

# Highways to Hell



A critical examination of  
the environmental impacts of the  
Security and Prosperity Partnership

A CENTER FOR BIOLOGICAL DIVERSITY REPORT

# Highways to Hell:

## A critical examination of the environmental impacts of the Security and Prosperity Partnership

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December 2009

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A highway cuts through Texas Hill Country.  
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*This guide does not constitute legal advice. This guide provides legal information about the law and is designed to help readers understand litigation options. Legal information differs from legal advice—legal advice refers to the application of law to an individual’s specific circumstances. Therefore, this guide should not be construed as providing specific legal advice for a particular person’s case or situation. Furthermore, this guide does not explain everything a reader needs to know about the litigation process, including standing, attorney-client privilege, discovery, liability, and strategic lawsuits against public participation (SLAPP suits).*

## Introduction

There is growing concern across the political spectrum about the implications of the Security and Prosperity Partnership of North America (SPP). This initiative, launched in March 2005 at a summit of the heads of state of the United States, Canada, and Mexico, was a follow-up to the 1994 North American Free Trade Agreement (NAFTA). Unlike other international free trade agreements, the SPP is not the result of a U.S. law, treaty, or formal signed agreement. Therefore, there are no mechanisms for public accountability nor is there built-in oversight. Instead, the SPP operates through nineteen working groups that operate outside the legislative process. Members of U.S. federal agencies such as the Departments of Transportation, State, Agriculture, Energy, and Homeland Security, sit on these working groups to “consult with stakeholders; set specific, measurable, and achievable goals and implementation dates; and identify concrete steps the governments can take to achieve these goals.”<sup>1</sup>

Proponents of the SPP promote it as a necessary response to the challenges of globalization. They claim that it will increase North American economic competitiveness, facilitate extraction of critical natural resources, and greatly enhance the freer movement of industrial and consumer goods between the three countries. Critics representing a wide range of political interests in all three countries argue that the SPP is primarily geared toward increasing the profits of multinational corporations and U.S. big business.<sup>2</sup> Environmentalists in particular have raised a host of concerns about the possible consequences of the SPP on global warming, water and air quality, and species and habitat. They insist that the adverse environmental impacts of SPP policies are being deliberately ignored in the rush to implement a pro-corporate agenda. This fear may be justified given that to date, 40 percent of NAFTA challenges have been about environmental concerns,<sup>3</sup> and the SPP is now inviting “recommendations and views on ways to cut red tape and eliminate unnecessary barriers to trade.”<sup>4</sup>

The only formal advisory board to the SPP is the North American Competitiveness Council (NACC), comprised entirely of corporate CEOs. U.S. members include Wal-Mart, Merck, General Electric, UPS, and FedEx. The U.S. Chamber of Commerce and the Council of the Americas serve as the U.S. secretariat of the NACC. At least one court has determined that the NACC is not a federal advisory committee and is therefore not subject to public input or scrutiny.<sup>5</sup> The SPP’s approach to policy development thus represents a further extension of the privatization of governmental regulatory functions inaugurated by NAFTA and other World

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<sup>1</sup> SPP Prosperity Working Groups, [http://www.spp.gov/prosperity\\_working/index.asp?dName=prosperity\\_working](http://www.spp.gov/prosperity_working/index.asp?dName=prosperity_working).

<sup>2</sup> Opponents include several states: Alabama (SJR68), Arizona (SCM 1002; HCM2003), Florida (S670), Georgia (Senate Resolution 124), Idaho (HJK-5), Illinois (House Joint Resolution 29), Kansas (H.C.R. 5033), Massachusetts (MA H. 341), Missouri (Senate Concurrent Resolution 15 House Concurrent Resolution 33), Montana (House Joint Resolution 25), Ohio (H.C.R. No. 31), Oklahoma (Senate Concurrent Resolution 10), Oregon (Senate Joint Memorial 5), South Carolina (House Concurrent Resolution H 3185), South Dakota (S.C.R. 13), Tennessee (Senate Joint Resolution 88), Texas (HB 3647), Utah (H.R. 1), Virginia (Senate Joint Resolution 442, House Joint Resolution No. 86), and Washington (Senate Joint Memorial 8004 House Joint Memorial 4018).

