supporters' main goals.  

Litigation has shone a bright spotlight on section 4(f) requirements. Courts have concluded that section 4(f), unlike NEPA, contains both substantive and procedural requirements, meaning that DOT must act in a manner demonstrating sensitivity to historic site and parkland protection. For example, the Supreme Court's influential decision in Citizens to Preserve Overton Park, Inc. v. Volpe established that section 4(f) does not allow DOT to balance economic and environmental factors in determining if a "feasible" and "prudent" alternative exists to using a protected resource. Rather, DOT must engage in "a thorough, probing, in-depth review" before deciding to use lands named in section 4(f) for construction. Only where the agency can provide a "unique" reason for using protected land may it do so. Overton Park remains a seminal decision in administrative and environmental law, standing for the principle that courts can rigorously examine agency decision-making and question agency expertise. It established a basis for the modern "hard look" school of judicial review of informal agency actions.

A circuit split following Overton Park has caused confusion for state DOTs regarding their section 4(f) compliance. Two circuits have rejected the strict adherence to section 4(f) that Overton Park required. These opinions would allow DOT to balance economic considerations and administrative efficiency with environmental concerns. The first, Eagle Foundation, Inc. v. Dole, concerned a conservation group's challenge to an FHWA and Illinois state DOT plan to build a highway that would affect parkland and a historic site. The plaintiff group claimed that FHWA's conclusion that "all technically feasible alternatives to [the
chosen site] are imprudent” violated section 4(f). In upholding the decision to use the section 4(f) lands, the Seventh Circuit deliberately disagreed with the Supreme Court’s mandate in Overton Park that section 4(f) requires a “unique” reason to use the listed types of land. Instead, the court invited DOT to balance competing interests and reject alternatives if a “strong” or “powerful” reason to use the section 4(f) property existed. This represented a clear retreat from the strictness of Overton Park by widening DOT’s options in implementing the statute.

The Fourth Circuit agreed with the Seventh Circuit’s interpretation in Hickory Neighborhood Defense League v. Skinner. In Skinner, the court called Overton Park’s use of “unique” mere “emphasis,” allowing the Secretary to use section 4(f) land if “there were compelling reasons for rejecting the proposed alternatives as not prudent.”

In contrast to the Fourth and Seventh Circuits, other courts have maintained and upheld the exacting standards of Overton Park. In general, these decisions have received support from the environmental and historic preservation communities. In Stop H-3 Ass’n v. Dole, the Ninth Circuit rejected DOT’s “totality of circumstances” argument that would have allowed DOT to meet more easily Overton Park’s requirement of “unique” reasons to use section 4(f) property. Likewise, the Eleventh Circuit proclaimed that it would accept “no exceptions to the requirement that there be no prudent alternatives to the use of parks and historic sites before the Secretary can approve a project using protected properties.”

The American Association of State Highway and Transportation Officials has blamed these competing interpretations of section 4(f) for

67. Id. at 803.
68. See id. at 804.

[W]e do not overlook the Supreme Court’s use of ‘unique.’ If the reasons not to use the § 4(f) property must be ‘unique’, then the Secretary’s decision here cannot stand. . . . None of [the reasons to reject an alternative] is ‘unique’ . . . . Yet we cannot believe that the Supreme Court meant that if a risk or cost has been accepted, or an obstacle overcome, for any highway in the United States, then it always must be accepted or overcome in preference to the use of any § 4(f) lands.

70. See Kunz, supra note 57, at 289.
72. Id. The court found that the Secretary’s reasons for rejecting the alternatives were prudent. The alternatives would “limit access to two hospitals . . . . require the use of two streets versus one in [a historic district] and would route a major portion of highway traffic through a stable and quiet residential neighborhood.” Id. at 163–64.
73. See Kunz, supra note 57, at 293.
74. Stop H-3 Ass’n v. Dole, 740 F.2d 1442, 1451 n.14 (9th Cir. 1984).
75. See Druid Hills Civic Ass’n, Inc. v. FHWA, 772 F.2d 700, 716 (11th Cir. 1985).
leading to a "lack of flexibility, balance, and common sense."\textsuperscript{76} The circuit split does demonstrate that state DOTs have a legitimate claim to uncertainty in how to follow section 4(f). Despite these competing interpretations of \textit{Overton Park}, the Supreme Court has yet to hear another section 4(f) claim.\textsuperscript{77} Meanwhile, transportation goals continue to conflict with historic preservation.\textsuperscript{78}

II. A SURVEY OF STREAMLINING EFFORTS

Responding to transportation officials' concerns and uncertainty stemming from the compliance requirements of both NEPA and section 4(f), Congress, as well as the Clinton and Bush Administrations, initiated efforts to "streamline" the review requirements and expedite project delivery.

A. Past Legislative Attempts

Section 1309 of the Transportation Equity Act of the 21st Century (TEA-21), passed in 1998, initiated the era of streamlining efforts.\textsuperscript{79} TEA-21's streamlining section created a coordinated review process for all environmental issues potentially affecting a project. The statute provided that different agencies' environmental reviews would be concurrent rather than sequential, and that the agencies would cooperatively determine a time period for the completion of the reviews.\textsuperscript{80} Further, state project sponsors could address any required state environmental review during the federal review process, meaning that any state process could potentially proceed concurrently with the federal review.\textsuperscript{81} The law directed DOT to issue regulations on how state DOTs should issue reasonable deadlines to other agencies and conduct these concurrent reviews.\textsuperscript{82} After DOT failed to enact regulations, members of Congress introduced two bills on streamlining in an attempt to push DOT into action.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{76} \textit{Heating on TEA-21, supra} note 8 (statement of Am. Ass'n of State Highway and Transp. Officials).
\item \textsuperscript{77} \textit{See Kunz, supra} note 57, at 286.
\item \textsuperscript{78} \textit{See Hearing on TEA-21, supra} note 8 (statement of Emily Wadhams, Vermont State Historic Preservation Officer).
\item \textsuperscript{80} TEA-21 § 1309(a)(2)(A).
\item \textsuperscript{81} \textit{Id.} § 1309(d).
\item \textsuperscript{83} Though neither of these bills succeeded, another piece of legislation that included streamlining provisions for aviation projects passed in 2003. \textit{See} Aviation Development Streamlining Act § 304(a), Pub. L. 108-176, 117 Stat. 2534 (codified at 49 U.S.C. § 47171 (2006)).
\end{itemize}
Rep. Don Young (R-AK) introduced the House bill, H.R. 5455: Expediting Project Delivery to Improve Transportation and the Environment Act (ExPDITE), in 2002. The bill stated that Congress had found that "delays in our surface transportation projects have a significant negative impact on our Nation's economy" and charged federal, state, and local agencies with working together to complete projects faster without losing opportunities for public comment. The Senate's bill, S. 3031: Maximum Economic Growth for America through Environmental Streamlining Act (MEGA Stream Act), contained similar provisions to H.R. 5455. Although both bills ultimately failed passage, their progeny formed much of the backbone for discussion of the TEA-21 reauthorization. Several sections of S. 3031 and H.R. 5455 were enacted as part of SAFETEA-LU. These include provisions giving DOT lead agency responsibility in determining the "Purpose and Need" of a project and the range of alternatives to be considered, creating procedures for a concurrent review process, establishing stricter time limits on lawsuits challenging decisions made during the environmental review, and requiring the DOT Secretary to inform Congress of delays in the decision process. H.R. 5455 also spurred the controversy surrounding the potential for only one historic preservation review, rather than the two reviews required under section 106 and section 4(f).

B. Bush Administration Efforts

The Bush Administration has made environmental streamlining one of its environmental policy priorities. Efforts to streamline the

85. ExPDITE, H.R. 5455 § 2.
86. Maximum Economic Growth for America through Environmental Streamlining Act (MEGA Stream Act), S. 3031, 107th Cong. (2002). The MEGA Stream Act was introduced by Senator Max Baucus (D-MT). See Baucus Statement, supra note 82.
88. ExPDITE, H.R. 5455 § 101(a); MEGA Stream Act, S. 3031 § 3(a) ("Agency Role and Responsibilities; Statement of Purpose and Need; Alternatives"). For the results in SAFETEA-LU, see infra notes 125–28 and accompanying text.
89. MEGA Stream Act, S. 3031 § 3(a).
90. ExPDITE, H.R. 5455 § 102(a). For the results in SAFETEA-LU, see infra note 134 and accompanying text.
91. ExPDITE, H.R. 5455, § 102(a); MEGA Stream Act, S. 3031§ 3(a) ("Secretarial Decision Deadline; Committee Notification"). For the results in SAFETEA-LU, see infra note 135 and accompanying text.
92. See ExPDITE, H.R. 5455 § 103(a); see infra Part II.B.
environmental review process for transportation projects specifically began with an Executive Order in 2002. The Administration's TEA-21 reauthorization proposal, the Safe, Accountable, Flexible and Efficient Transportation Equity Act (SAFETEA), built upon and expanded this effort. This section describes the Executive Order and explores the litigation it engendered before turning to the streamlining sections of SAFETEA, which laid a firm foundation for streamlining in SAFETEA-LU.