<sup>3</sup> Martin Mittelstaedt, “Will Dow challenge Quebec pesticide law?,” *Global and Mail*, Apr. 3, 2009, available at [http://www.bilaterals.org/article.php?id\\_article=14766](http://www.bilaterals.org/article.php?id_article=14766).

<sup>4</sup> SPP Prosperity Working Groups, *supra* note 1.

<sup>5</sup> *Judicial Watch v. Dep’t of Commerce*, 576 F. Supp. 2d 172 (Dist. D.C. 2008); *Judicial Watch, Inc. v. Dep’t of Commerce*, 501 F. Supp. 2d 83 (D.C. Dist. 2007).

Trade Organization agreements, inspired by neo-liberal economic theory and closed to public input.

As the name indicates, the Security and Prosperity Partnership of North America has two basic components: the “Security Agenda” and the “Prosperity Agenda.” The Security Agenda involves extensive military coordination, much of it focused on anti-terrorism policies, but also geared toward protecting energy and transportation infrastructures. It aims to streamline the movement of critical goods across borders while curbing “illegal” immigration. The Prosperity Agenda also focuses on promoting the transcontinental movement of goods and services. Its goals include expanded and streamlined cross-border transportation networks—networks that will facilitate not only trade within the continent, but also imports into North America of cheaply made foreign goods. It is precisely these proposed transportation networks and their potential for significant environmental damage that have raised widespread concern among environmentalists in all three North American countries.

## *Goals of This Guide*

Over the coming years, the SPP’s proposed transportation projects will likely have significant cumulative effects on the environment. Although the Federal Highway Administration is behind most of the transportation projects, a reliable nationwide map indicating the planned projects has not been produced, nor has there been an assessment of the cumulative effects of the planned projects.<sup>6</sup> Therefore, this report seeks to accomplish the following:

- 1) identify and map the NAFTA corridors
- 2) identify and map critical environmental features of the affected landscape, including
  - a. the presence of endangered species and designated critical habitat
  - b. air attainment and nonattainment areas
  - c. waterways and wetlands
  - d. farmlands, private and public lands
  - e. national historic sites, public parks, recreation areas, and wildlife and waterfowl refuges
- 3) analyze the projects, corridors, and larger SPP transportation framework through the application of key environmental laws
- 4) provide advocates with information about the SPP and its likely impacts to the American landscape, as well as tools to ensure that SPP-related construction does not harm the environment.

## *How To Use This Guide*

This report analyzes seven major NAFTA corridors. The guide is intended to provide a landscape-level portrait of what the cumulative impacts of the proposed corridors could look like, as well as a magnified view of a select number of projects and corridors. Each chapter focuses on one corridor and one environmental law, but the guide is written so that lessons

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<sup>6</sup> The Commission on Environmental Cooperation is currently researching similar issues in a project called Greening the North American Trade and Transportation Corridors (personal communication, June 2009).

learned from any of the chapters can be applied to other projects.

## *Limitations of the Guide*

This guide is national in scope and does not provide information on local effects beyond what is described in the highlighted projects, nor does it address the effects these projects are having on Canada or Mexico. We have attempted to give the U.S. reader enough information to conduct independent, site-specific investigations of local projects. Also, the guide does not offer suggestions or alternatives to the planned corridor construction, nor is it a guide to all potentially relevant laws.<sup>7</sup>

There are many impacts from the construction and operation of highways that are not mitigated that are not discussed in this guide. While we have attempted to identify broad categories of environmental factors, we were unable to identify all associated factors. The guide does not account for infrastructure-related impacts such as:

- impact on oil and gas demands
- installation of transmission lines
- spills from auto and rail accidents
- effects on air travel
- intelligent transportation system infrastructure
- increased auto manufacturing and disposal
- effects of noise pollution
- increase in rock-salt and roadside pesticide application
- increase in hazardous-material transportation

## *Key Conclusions and Recommendations*

- The transportation networks have disparate local promoters but common national advocates and financiers.
- There is currently no oversight over the entire NAFTA infrastructure, allowing the simultaneous construction of various components of the infrastructure with no environmental review for cumulative impacts.

Because most of these projects go through federal permitting processes, there are opportunities, if not mandates, for more cumulative and inclusive environmental analysis.

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<sup>7</sup> A nonexhaustive list of potentially relevant laws not reviewed in this guide include: Farmland Protection Policy Act, 7 U.S.C. § 4201; Food Security Act, 16 U.S.C. § 3811; Wild & Scenic Rivers Act, 16 U.S.C. § 1271; Coastal Zone Management Act, 16 U.S.C. § 1451; Flood Plain Management, Executive Order 11988; Solid Waste Disposal Act, 42 U.S.C. § 6901; Migratory Bird Treaty Act; and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601.

# Chapter 1: Overview of the NAFTA Corridors

Contrary to the claims of certain critics, the Security and Prosperity Partnership has not mandated the construction of a single “NAFTA super-corridor” across the United States.<sup>8</sup> Rather, the SPP, its Transportation Working Group, and its corporate supporters are in the process of promoting a series of distinct but interrelated highway projects. If these projects are completed, the results will be a combined network of new highways and expanded existing highways, creating a series of interstate transportation corridors stretching from Canada through the United States to Mexico.

The term “NAFTA corridor” has gained traction and broadly refers to transportation systems that facilitate NAFTA trade.<sup>9</sup> Congress put into place a federal regulatory mandate authorizing the construction of such high-priority corridors with the passage of the Intermodal Surface Transportation Efficiency Act (ISTEA).<sup>10</sup> Subsequent federal legislation, namely the National Highway System Designation Act of 1995 (NHS); the 1998 Transportation Equity Act for the 21st Century (TEA-21); and the 2005 Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA-LU) authorized the continued financing and construction of such corridors. The benefit of high-priority corridor designation is direct funding through federal legislation.<sup>11</sup> Between the four acts, Congress has designated 80 high-priority corridors.<sup>12</sup>

Additionally, in September 2007, the Department of Transportation announced six interstate routes that will be the first to participate in the Corridors of the Future Program, a new initiative to reduce highway congestion.<sup>13</sup> The objectives of the program are to promote congestion mitigation, address transportation needs, create a more efficient environmental review process, and develop corridors to increase freight mobility.<sup>14</sup> The priority projects are:

- I-95 from Florida to Canada at \$21.8 million;
- I-70 in Missouri, Illinois, Indiana, and Ohio at \$5 million;
- I-15 in Arizona, Utah, Nevada, and California at \$15 million;
- I-5 in California, Oregon, and Washington at \$15 million;
- I-10 from California to Florida at \$8.6 million; and
- I-69 from Texas to Michigan at \$800,000.

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<sup>8</sup> James Langton, *Texans Fear U.S. Sovereignty Will Disappear Down Superhighway*, Telegraph.co.uk, Mar. 4, 2007, <http://www.telegraph.co.uk/news/uknews/1544550/Texans-fear-US-sovereignty-will-disappear-down-superhighway.html>.

<sup>9</sup> NAFTA Transportation Corridors: Approaches to Assessing Environmental Impacts and Alternatives, Sierra Club and Shelia Holbrook-White and Texas Citizen Fund 2000, *citing* Transport Canada 1999.

<sup>10</sup> NHS High Priority Corridors, <http://www.fhwa.dot.gov/planning/nhs/hipricorridors/index.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Federal Highway Administration, Listing of High Priority Corridors, <http://www.fhwa.dot.gov/planning/nhs/hipricorridors/hpcorqk.html>.