1. Executive Order

President Bush's Executive Order 13,274 (the EO), Environmental Stewardship and Transportation Infrastructure Project Reviews, furthered TEA-21's concept of environmental streamlining by charging the Secretary of Transportation with naming a list of high priority projects for "expedit[ed] environmental reviews." The EO provided a visible example of the Administration's commitment to streamlining, but critics charged that the EO lacked clear definitions for "expedite" or "streamline," contained no guidelines for implementation, and gave little more than lip service to environmental protection. Nevertheless, FHWA has fulfilled the goals described in the EO, including creating a priority project list, forming a task force, and reporting on streamlining efforts and results. One highway on the priority project list has already generated its own storm of litigation. Senville v. Peters, litigation brought following DOT's 2002 approval of a 1986 Final EIS, demonstrates the danger expedited review poses for environmental interests. The suit concerns Vermont's Chittenden County Circumferential Highway (the Circ), a project designed to alleviate congestion and spur economic growth in the northwestern part of the state. In 2002, DOT named the Circ to the priority project list required by the streamlining Executive Order. This designation made the Circ one of the first projects to test how streamlining would play out in the real world.

Ironic in light of the soon-to-commence litigation, not even four months after this designation, DOT praised the Circ's expedited status.

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95. See FHWA, Streamlining, supra note 10.
97. Id. at 340.
for "resolv[ing] [differences] among federal agencies over mitigation for induced growth that had stalemated review." For the Circ, expedited review meant that the Vermont Division of FHWA, the Vermont DOT, and EPA's Region 1 office held discussions to deal with EPA's concerns. EPA officials noted that the expedited process could cause public involvement problems because "if the unintended consequences of the Executive Order give the public the feeling they are being shut out, whether this be real or perceived, the process is not going to work." This proved true, as a status report on the EO's priority projects indicated that the public felt excluded from the federal agency process for the Circ, and several environmental organizations reported they were denied access to meetings discussing revisions to the draft EA. Despite these public participation problems, in August 2003, FHWA and the Vermont state DOT issued an EA and final Record of Decision (ROD) saying that the 1986 EIS required no updates regarding emissions or air pollution analysis. If streamlining and expedited review satisfied the concerns of the federal agencies, environmentalists were less thrilled. In October 2003, environmental advocacy groups challenged FHWA's ROD approving the 1986 final environmental impact statement, alleging violations of NEPA, Council on Environmental Quality regulations, and FHWA regulations. The district court agreed, finding that FHWA's approval of the environmental documents neglected to consider cumulative impacts.


100. See INTERAGENCY TRANSP. INFRASTRUCTURE STREAMLINING TASK FORCE, ANNUAL REPORT TO THE PRESIDENT 13 (2004) [hereinafter INTERAGENCY TASK FORCE], http://www.fhwa.dot.gov/stewardshipeo/annualreport04.pdf. Interestingly, the report notes the initiation of the lawsuit but does not reveal the court's decision, despite the report's publication more than six months after the conclusion of the litigation. See id. at 14.


104. ENVTL. DEF., STEWARDSHIP, supra note 101, at 11.

or to properly conduct a section 4(f) analysis.\(^{106}\) The Vermont DOT has begun to re-evaluate the environmental documentation for the project, and it was still holding public meetings as of the spring of 2006—more than two years after the project was supposed to move forward.\(^{107}\) The example of the Circ and Senville is a warning that streamlining can cause shortcuts that result in further delay.

2. Reauthorization Proposal: SAFETEA

While the Bush Administration's EO demonstrated a commitment to streamlining, the biggest push came in its TEA-21 reauthorization proposal, the Safe, Accountable, Flexible and Efficient Transportation Equity Act (SAFETEA). SAFETEA contained many streamlining sections similar to what Congress enacted in the final SAFETEA-LU legislation.\(^{108}\) In the SAFETEA proposal, the Administration pushed most strongly for a 180-day limit on legal challenges to federal agency approvals connected to highway or public transit construction.\(^{109}\) This provision was included in the bill's final version.\(^{110}\) Regarding historic preservation, the Administration proposed to have the National Historic Preservation Act's section 106 review also satisfy the rigorous and substantive section 4(f) review.\(^{111}\) The National Trust for Historic Preservation (NTHP) loudly objected to the changes, accusing the Administration of an attempt to "eviscerate the protection provided by section 4(f)."\(^{112}\) As the next section analyzes, following heavy lobbying and a compromise brokered by Senator Voinovich of Ohio, the NTHP,

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106. Senville, 327 F. Supp. 2d at 370.
108. Although the two share a similar name and acronym, there are many differences between SAFETEA, the Administration's proposal, and SAFETEA-LU, the enacted statute.
and AASHTO, SAFETEA-LU maintains the dual review of both section 106 and section 4(f).\textsuperscript{113}

The SAFETEA proposal also addressed and sought to expand the ability of federal agencies to rely on NEPA reviews conducted by state and local project sponsors in their decision-making.\textsuperscript{114} The Administration specified that it intended to address two appellate decisions limiting the ability of federal agencies to adopt state-conducted NEPA reviews.\textsuperscript{115} In \textit{Utahns for Better Transportation v. United States Department of Transportation}, the circuit court agreed with the plaintiffs' allegations that FHWA violated NEPA when it "did not sufficiently participate and independently review" an EIS prepared by a state DOT.\textsuperscript{116} In the other opinion, \textit{Sierra Club v. United States Army Corps of Engineers}, the circuit court reaffirmed its opinion that federal permitting agencies violate NEPA if they rely on a state agency to prepare an EIS.\textsuperscript{117} The court found that such "reliance [is] an impermissible delegation of the federal agency's authority and responsibility to a local, interested entity that would not be likely to bring the needed objectivity to the mandated evaluation of federal interests."\textsuperscript{118} These opinions distinguished between the funding and permitting roles of federal agencies, allowing a federal agency to rely on a state-prepared EIS if the agency will only fund the project, but not if the agency must make a permitting decision.\textsuperscript{119} The court noted that the legislative history of NEPA demonstrates that Congress "consciously refrained" from granting permitting agencies the ability to rely on a state-prepared EIS. Congress believed permitting involves greater decision-making and that state agencies may have a biased interest or an "axe to grind" in seeing a project accomplished in a certain way.\textsuperscript{120}

SAFETEA would have changed the regulations to specify that a state or local agency can serve as a "joint lead agency" with DOT in the

\begin{itemize}
  \item \textsuperscript{114} See SAFETEA PROPOSAL, supra note 111, § 1602(d). For further discussion of NEPA regulations pertaining to federal-state decision-making, see supra Part I.A.
  \item \textsuperscript{115} SAFETEA ANALYSIS, supra note 109, at 22-25 (explaining section 1602(d), "Clarification Regarding Environmental Impact Statements Prepared by State and Local Transportation Agencies").
  \item \textsuperscript{116} Utahns for Better Transp. v. United States Dep't of Transp., 305 F.3d 1152, 1185-86 (10th Cir. 2002). The topic of this litigation, the Legacy Parkway, is discussed further infra Part III.B.2.b.
  \item \textsuperscript{117} Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011, 1037 (2d Cir. 1983).
  \item \textsuperscript{118} Id. at 1038.
  \item \textsuperscript{119} Id. In \textit{Utahns}, the court agreed with the division between funding and permitting, finding that FHWA as a permitting agency could not adopt the EIS prepared by the Utah DOT. \textit{Utahns}, 305 F.3d at 1186.
  \item \textsuperscript{120} Sierra Club, 701 F.2d at 1038.
\end{itemize}
preparation of NEPA documents, as long as DOT provides guidance and evaluates the review.\textsuperscript{121} Other federal agencies could also adopt the state DOT-prepared EIS, superseding the problem in \textit{Sierra Club}.\textsuperscript{122} As enacted, SAFETEA-LU includes these changes.\textsuperscript{123}

III. SAFETEA-LU: STREAMLINING SUCCEEDS

More than two years after the Bush Administration submitted SAFETEA, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) on August 10, 2005.\textsuperscript{124} Among its many elements, SAFETEA-LU provided $244.1 billion in funding for highways, highway safety, and public transportation projects. The first part of this section gives an outline of the changes SAFETEA-LU enacted to streamline environmental review. The second part analyzes these changes, praising those that are environmentally sensitive and critiquing sections that harm the environment.