<sup>13</sup> Department of Transportation, *U.S. Department of Transportation Names Six Interstate Routes as “Corridors of the Future” to Help Fight Traffic Congestion*, <http://www.fhwa.dot.gov/pressroom/dot0795.htm>.

<sup>14</sup> Corridors of the Future Program, SunGuide Disseminator (Florida Department of Transportation), May 2007, *available at* [http://www.dot.state.fl.us/trafficoperations/Newsletters/2007/05\\_2007/05\\_2007.shtm](http://www.dot.state.fl.us/trafficoperations/Newsletters/2007/05_2007/05_2007.shtm).

Although we know that the SPP is endorsing increased freight mobility, it is unclear which, if any, specific projects the SPP is promoting. The SPP Web site provides little transparency into the actual workings of the Transportation Working Group,<sup>15</sup> and Freedom of Information Act requests to various agencies have been unsuccessful in providing additional useful information. Therefore, the analysis in this report is limited to a selection of projects that have been, in one form or another, associated with furthering the goals of the SPP or NAFTA—but it does not represent all the projects that have ties to NAFTA trade:<sup>16</sup>

- The **Trans-Texas and International Trade Corridor**, which will incorporate U.S. highway I-35 in Texas with I-29, I-80, and I-94 to connect Mexico to Canada;
- The **West Coast Corridor**, which will run from San Diego, California to Vancouver, British Columbia;
- The **Canamex Highway**, planned to run from Nogales, Arizona to Edmonton, Canada;
- The **I-95 Corridor**, which will run from northern Maine to Florida;
- The **Continental One International Trade and Travel Corridor**, which will run from Toronto to Miami;
- The **Great Plains International Trade Corridor**, which will run from Laredo, Texas to the Canadian border and includes the **Ports-to-Plains Corridor**, **Heartlands Expressway**, and **Theodore Roosevelt Expressway**; and
- **Kansas City SmartPort** and its termination point in the deep-water harbor in **Lazaro Cardenas, Mexico**.

There are significant limitations to understanding the transportation sector's impact on the environment. First, there are basic information gaps in data availability on existing impacts. An EPA report found that while local data is often available, national data is virtually nonexistent.<sup>17</sup> It found that there were limited or no national data measures available to indicate many of the transportation sector's impacts on the environment.<sup>18</sup> In addition to the limited availability of national data, there are significant gaps in local data. For example, most states do not track the combined effects of highway construction on wetlands or species.<sup>19</sup> Another major obstacle is that there is no clearinghouse of information on the existing NAFTA corridors.<sup>20</sup> There are various sources that propose differing estimations of the corridors' reach,<sup>21</sup> and some of the corridor

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<sup>15</sup> See SPP Prosperity Working Groups, *supra* note 1; see also Dave Lewit, *Why a "Globalization Impact Bill"?* *Toward Passage of H.374 in 2008*, [http://www.newenglandalliance.org/sn\\_display1.php?row\\_ID=21](http://www.newenglandalliance.org/sn_display1.php?row_ID=21) (note: the membership of the groups is concealed).

<sup>16</sup> Other "trade corridors" include the Inner-Port at Roanoke, Virginia, the La Entrada al Pacifico Corridor, the Canadian Intelligent Super Corridor, the North American Super Corridor, the Prairie-to-Ports Gateway and Inland Port, the River of Trade Corridor, and the remaining highways from the "Corridors of the Future Program."

<sup>17</sup> EPA, *Indicators of the Environmental Impacts of Transportation: Highway, Rail, Aviation, and Maritime Transport*, EPA 230-R-96-009, at 23 (Oct. 1996).

<sup>18</sup> *Id.* at vi.

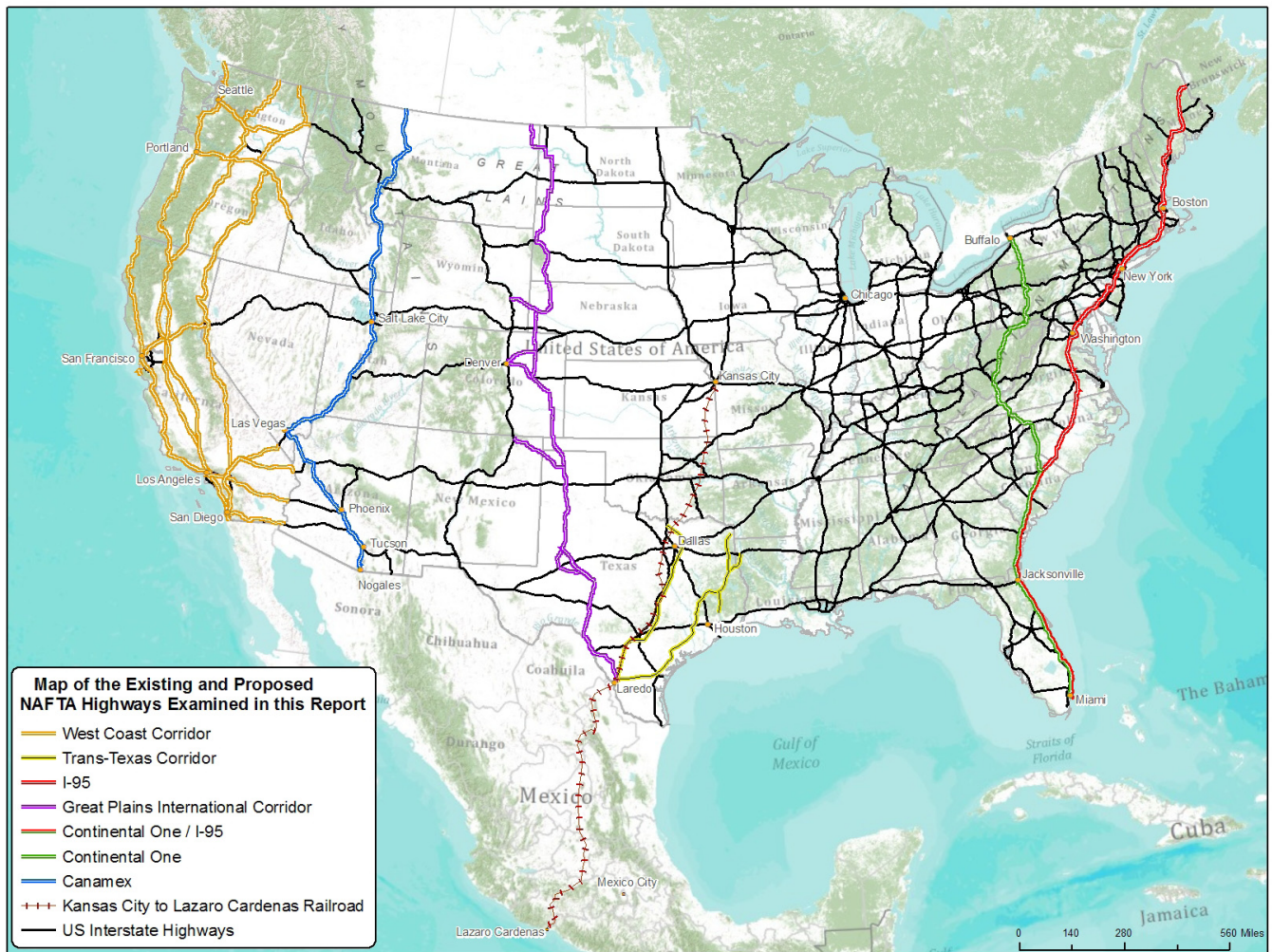
<sup>19</sup> See *id.* at 43 (finding that most states do not track acreage of wetlands lost or number and type of species affected by highway construction and operation).