A. \textit{Streamlining in the Statute: An Overview}

While distinct from the Bush Administration’s SAFETEA proposal, SAFETEA-LU contains many of the Administration’s goals for streamlining the environmental review process. First, section 6002 revamps the NEPA process for projects requiring the preparation of an Environmental Impact Statement.\textsuperscript{125} This section outlines a process that attempts to better coordinate the involvement of the public and other agencies in the NEPA process.\textsuperscript{126} If DOT chooses, the new procedures would also apply to Environmental Assessments (EAs) and categorical exclusions.\textsuperscript{127} Under this section, DOT has responsibility to determine the purpose, need, and range of alternatives for consideration in environmental review documents, after consultation with the public and other agencies.\textsuperscript{128}

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\begin{footnotesize}
\begin{enumerate}
\item See SAFETEA ANALYSIS, supra note 109, at 23.
\item See \textit{id.}, \textit{Sierra Club}, 701 F.2d at 1037.
\item See \textit{Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users} (SAFETEA-LU), Pub. L. No. 109-59, § 6002, 119 Stat. 1144, 1864-65. For further discussion, see \textit{infra} notes 130-33 and accompanying text.
\item Id. § 139(c)–(h).
\item Id. § 139(a)(3).
\item Id. § 139(f).
\end{enumerate}
\end{footnotesize}
Section 6002 also gives state, local, and tribal agencies a more formal role under the designation of "participating agency." If the state or local government is the project sponsor, SAFETEA-LU allows the state or local government to act as a "joint lead agency" with the federal lead. As a joint lead agency, a state or local government can prepare NEPA documents as long as the DOT Secretary or other federal lead agency provide guidance, evaluate the document, and ensure that the state or local government project sponsor complies with environmental mitigation commitments in the documents. In addition, other federal agencies can adopt and use the state or local government project sponsor-prepared documents. In this manner, SAFETEA-LU resolves the issues in Utahns and Sierra Club in favor of devolving NEPA responsibilities to state and local government project sponsors.

Section 6002 also incorporates the SAFETEA proposal for a 180-day limit on claims challenging a federal approval, permit, or license, as long as the decision was published in the Federal Register. Besides the 180-day limit on lawsuits, DOT must also notify Congress, the project sponsor, the Governor, participating agencies, and the Council on Environmental Quality, if, after consultation with other agencies, a contested issue remains that could result in the denial of any permits or delay the review process by more than 180 days.

Besides the joint lead agency opportunities in section 6002 described above, several other sections delegate much of FHWA and DOT's environmental review responsibilities to states. For example, section 6003 establishes a pilot program where states can assume the NEPA and section 4(f) review responsibilities for the Recreational Trails and Transportation Enhancements programs. Under section 6004, a state can enter into a Memorandum of Understanding with DOT to assume responsibility for managing all categorical exclusions.

Finally, section 6005 allows five named states to participate in a pilot program to assume

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129. Id. § 139(d). The role of state agencies is more thoroughly described in SAFETEA-LU Section 6003, 23 U.S.C. § 325.
131. Id. § 139(c)(3)-(4).
132. Id. § 139(c)(5).
133. Id. § 139 (c)(3)-(5); see Utahns for Better Transp. v. United States Dep't of Transp., 305 F.3d 1152, 1185-86 (10th Cir. 2002); Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011, 1037 (2d Cir. 1983).
135. Id. § 139(h)(3)(b).
137. Id. § 325. In the first three fiscal years, the section limits the program to five states. Id. § 325(a)(1)(B).
138. Id. § 326.
all NEPA and other federal environmental responsibilities for highway projects (excluding Clean Air Act and transportation planning).\footnote{Id. § 327(b)(1).}

Two other sections contain the first substantive changes to section 4(f)'s historic sites and parklands protection since the 1966 enactment of the Department of Transportation Act.\footnote{SAFETEA-LU § 6007, 23 U.S.C. §§ 103(c)(5), 138 (2006); see also Memorandum from Cynthia J. Burbank, Assoc. Adm'r, Planning, Env't & Realty, U.S. Fed. Highway Admin., to Div. Adm'rs (Dec. 13, 2005), available at http://www.fhwa.dot.gov/hep/guidedeminimis.htm.} Section 6007 exempts the bulk of the Interstate Highway System (IHS) from consideration as a historic resource and section 4(f) review.\footnote{23 U.S.C. § 103(c)(5)(A) (2006).} As the IHS approached its fiftieth anniversary, the usual time when structures become eligible for historic status, DOT and state DOTs worried that any change to the 46,700-mile system, including safety improvements or routine projects like line-painting, could require section 4(f) and section 106 review.\footnote{See Memorandum from Cynthia J. Burbank, Assoc. Adm'r, Planning, Env't & Realty, U.S. Fed. Highway Admin., to Div. Adm'rs (Jan. 13, 2006), available at http://www.fhwa.dot.gov/hep/interstate4f.htm; Horsley Testimony, supra note 2.} A regulation from the Advisory Council on Historic Preservation (ACHP) provided that federal agencies would not need to perform a section 106 analysis for the IHS, except for certain specifically designated elements of historic significance.\footnote{Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11,928 (Mar. 10, 2005).} Section 6007 of SAFETEA-LU applies a similar process to the section 4(f) review—only projects affecting designated elements of the IHS will undergo section 4(f) review.\footnote{23 U.S.C. § 103(c)(5)(B).} Between the ACHP regulation and the SAFETEA-LU legislation, only work on especially important structures within the IHS will need to undergo historic preservation review.\footnote{Id. § 103(c)(5).}

Section 6009 allows DOT to streamline the requirements of section 4(f) for projects with a “de minimis” impact.\footnote{Id. § 138(b)(2)(A)(i).} The statute defines “de minimis” for historic sites as “no adverse effects” or “no historic properties affected.”\footnote{See U.S. Dep’t of Transp., Fed. Highway Admin., Questions and Answers on the Application of the Section 4(f) De Minimis Impact Criteria, http://www.fhwa.dot.gov/hep/qasdeminimus.htm (last visited July 9, 2006) [hereinafter FHWA, Q&A].} These standards overlap with the section 106 analysis under the National Historic Preservation Act. This means that if the section 106 review concludes that the project will not have adverse effects or not affect a historic property, the same evaluation can establish a de minimis standard for section 4(f).\footnote{Id. § 138(b)(2)(A)(i).} DOT must inform and obtain
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the agreement of the state historic preservation office in the "no adverse effects" determination.\footnote{SAFETEA-LU § 6009, 23 U.S.C. § 138(b)(2) (2006); see also FHWA, Q&A, supra note 148.}

For parks, recreation areas, and wildlife and waterfowl refuges, "de minimis" means impacts that do not "adversely affect the activities, features, and attributes" of the resource.\footnote{23 U.S.C. § 138(b)(3)(A); see also FHWA, Q&A, supra note 148.} The SAFETEA-LU Conference Report explains this standard with an example distinguishing playground equipment at a public park (important to protect) from the park's parking facilities (a minor but adverse effect does not detract from the park's value).\footnote{H.R. REP. NO. 109-203, at 1057 (2005) (Conf. Rep.); see also FHWA, Q&A, supra note 148.} The official with jurisdiction over the resource must concur in the de minimis decision.\footnote{23 U.S.C. § 138(b)(3).} No alternatives analysis is required for use of these types of resources once a de minimis standard is met.\footnote{Id. § 138(b)(1)(B).}

Finally, section 6009 requires the Secretary to promulgate a rule on the meaning of "prudent and feasible" regarding the section 4(f) alternatives analysis.\footnote{Id. § 138.} DOT has commented that this section will respond to the circuit split over the proper application of section 4(f) following Overton Park\footnote{SAFETEA ANALYSIS, supra note 109, at 27.} and will "greatly simplif[y]" section 4(f) compliance.\footnote{FHWA, Q&A, supra note 148.}

\section{Analysis: The Good, the Bad, and the Useless}

After the twelve extensions of TEA-21 following its September 30, 2003 expiration,\footnote{See Press Release, Am. Ass'n of State Highway and Transp. Officials, President Bush Signs Transportation Reauthorization Bill (Aug. 10, 2005), available at http://news.transportation.org/press_release.aspx; Envtl. Def., New Federal Transportation Law: Money for roads, transit, bikes, diesel cleanup; threatened environmental protection laws remain largely intact, http://www.environmentaldefence.org/article.cfm?contentid=4434 (last visited July 9, 2006). Some might say the cheers were simply that a bill was enacted at all, given that TEA-21 had expired two years previously.} SAFETEA-LU received almost universal praise upon its enactment.\footnote{For a list and description of the extensions, see U.S. Dep't of Transp., Fed. Highway Admin., Reauthorization of TEA-21, http://www.fhwa.dot.gov/reauthorization/extension.htm (last visited July 9, 2006).} Although SAFETEA-LU may contain many beneficial provisions that satisfy both environmental and transportation interests, the streamlining sections give transportation advocates more reason to cheer than they do environmentalists. From the perspective of safeguarding the environment, the streamlining sections in SAFETEA-
LU are unsatisfying and ultimately troubling. While the legislation does include some sections that will benefit environmental interests, too many will hurt environmental protection by sacrificing NEPA and section 4(f) protections for speed rather than enhancing environmental review with greater timeliness and quality. Worse, some sections will result in shoddy environmental reviews without even the benefit of saving time in the overall project delivery.

1. SAFETEA-LU's Helpful Provisions

Environmentalists cannot write off the entire streamlining package in SAFETEA-LU as detrimental to environmental interests. Certain sections could ensure that environmental reviews proceed more efficiently while concentrating on protection of resources of the greatest sensitivity. First, section 6002's general requirement that agencies collaborate early and conduct environmental reviews concurrently makes practical sense and, if followed, will make more information available to the public and resource agencies. If agencies conduct their reviews sequentially, information from when the first agency conducted its review may be less relevant by the end of the process. By working concurrently and sharing information more cooperatively, agencies will likely be able to build off their collective knowledge and reach more productive decisions more quickly. For example, states that have developed and implemented more collaborative approaches to environmental review have found that when the transportation and resource agencies see each other as allies with common goals, environmental review proceeds more smoothly.159

Second, the rulemaking required by section 6009 on the meaning of "prudent and feasible" in section 4(f) also has benefits. It will clarify a long-standing uncertainty for courts and transportation decision-makers.160 The circuit-splitting progeny of Overton Park have either narrowed Overton Park to allow a balancing test of environmental, cost, and other factors, or maintained the strict requirements of the seminal case.161 The sometimes-perverse effects of the strict interpretation of section 4(f) are only too well documented by AASHTO and its supporters.162 If, as expected, DOT issues rules that support the balancing

159. Hearing on TEA-21, supra note 8 (statement of Emily Wadhams, Vermont State Historic Preservation Officer).
161. See id.; see also supra Part I.B.
162. AASHTO claims that because of section 4(f), FHWA often finds itself "protecting a minor historic property at the expense of other, more sensitive environmental resources." Hearing on TEA-21, supra note 8 (statement of Am. Ass’n of State Highway and Transp. Officials). For example, the Kentucky DOT avoided a historic farmhouse by constructing an alignment through a modern house. Kentucky paid the owner of the modern house for the
idea, section 4(f) would actually be restored to the intent of its drafters, who never intended to hold a project hostage because of minimal effects on parklands or historic sites.\footnote{163}

Finally, the exemption of most of the Interstate Highway System from both section 106 and section 4(f) review will sensibly allow routine maintenance and repairs to proceed without delay. The regulation and legislation mean that only historically significant bridges, interchanges, and rest stops will undergo historic preservation review.\footnote{164} Moreover, the criteria for selecting the historically significant portions will allow preservation interests to play a role in the decision-making.

2. \textit{Sacrificing the Environment for Streamlining}

Despite these benefits, the environmental streamlining sections in SAFETEA-LU tremendously favor the "streamlining" over the "environmental." It is clear from a plain reading of the statute that the priority for Congress was speeding project delivery, not environmental protection. Unfortunately, SAFETEA-LU treats these as mutually exclusive goals, giving project sponsors numerous means to shut out public comment and short-change environmental review in the hopes of receiving project approvals faster. This section looks at three ways that SAFETEA-LU clearly favors speed over environmental protection: the limitations on judicial review, the circumvention of the NEPA process, and the unjust blame attributed to environmental review for project delays.

\textbf{a. Stifling Public Participation by Limiting Judicial Review}

Unlike other environmental statutes, NEPA does not contain a section on judicial review.\footnote{165} Instead, before SAFETEA-LU, the Administrative Procedure Act's default six-year statute of limitations applied for NEPA claims.\footnote{166} SAFETEA-LU's 180-day deadline cuts that taking, and the owner, who also happened to own the historic farmhouse, used the payment to destroy the historic farmhouse and move the modern house to the former site of the farmhouse.\footnote{See Horsley Testimony, supra note 2.}

\footnote{163. See Kunz, supra note 57, at 282–84.}

\footnote{164. Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11,928 (Mar. 10, 2005). The regulation exempts the Interstate only from section 106 of the National Historic Preservation Act's. SAFETEA-LU section 6007 exempts the Interstate from section 4(f), except for Secretary-designated individual elements of historic importance.}

\footnote{165. LUTHER, supra note 20, at 14.}

timeframe back by more than 80 percent. Under SAFETEA-LU, an agency that has made a final decision regarding a highway or transit project can publish a notice in the Federal Register that claims relating to that decision must be filed within 180 days of the notice. The American Association of State Highway and Transportation Officials (AASHTO) pushed for this change, claiming that eleventh-hour lawsuits delay projects under construction. Yet the availability of the laches defense means that these lawsuits would face dismissal because the project sponsor could show reliance on a final decision and prejudice from the delay, making this argument specious. Given the complexity of many transportation projects and the length and technical nature of an EIS, it is not unreasonable to ensure that the public has adequate time to read and review a final decision, particularly if the project sponsor has not yet awarded contracts or taken other actions in reliance.

The new deadline misconstrues the role litigation plays in ensuring that only properly approved projects move forward, and the time limit will stifle public participation, derailing an important purpose of NEPA. Most litigation is filed only after consultation attempts urging consideration of environmental impacts have failed. Since projects are often approved before the appropriation of funding, litigation will likely now be filed immediately, eliminating the time formerly available for negotiations during the funding process. Thus, the 180-day time limit may actually spur unnecessary litigation, as those opposed to projects will be encouraged to rush to the courthouse instead of working with DOT and the project sponsor in a non-adversarial manner. Interim Guidance from FHWA on implementing this “Limitation on Claims Notices” provision in SAFETEA-LU admits “a notice may prompt some parties to sue merely to preserve their claims until they are more certain whether

168. Id.
170. See, e.g., Citizens for Mass Transit Against Freeways v. Brinegar, 357 F. Supp. 1269, 1276 (D. Ariz. 1973). Laches is an equitable doctrine that allows a defendant to claim a plaintiff has waited too long before filing suit. The defendant must demonstrate that the plaintiff did not attentively pursue the claim and that the defendant is prejudiced by the resulting delay in litigation. See, e.g., Ocean Advocates v. United States Army Corps of Eng’rs, 402 F.3d 846, 862 (9th Cir. 2004). Laches is not generally favored for environmental litigation because of its recognized ability to forestall public participation. Id. Yet a recent court faulted the plaintiffs for waiting not even a month to bring their suit alleging a NEPA violation. See Montrose Parkway Alternatives Coal. v. United States Army Corps of Eng’rs, 405 F. Supp. 2d 587, 600 (D. Md. 2005).
172. See id.
their interests are adversely affected by the Federal action." \(^{173}\) FHWA thus acknowledges that the 180-day deadline will actually encourage extraneous litigation, as parties will file "placeholder" lawsuits before the expiration of 180 days just in case they discover issues they want to litigate later. \(^{174}\)

It is not even certain that plaintiffs will receive even the full 180 days to review environmental decisions and prepare for litigation. The Interim Guidance indicates that if the NEPA analysis relates to a decision made under a different statute with a shorter deadline on judicial review, the shorter deadline applies. \(^{175}\) The Interim Guidance goes on to advise project sponsors on the most beneficial ways to use the judicial review deadline to frustrate the efforts of environmental groups with concerns about the project:

If there are known interested parties threatening to file a lawsuit, then the notice may serve to ensure that such action occurs quickly. . . . A notice may be very useful in cases where there are no known potential litigants, but where there are complex or controversial issues or impacts that may generate opposition in the future, as the project moves into an implementation phase. A [judicial review deadline] notice will define the time period during which such 'newly' interested parties must act on their views. \(^{176}\)

This passage in the Interim Guidance praises the deadline for frustrating the attempts of adversely affected parties when impacts are undiscovered until the time of project implementation. \(^{177}\) This allows the project sponsor to downplay adverse impacts in the environmental review documentation, knowing that when the potential plaintiff discovers the harm to her property or interests, it will be too late for her to challenge the review process. In addition, given the tendency of actual project implementation to differ from the EIS, this change limits the public's opportunity to review information on environmental impacts, undermining one of the key goals of NEPA.

Although thorough public participation and environmental review will almost always slow down the initial stages of a project, even state DOTs have admitted that the NEPA public involvement process can produce higher-quality projects that are less likely to be contested later in

\(^{173}\) Interim Guidance, supra note 166.

\(^{174}\) Id.

\(^{175}\) Id. For example, challenges to orders from FAA must be brought within sixty days; challenges to a decision of the Secretary of Interior to take Indian land into trust must be brought within thirty days. See Hearing on NEPA: Lessons Learned and Next Steps: Hearing Before the House Comm. on Resources, 109th Cong. 10 (2005) (testimony of Nicholas C. Yost).

\(^{176}\) Id. (emphasis added).

\(^{177}\) See id.
the public forum or the courtroom. Yet the Interim Guidance makes clear that the FHWA considers the judicial review deadline to be all about speed, not environmental protection. The document makes numerous references to stopping and avoiding delays, but not once does it mention the supposed other goal of streamlining: maintaining environmental safeguards. Rather than reinforcing the benefits of public participation, FHWA has chosen to interpret SAFETEA-LU to cut off public involvement in favor of forcing litigation.

b. Limiting Involvement in Purpose and Need: The Only “Alternative” Is the One DOT Wants to Build

The “Purpose and Need” changes in SAFETEA-LU make it more likely that transportation projects will negatively affect the environment. These changes limit the ability of resource agencies and the public to be involved in determining a project’s goals and selecting among project alternatives. As noted above, NEPA requires a “Purpose and Need” description for each project so that the examination of alternatives includes only options that could reasonably meet the project’s goals. An overly-narrow Purpose and Need can thus eliminate alternatives that might have less environmental impact, as an agency can make the Purpose and Need so specific that only one option will satisfy the project goals. Section 4(f) also relies on an alternatives analysis, as DOT can use a historic site or parkland only if there is “no feasible and prudent alternative.” Allowing DOT, as the lead federal agency on a transportation project, to have sole discretion over the definition of the alternatives for a project will shut out the public and environmental interests from taking part in these key decisions. As proclaimed by Environmental Defense, SAFETEA-LU “increases the authority of federal and state highway bureaucrats to limit consideration of alternatives to building new highways . . . , reducing the authority of the environmental protection and resource agencies, local officials, and the public in that part of the environmental review process.” Formerly, DOT had to consult with other federal agencies with jurisdiction over a

178. See SIERRA CLUB, NEPA PROCESS, supra note 17 (profiling the NEPA process' beneficial impact on numerous projects, as acknowledged by community members, state DOT officials, and project sponsors).
179. See Interim Guidance, supra note 166.
181. NEPA Regulations, 40 C.F.R. § 1502.13 (2006); see also supra notes 46-51 and accompanying text.
183. See supra Part I.B.
184. ENVTL. DEF., SCORECARD, supra note 171.
project on the definition of the Purpose and Need. Just as it advocated limited judicial review, AASHTO also encouraged an end to Purpose and Need consultations, arguing that allowing resource agencies to participate was "a recipe for paralysis" because too many alternatives had to be examined.\textsuperscript{185}

FHWA's 1990 guidance statement on Purpose and Need demonstrates that this frustration is not new at DOT:

If the project's purpose and need are not adequately addressed, specifically delineated and properly justified, resource agencies, interest groups, the public or others will be able to generate one or possibly several alternatives which avoid or limit the [environmental] impact and 'appear' practicable. Sometimes long, drawn out negotiations or additional analyses are needed to clearly demonstrate that an alternative is not practicable, where a well-described justification of the project's purpose and need would have clearly established it.\ldots\ This will assist in pinpointing and refining the alternatives which should be analyzed. Further, it will in a sense 'protect' those viable alternatives from sniping by external interests and capricious suggestions to study something else. If the purpose of and need for the proposed project are rigorously defined, the number of 'solutions' which will satisfy the conditions can be more readily identified and narrowly limited.\textsuperscript{186}

DOT certainly has good reason to want an unambiguous and defined Purpose and Need in order to avoid the task of considering an infinite number of alternatives, but it does not seem unreasonable to require DOT to take into account reasonable alternatives proposed by resource agencies, which have expertise in environmental management, or the public that will live with a project's impacts on a daily basis. The attitude at DOT, as demonstrated in SAFETEA-LU and particularly in the 1990 guidance, is that involvement by the public and resource agencies in determining how to plan projects to avoid environmental harms is useless and detrimental. It is not only that DOT does not want participation from these groups for final project selection—these groups are even to be excluded from deciding on the range of choices from which the final project selection will occur. In short, DOT does not want to share its Purpose and Need toys or let others play in the project selection sandbox. These statements give credence to the idea that a project sponsor selects the project it wants to build, and then DOT crafts a Purpose and Need statement around that project so as to eliminate other possible choices.

\textsuperscript{185} Hearing on TEA-21, supra note 8 (statement of Am. Ass'n of State Highway and Transp. Officials). While SAFETEA gave DOT "lead agency" status, it did not include the SAFETEA-LU changes to the Purpose and Need development.

from consideration. SAFETEA-LU will only make this end-run around NEPA easier. DOT can then more easily avoid consideration of environmentally-friendly alternatives—unless DOT itself thinks of those alternatives first.

This negative attitude toward a collaborative Purpose and Need illustrates SAFETEA-LU’s unenthusiastic outlook toward all of environmental review. After all, an insufficient alternatives analysis takes the “heart” out of the environmental impact statement. Too often, state DOTs view NEPA and section 4(f) as time-wasting paper burdens rather than as positive opportunities to mitigate environmental impacts. The success of public involvement in the environmental review process depends on public participation in alternatives analysis, and limiting alternatives through a single agency’s view of Purpose and Need will eliminate this benefit. SAFETEA-LU’s attempt to streamline public involvement forgets that the spirit of NEPA understands public participation to be a good thing, not something agencies should try to avoid or discount.

The saga of the Legacy Parkway in Utah reveals the stark contrast between how the public and how a state DOT view public involvement in environmental reviews. The Legacy proposal originally included a 120-mile highway through farmlands and wetlands that would parallel the recently expanded Interstate 15. A coalition of environmental and public interest groups litigated to stop the project, contending that the highway would increase air pollution, encourage sprawling development, destroy wetlands and bird habitat, and cause traffic congestion. The plaintiffs’ arguments always focused on the availability of better alternatives. Following several opinions from the Utah District Court, the Tenth Circuit found that the EIS for the Legacy was inadequate. This decision had real consequences for the project’s environmental impacts, as it prompted a settlement agreement between the parties in

189. See SIERRA CLUB, NEPA PROCESS, supra note 17.
191. See id.
192. Utahns for Better Transportation, Legacy Highway, http://www.utahnsforbettertransportation.org/legacy.html (last visited July 9, 2006) (claiming that not only was the Utah DOT not looking at the right alternatives, it also had not properly defined the project’s purpose).
September 2005 that allowed a scaled-back 14-mile parkway to move forward.\textsuperscript{194} Utah DOT has listed the design changes in the settlement that resulted from the Tenth Circuit finding its EIS inadequate, including reduced wetland impacts, a Parkway that will give drivers "a unique and enjoyable driving experience," and "new ways to integrate construction of Legacy with mass transit."\textsuperscript{195} In the settlement, the Utah DOT agreed to provide environmental mitigation of almost-unprecedented quality and quantity, such as a 2200-acre nature preserve of habitat critical for wildlife in the sensitive Salt Lake ecosystem, no billboards, a maximum speed limit of 55 miles per hour, and the use of noise-reducing pavement surfaces.\textsuperscript{196} Environmentalists have praised the settlement as an example of how environmental review should work: public groups were able to participate in the process and exact meaningful change to a project.

Despite these seemingly positive developments arising from the NEPA process, the Utah state attorney involved in the case believes it "exemplified how NEPA is not working.... The only role the federal environmental laws played was to allow special interest groups to exercise power they would not otherwise have."\textsuperscript{197} Many members of the public would likely respond that this access is exactly the point. Utahns for Better Transportation, the lead plaintiff, explained that "[t]his is a perfect example of how NEPA works. It provided an opportunity for citizens to participate and compromise, which is exactly what NEPA is supposed to do."\textsuperscript{198}

SAFETEA-LU's lack of sympathy for this viewpoint implies that DOT does not want the public to participate in environmental reviews—whether in determining a project's goals, selecting alternatives to consider, or choosing the final design plan. Instead, SAFETEA-LU prioritizes speeding environmental review documentation at the expense of developing better projects through public and resource agency input.

c. **Misplaced Blame and the Degradation of NEPA's Purpose**

The crux of the pro-streamlining argument is that environmental review leads to project delay in two ways: the preparation of environmental review documents and lengthy litigation. While eliminating needless duplication and improving coordination among

\textsuperscript{194} Utah Dep't of Transp., Legacy Parkway Project History, http://www.udot.utah.gov/index.php/m=c/tid=1056 (last visited July 9, 2006).
\textsuperscript{198} Id.
agencies seem like reasonable tactics to improve project delivery, in reality SAFETEA-LU only codifies and gives credence to the incorrect assumptions that environmental review adds nothing to a project but obstruction and that environmental review causes the long timeframe of many projects. As such, SAFETEA-LU does not address the real sources of delay.

In reality, issues unrelated to environmental review like funding, agency prioritization of other projects, community concerns, or engineering and design evaluation can all interrupt or halt project development. When a transportation project falls behind on its completion schedule, too often environmental review receives blame more aptly directed at these factors. A study conducted by FHWA in 2000 of eighty-nine projects that had been in progress for more than five years found that 62% of project sponsors named lack of funding, low priority, local controversy (supposedly unrelated to environmental concerns), or complexity as the greatest reason for the delay. Sierra Club reports similar figures, naming “lack of funding, local support and project complexity” as responsible for 67% of the delay.

These statistics and the Senville litigation force the inquiry of what streamlining is really meant to accomplish and what hidden motivations exist for expediting environmental review. If hastening the NEPA and section 4(f) processes means that their purposes will not be followed, as Senville would indicate, and changing the statutes will not reduce delay, as the statistics suggest, what will the SAFETEA-LU changes do? Many of the changes—the 180-day limitation on lawsuits and the limitation of project alternatives examination—sacrifice environmental concerns in the name of speed, and, even worse, they fail to adequately address the true problems underlying project delays. Without addressing the underlying funding and staffing concerns, it would seem that not even SAFETEA-LU will produce the desired result of expeditious reviews.

These changes tear at the very purpose of NEPA and environmental review. As the “Magna Carta” of U.S. environmental law, NEPA was supposed to provide an environmental charter that would integrate environmental values into all levels of federal agencies and make the environment a key concern in all federal decision-making. Rather than

199. Luther, supra note 20, at 9.
202. Sierra Club, Stop Sprawl, supra note 200.
203. See supra notes 96–107 and accompanying text.
viewing NEPA as a valuable tool to gain insight into a project’s spectrum of environmental impacts and a platform for thinking creatively about environmental mitigation, SAFETEA-LU just codifies the way agencies have treated NEPA for years: as an obstacle before moving to project implementation. Environmentalists also have cause to worry about SAFETEA-LU’s devolution of NEPA responsibilities from federal agencies to the states. Comments from AASHTO emphasize that the state DOTs see environmental review as little more than a hurdle to overcome before moving to project construction, blaming potential NEPA litigation for an inability to “achieve true closure on the environmental process” as quickly as possible. The ability to substitute state decisions for federal ones and the limited time for judicial review highlight how far environmental law and Congress have drifted from the public spirit that formed NEPA’s origin. When the federal government abrogates its environmental responsibilities and the public has a very limited opportunity to participate in the process, the intentions of NEPA are wholly frustrated. Instead of recognizing ways to improve the NEPA process to make it a more meaningful decision-making tool for agencies and a more cooperative facilitator for public participation, SAFETEA-LU will make it even more difficult for NEPA to guide agencies in developing and furthering a national environmental ethic and policy.

3. A Lament: Futile Efforts

With the streamlining sections of SAFETEA-LU, Congress not only failed to enact obvious changes that would have resulted in effective streamlining, but it also enacted provisions that will serve little or no streamlining purpose. Having previously commissioned the General Accounting Office (GAO) to study which elements of environmental review contribute to project delay, Congress had a ready blueprint of what it needed to do with the transportation reauthorization legislation. Yet Congress ignored the GAO study when it appeared not to suit Congress’ notion of what streamlining should encompass.

Instead, Congress chose to focus on several aspects that the GAO had concluded would have little efficacy. For example, according to the GAO’s studies, few transportation officials thought that delegating to states the responsibility for low-level environmental reviews, such as categorical exclusions, would make a significant difference in project delivery time. Yet Congress devoted SAFETEA-LU section 6004 to

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205. Tripp & Alley, supra note 187, at 75 (finding that agencies “have often decried [NEPA] as a time- and resource-consuming annoyance”).

206. See Hearing on TEA-21, supra note 8 (statement of Am. Ass’n of State Highway and Transp. Officials).
doing just that. Moreover, this complete delegation may not even be legal, as NEPA requires federal guidance and independent evaluation of state-prepared materials. The GAO also reported that transportation officials named a lack of staff at resource agencies for contributing to delays, but SAFETEA-LU does nothing to address this.

At the same time that Congress failed to address the problems highlighted by the GAO, it created problems that cut against the streamlining principle of coordinated decision-making. The requirement that DOT notify Congress, CEQ, the governor, and others if an issue may take longer than six months to resolve will result in useless paperwork because there will almost always be conflicts among agencies with different missions and ideas about a project’s goals. The disagreements between EPA and DOT regarding Vermont’s Circ project, over induced growth, storm water impacts, and the potential for project management to meet the identified project purpose, are just one example of the differing concerns of a resource agency and a transportation agency.

Forcing DOT to run to political officials, including the congressional committees that fund its programs, any time the review process hits a difficult issue may mean that DOT will understandably try to hurry the resolution of complex concerns in order to avoid having to admit the “failure” of streamlining. More cynically, this tattling to Congress may induce resource agencies to yield in a conflict rather than be publicly labeled as a roadblock in the process. This aspect of the SAFETEA-LU legislation is a direct contradiction to the collaborative, alternative dispute resolution process for environmental review conflict resolution that DOT approved in 2002.

Finally, most transportation projects will still need to undergo historic preservation review twice: once for section 4(f) and once for section 106. In contrast, the SAFETEA proposal to allow the thorough section 4(f) review to satisfy the procedural section 106 requirements


212. See INTERAGENCY TASK FORCE, supra note 100.

213. See FHWA, Collaborative Problem Solving, supra note 211.
made sense.\footnote{See SAFETEA PROPOSAL, supra note 111.} Given the greater burdens of meeting section 4(f), DOT should not have to create a watered-down version to also satisfy section 106. All federal agencies must comply with section 106; DOT is the only agency that must follow a double procedure. More than half of the transportation officials surveyed by GAO named fulfilling section 4(f) as a significant factor in prolonging environmental review, calling the requirements "inflexible, and therefore, burdensome."\footnote{U.S. GEN. ACCOUNTING OFFICE, supra note 3, at 23.} It would seem that one of the easiest things for Congress to do in its supposed goal of streamlining is to remove such obvious duplication.

IV. WHAT STREAMLINING SHOULD HAVE DONE

SAFETEA-LU represents the old way of doing business at DOT, but some within DOT and the state DOTs have begun to engage in new techniques and processes that are more sensitive to natural and historic resources. Many environmentalists and environmental advocacy organizations, fearing the end of public comment periods and a "steamrolling"\footnote{E.g., J.R. Pegg, White House Keen to Speed Up Environmental Review, ENV'T NEWS SERV., Sept. 25, 2003 (quoting Sharon Buccino, a Natural Resources Defense Council attorney, who opined that "[t]he Bush administration's 'streamlining' strategy for NEPA would amount to steamrolling environmental protections and public input.").} of NEPA, have discounted the potential benefits and coalition-building that could result from a pragmatic and responsible streamlining process. Such complete rejection may miss opportunities to make progress with a DOT that is more environmentally aware than ever.\footnote{One example of DOT's commitment to environmental sensitivity is its newly released guidance on using an "ecosystem approach" to infrastructure development in order to avoid or mitigate impacts on wildlife, habitat, and ecosystems. JANICE W. BROWN ET AL., ECO-LOGICAL: AN ECOSYSTEM APPROACH TO DEVELOPING INFRASTRUCTURE PROJECTS (2006) (DOT agencies, state DOTs, and several resource agencies and other infrastructure agencies contributed to its completion), available at http://www.environment.fhwa.dot.gov/ecological/ecological.pdf.} While the "pro-environment stewardship revolution within transportation agencies" claimed by the House Transportation & Infrastructure Committee Chairman Don Young\footnote{Hearing on H.R. 5455, supra note 84 (statement of Rep. Don Young, Chairman, H. Comm. on Transp. & Infrastructure).} may not ring true for many environmentalists, DOT and the state DOTs have taken many steps toward integrating environmental stewardship into their work. Some of these steps are apparent in SAFETEA-LU. Even environmentalists have praised several sections of SAFETEA-LU for demonstrating an environmental commitment not previously seen in a transportation bill.\footnote{See, e.g., Envl. Def., Vital Transportation Law Signed into Action: Money for Roads, Transit, Bikes, Diesel Cleanup; Threatened Environmental Protection Laws Remain Largely}
from vehicle collisions and the record increase in funding for bicycle and pedestrian projects drew commendations from environmental groups that often have little praise for DOT. 220

Unfortunately, the streamlining sections of SAFETEA-LU do not always reflect this welcome environmental ethic. The voiced motives behind SAFETEA-LU's streamlining provisions give environmentalists reasons to doubt the potential benefits of streamlining. Streamlining supporters, while paying lip service to protecting the environment, made it clear that streamlining's real priority was expediting projects and that environmental review only got in the way. 221 As discussed above, supporters successfully convinced decision-makers that environmental review is responsible for project delays, despite the evidence gathered by both FHWA and the GAO demonstrating that other factors are largely to blame. 222 To distract from this evidence, streamlining supporters make no effort to specify a link between lengthy environmental review and a delay in a particular project. Instead, they simply cite the number of years since a project's proposal, leaving one to conclude that the whole time period has been spent on environmental review.

From reading these attacks alone, streamlining seems only what environmental advocacy groups accuse it of being: an attempt to steamroll the environment and pave over the protections of NEPA and section 4(f). 223 By focusing on environmental review as the main culprit in delaying transportation projects, supporters effectively prevented Congress from passing legislation that could expedite projects while maintaining and even improving agencies' environmental records. However, if environmental review represents only a "paper tiger" burden to agencies, changes are clearly needed to make these reviews meaningful assets in decision-making. In the hope that Congress and the Administration do have respect for the review process and the environment, this Comment presents the following options that would advance the goals of improved project delivery and continued environmental protection better than the contents of SAFETEA-LU.


222. See supra Part III.B–C.

A. Integrate Planning and NEPA

SAFETEA-LU fails to take advantage of the streamlining benefits that could accrue by fully integrating environmental review into the planning phase of project development. The earlier environmental impacts are considered, the more can be done to mitigate them and avoid litigation and disagreements with environmental advocates. However, the current schedule of project planning, environmental review, design, right-of-way acquisition, and construction mobilizes environmental review too late in the process. NEPA and the CEQ Regulations provide that environmental review and planning should take place jointly "at the earliest possible time."224 But typically, NEPA review begins after the completion of the planning phase.225 By planning a project first and then conducting its environmental review, key choices about project siting and goals have taken place before the environmental review has a chance to inform these decisions.226 This means that agencies often enter the NEPA process with a plan and alternatives already prepared.227 The sequential disconnect means that "the [NEPA] process causes the planning gears to grind to a halt" while the information the environmental review produces "become lost amid the clutter" in between the planning and development phases.228 FHWA has advocated changing the culture of planning and NEPA to integrate the two, noting that the "potential pay-off is greatly improved" when transportation planning incorporates NEPA and public involvement.229

More and earlier involvement by resource agencies could also improve the planning and NEPA processes and prevent litigation, as the resource agencies might have greater expertise in identifying and addressing potential environmental impacts:

[I]ndications are that well-planned projects do move faster once the environmental documentation is completed.... EPA early involvement in project planning and development ... reduces delays at the later stages of project review resulting from interagency disagreements. It also ensures that critical resource issues are identified and analyzed, which can reduce the time lost to third party litigation on the adequacy of the NEPA documentation.230

227. See Tripp & Alley, supra note 187, at 82.
228. Id. at 87.
229. FHWA, Linking, supra note 225.
230. Hearing on TEA-21, supra note 8 (statement of John Peter Suarez, Assistant Adm'r for Enforcement and Compliance Assurance, U.S. EPA).
FHWA acknowledges that "[s]uccessful examples of using planning products in NEPA analysis are based on early and continuous involvement of ... resource agencies."\[231\] NEPA charges all federal agencies equally, and this greater cooperation might lead agencies to see themselves as equal keepers of the public's trust regarding environmental protection. While SAFETEA-LU does mandate collaborative efforts with resource agencies during the NEPA review, the statute does nothing to encourage or require the involvement of resource agencies in the planning phase.

Integration of planning and NEPA would greatly increase the value of the environmental review to decision-makers. If an agency approaches the planning and environmental review before it has committed resources or developed a concrete vision for a project's goals, the resulting NEPA documentation will be a more useful decision-making tool and less "a rubber stamp" for a previously-selected alternative.\[232\] This integration would make public participation more meaningful and the NEPA review more useful and complete—key ingredients to dissolving potential litigation.

This situation presents something of a paradoxical tradeoff: by trying to rush the environmental review process, DOT stands to lose more time than it gains. Environmental and other public interest groups will have more cause to challenge projects for failing to comply with NEPA and public involvement procedures. On the other hand, by spending more time on the planning and environmental review phases, it is likely that challenges and litigation will decrease while better projects with less environmental impact and greater public support will emerge. These benefits all demonstrate that combining environmental review and planning would result in true environmental streamlining: cost- and time-saving improvements that maintain environmental protection.


Not only should the NEPA process begin earlier, but environmental review should be a continuing responsibility during the design, construction, and maintenance of a project. As envisioned by its drafters, NEPA was to produce an ongoing process with environmental impacts re-evaluated throughout the lifecycle of a project.\[233\] President Bush's CEQ Chairman, James Connaughton, has expressed support for this

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\[231\] FHWA, Linking, supra note 225 (emphasis added).
\[232\] See Tripp & Alley, supra note 187, at 82, 89.
principle.\footnote{234} He has extolled the benefits of ongoing environmental review that would "include a continual flow of information that is constantly updated and reviewed, with decision-making evolving and moving according to new information."\footnote{235} Despite these aims, courts have interpreted NEPA to not require agencies to monitor the actual impacts of a project once the initial environmental review is completed, which leaves the actual resulting effects of federal actions on the environment unexamined.\footnote{236}

The use of two related concepts, environmental management systems (EMS) and adaptive management, would institute post-NEPA compliance monitoring as part of an agency's environmental responsibility. These ideas have precedent: Executive Order 13,148, Greening the Government through Leadership in Environmental Management, required all federal agencies to implement an EMS system at appropriate agency facilities by the end of 2005.\footnote{237} Also, CEQ's NEPA Task Force identified adaptive management as a strategy that would improve the environmental review process and reduce litigation.\footnote{238} SAFETEA-LU would have been an excellent opportunity for Congress to give legislative approval to these tools.

An EMS refers to a framework that establishes environmental goals and performance measures.\footnote{239} It attempts to apply the business model of "plan, do, check, act" to environmental issues.\footnote{240} EMSs help an organization move beyond compliance to prevention of environmental problems.\footnote{241} Agencies and private businesses that have implemented EMSs have found that the systematic management of environmental issues improves efficiency, productivity, and credibility of environmental

\footnotesize{\bibitem{234} Connaughton, supra note 24, at 10.}
\footnotesize{\bibitem{235} Id.}
\footnotesize{\bibitem{236} H. Council on Envtl. Quality, NEPA Task Force, Eastern Roundtable Report 6 (2003) (calling "the lack of post decision follow-up by agencies" the "weakest part of the NEPA process"), available at http://ceq.eh.doe.gov/ntf/EasternRoundTableReport.pdf. This lack of post-decision monitoring reflects the courts' interpretation that NEPA lacks substantive law. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Counsel, 435 U.S. 519, 558 (1978) (NEPA's mandate is "essentially procedural"); see also Jeannette MacMillan, Note, An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks (Department of Transportation v. Public Citizen), 32 Ecology L.Q. 491, 517 (2005) (lamenting that "the substantive language of NEPA has proved too vague for judicial enforcement, the ambitious goal of integrated environmental management has been eclipsed").}
\footnotesize{\bibitem{238} See id.; H. Council on Envtl. Quality, NEPA Task Force, supra note 236.}
\footnotesize{\bibitem{239} N.C. Dep't of Env't & Natural Res., EMS FAQ, http://www.p2pays.org/iso/emsisofaq.asp#faq2 (last visited July 9, 2006).}
\footnotesize{\bibitem{240} Id.}
\footnotesize{\bibitem{241} Id.}
commitments.  The EMS produces these results by pushing the organization to identify all aspects of its work that have environmental effects, specify goals for reducing impacts, create plans to achieve those goals, and, most importantly, monitor its performance relative to its goals.  An EMS would serve streamlining goals by requiring DOT to have an available, updated list of each program's environmental impacts and plans for mitigation. Having this information always ready would make NEPA documents much easier and faster to prepare.

Adaptive management refers to "any adaptive approach that seeks to respond to changing conditions or subsequently acquired knowledge."  Applied to environmental review, adaptive management means that reviews should adjust to decisions, circumstances, and events that occur throughout the lifecycle of a project.  For example, the construction phase of a project may reveal that the mitigation techniques envisioned during an early environmental review are not the best option. Adaptive management would allow decision-makers to process this new information and re-evaluate alternatives.  Adaptive management thus furthers the goals of streamlining by interspersing useful environmental review at each stage of a project, rather than massing the review in one phase that produces a lengthy document largely ignored after its completion.

EMS and adaptive management could provide continuous flows of information and results to project supervisors, who would then modify future actions based on past and present experiences.  Over the long term, these techniques have the potential to result in shorter, more cost-effective, and more accurate EAs and EISs. By including review at each step of a process, awareness of where efficiency can be heightened and the failures that cause the most delay can be identified and remedied. This would benefit a project's timeline from the early planning stages to construction and post-decision follow through.

Moreover, adaptive management would allow DOT to more efficiently use its resources. Rather than exploring every detail in an EIS of alternatives DOT has already rejected, DOT could simply identify the unresolved questions and then provide more detail as on-the-ground experience reveals new information and resolves contingencies. This

243. Id.
244. Karkkainen, supra note 226, at 939 n.148.
246. Id.
248. Id. at 941.
would eliminate the bulky, "paper tiger" aspect of the EIS that has made the document largely useless to the agency and the public. The initial EIS or EA would cost less and take less time, and the agency could devote its resources to ensuring the mitigation of anticipated environmental impacts or adapting the project to address unexpected impacts. Furthermore, DOT may learn how to better approach and manage issues that were formerly uncertain by using the knowledge gathered through adaptive management. In this manner, DOT could use past results to better understand and explain uncertainties in its initial EAs and EISs.

As with integrating planning and NEPA, DOT faces a streamlining trade-off. Post-compliance monitoring would require a significant initial investment of time and resources. However, the long-term benefits of an improved information base are many. For DOT, follow-up on the initial NEPA review would provide experiential knowledge on the actual results of different projects. Such knowledge would likely allow DOT to make better predictions at the planning phase of future projects about which choices will make the most sense for both the project and its environmental impacts.

While the cultural shift required to proceed with uncertainty may seem unsettling and contrary to how courts have interpreted NEPA's requirements, the continual involvement of the public and resource agencies in settling issues throughout the project could quell these concerns. These new methods of dealing with uncertainty and monitoring project implementation would require statutory authority for altering the CEQ regulations to adopt EMS and adaptive management. An open, inclusive process that allows for ongoing public comment and involvement may itself reduce litigation and the animosity with which environmental advocates often view the transportation decision-making process. SAFETEA-LU could have provided exactly that. Instead, SAFETEA-LU chose to limit ongoing discussion of environmental review with the 180-day litigation deadline. By cutting short discussion and refusing to consider how environmental impacts materialize, SAFETEA-LU ignored the potential benefits from EMS and adaptive management.

C. Build the Concept of Context Sensitive Solutions into All Transportation Projects

The transportation planning and design method of context sensitive solutions (CSS) embodies the principles of integrated planning, EMS, and adaptive management. SAFETEA-LU could have strengthened the

249. See id. at 939.
The term “context sensitive solutions,” sometimes also called “context sensitive design,” refers to the idea that projects should fit to their surroundings: the environmental and cultural resources of an area, the human and economic scope of a location, and the individualized needs of a particular community. CSS entails the participation of all stakeholders during the project design and planning phase in a collaborative process to develop a project that fits the physical surroundings without disturbing the existing character of a community. SAFETEA-LU never mentions CSS by name, alluding only to FHWA and AASHTO publications for guidance on CSS implementation. While SAFETEA-LU does add a section on the principles of context sensitive solutions, a stronger mandate to FHWA and FTA could have brought this innovative concept to the forefront of environmental review. SAFETEA-LU also does not require the application of CSS, merely stating that design “may take into account” the natural environment and any “environmental, scenic, aesthetic, historic, community, and preservation impacts” of the project.

CSS represents a marked change from older design and engineering methods for transportation projects. In the past, roads were designed and built almost solely around the concept of the fastest way from Point A to Point B—“as if only the asphalt mattered.” This often resulted in projects that bifurcated communities, irrevocably altered an area’s character, or just did not fit with the scope and nature of the project site. Increasingly, the transportation community has recognized that this old way of doing business is outmoded and instead has begun substituting an approach modeled on CSS principles. For example, the use of CSS in the development of the Purpose and Need and alternatives analysis for the recent Utah DOT “3500 South” project meant that the discussion of alternatives relied on public involvement and community participation from the beginning.

252. Id.
254. Id. SAFETEA-LU also authorizes funding for CSS projects. SAFETEA-LU § 1702, 23 U.S.C. § 117(a)(2)(B) (2006) (authorizing funding for projects described in section 1702, such as $1.2 million for Context Sensitive Design Elements for the Market Street Bridge in Lycoming County, PA).
257. Id.
“DOT-only” outlook on the Purpose and Need emphasized in SAFETEA-LU.\(^{259}\) Other CSS elements of the project include increased access for pedestrians, bicyclists, and disabled users; improved safety features; and a capacity for traffic that is appropriate to roads in residential and agricultural contexts.\(^{260}\) The reconstruction of Paris Pike in Kentucky represents another excellent example of a project that pays attention to its context.\(^{261}\) During construction, the topsoil was removed from the area, saved, and then returned following construction because of its importance to the economy of Kentucky horse farms.\(^{262}\) Engineers designed the route to minimize impacts on historic sites, and local plants were used for landscaping.\(^{263}\) FHWA describes the CSS projects with pride on its website and in its documents, and it seems a shame that SAFETEA-LU not only fails to strengthen the CSS mandate, but actually undermines it by weakening opportunities for public involvement and environmental considerations.

The use of CSS would mean changing the modus operandi of DOT and the state DOTs. There have been some promising initial efforts in this direction. Some state DOTs have begun to work with CSS, and FHWA and AASHTO have made numerous efforts to encourage the use of CSS.\(^{264}\) FHWA devoted its January 2006 “Successes in Stewardship” monthly newsletter to CSS, demonstrating the agency’s interest and commitment to CSS strategies.\(^{265}\) FHWA and the state DOTs have access to a wealth of information on projects that used CSS,\(^{266}\) and FHWA praises CSS for “lead[ing] to safe, logical, cost-efficient solutions.”\(^{267}\) CSS thus has the support of DOT and the state DOTs and the promise to make decision-making more efficient and more environmentally friendly—the pronounced goals of streamlining. SAFETEA-LU missed an opportunity to give CSS a legislative boost by requiring its use by DOT, state DOTs, and other project sponsors.
D. More Technology

Finally, SAFETEA-LU could have required the greater use of technology to streamline reviews without steamrolling the environment. James Connaughton, the Chair of the Council on Environmental Quality, has stressed the need for agencies to use technological resources to share documentation and maintain a database of information from previous environmental reviews.268 FHWA has made great strides in developing programs for state DOTs to utilize technology to improve their environmental reviews. Unfortunately, the many technology-forcing sections of SAFETEA-LU do not include support for these efforts or a mandate to expand their use.269

Efforts begun by FHWA demonstrate how technology can be used to improve knowledge about environmental impacts of projects and better facilitate coordination among all the players. With its searchable “State Environmental Streamlining and Stewardship Practices Database” of best practices used “by states to efficiently and effectively fulfill their NEPA obligations,”270 FHWA has made all its guidance on public involvement, environmental permitting, and environmental review documentation available on its website.271 In addition, to help transportation and environmental resource agencies create cooperative deadlines for milestones in the environmental review process, FHWA has created a “Negotiated Timeframes Wizard” to improve project management and structure goals and timelines.272 FHWA hopes that by setting and measuring goals, accountability will improve.273 FHWA also anticipates that cooperative use of the Timeframe will identify and consider potential issues and environmental impacts earlier.274

Although FHWA and EPA already work together on mapping and GIS technology so that transportation projects can avoid environmentally sensitive locations,275 too often the information collected for the preparation of one environmental document is not made accessible to future project teams working in the same locale or on a similar project

269. SAFETEA-LU does contain other technology-forcing sections, e.g., “Technology Partnerships” in section 1502(c), “National Research and Technology Programs” in section 3016, “National Fuel Cell Bus Technology Development Program” in section 3045, and “Transportation Technology Innovation and Demonstration Program” in section 5508.
270. See FHWA, Streamlining, supra note 10 (“State Practices Database” link).
272. FHWA, Streamlining, supra note 10 (“Negotiated Timeframes: Questions and Answers” link).
273. Id.
274. Id; see also supra Part IV.B.
elsewhere in the country. As part of the collaboration and cooperation section of SAFETEA-LU, Congress could have required participation in data collection and sharing programs. The cooperation between FHWA and resource agencies to use GIS and map sensitive areas would allow for the avoidance of such areas in planning and design, reducing environmental impacts and hastening project completion.

CONCLUSION

By ignoring the real problems underlying project delay, the changes to environmental review of transportation projects enacted in SAFETEA-LU will likely make little difference in speeding project delivery time, but they will foreclose avenues of public comment and make it more difficult for DOT, resource agencies, and the public to ensure that transportation projects receive adequate environmental review. SAFETEA-LU and the examples of projects that have undergone environmental streamlining demonstrate that speeding up can actually slow us down. By expediting environmental review, SAFETEA-LU just makes litigation and post-environmental review delays more likely. SAFETEA-LU’s limit on judicial review may actually encourage litigation, and the anti-NEPA attitude of the statute treats public involvement as a mild annoyance at best and a crushing burden at worst.

While the effort to improve coordination both among federal agencies and between federal and state agencies is a necessary step toward improving both environmental information and project delivery, too many elements of SAFETEA-LU will serve no expediting purpose and will only cut off the public’s access to the decision-making process. Most unfortunately, SAFETEA-LU missed opportunities to encourage strategies such as adaptive management and information technology that have real potential both to streamline environmental review and to improve environmental protection.