<sup>20</sup> Sierra Club, Shelia Holbrook-White, and Texas Citizen Fund, *NAFTA Transportation Corridors, Approaches to Assessing Environmental Impacts and Alternatives*, at 31-32 (2000) [hereinafter Sierra Club et al., *NAFTA Transportation Corridors*], available at [http://www.cec.org/programs\\_projects/trade\\_envIRON\\_econ/pdfs/sierra.pdf](http://www.cec.org/programs_projects/trade_envIRON_econ/pdfs/sierra.pdf).

<sup>21</sup> Kevin Phillips, *Bush's Unpublicized Project That's Going to Make a Lot of People Really Angry*, Prairie Weather blog, June 2006, [http://prairieweather.typepad.com/big\\_blue\\_stem/2006/06/bushs\\_unpublici.html](http://prairieweather.typepad.com/big_blue_stem/2006/06/bushs_unpublici.html); North American Free Trade Agreement Superhighway, NAU War Room, <http://www.nauwarroom.org/index.php/nafta-superhighway>.



coalitions are apparently quite cognizant of other corridor projects' purposes and progress.<sup>22</sup> However, to date, there has been no comprehensive review of what the American landscape would look like should all of the NAFTA corridors be constructed, and no estimation of what the effects of their construction and operation would be on the environment.



## *Impact on Air Quality and Climate Change*

Transportation-related greenhouse gas emissions account for 49 percent of the growth in total U.S. greenhouse gas emissions in the last 20 years, with freight trucks responsible for 19.1 percent of that growth.<sup>23</sup> NAFTA-related truck transportation produces much of that air pollution. The byproducts from shipping trucks largely include nitrogen oxides, volatile organic compounds, and particulate matter, which contribute to ozone concentrations and air pollution and can lead to serious human health and environmental problems. Infrastructure enhancements

<sup>22</sup> Public Meeting CANAMEX Corridor Coalition, 12/16/05 meeting agenda, available at [http://www.canamex.org/PDF/CCC\\_121605\\_MTG\\_Agenda.pdf](http://www.canamex.org/PDF/CCC_121605_MTG_Agenda.pdf) (discussing Ports-to-Plains corridor); 8/15/05 public meeting outcome at [http://www.canamex.org/PDF/CCC\\_081505\\_MTG\\_Summary.pdf](http://www.canamex.org/PDF/CCC_081505_MTG_Summary.pdf) (discussing the Trans-Texas Corridor and Security and Prosperity Partnership).

<sup>23</sup> Up 69 percent from 1990, ICFI Consulting, *Greenhouse Gas Emissions from Freight Trucks: International Emissions Inventory Conference*, May 16, 2007.

related to NAFTA transportation also produces air pollution. This includes emissions related to the construction of transportation corridors, as well as the emissions associated with transporting the goods to construct such facilities.

It is difficult to know the precise greenhouse gas contributions from the SPP projects, as the science itself is often difficult to determine,<sup>24</sup> there are multiple sources of emissions associated with the construction of each project, and most importantly, a greenhouse gas analysis is not completed for most projects. For those transportation projects that do require some emissions analysis, most proponents claim they have a net reduction effect on air quality impacts.<sup>25</sup> However, what we do know is that, if fully constructed, 3,650 miles of the corridors would pass through areas already identified as not meeting air-quality standards.

Though federal and state laws call for analyses of air quality and sometimes global warming, the mechanisms for analyzing the cumulative effects of the existing and proposed NAFTA corridors are weak.



Smog over a busy Texas highway © iStockphoto.com/Pamela Moore

<sup>24</sup> California Air Pollution Control Officers Association, *CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act*, at 60 (Jan. 2008), available at <http://www.capcoa.org/CEQA/CAPCOA%20White%20Paper.pdf>.

<sup>25</sup> DOT SCH No. 200111165, Negative Declaration, at 5-8, available at [http://www.dot.ca.gov/dist07/resources/envdocs/docs/i5\\_sr126.pdf](http://www.dot.ca.gov/dist07/resources/envdocs/docs/i5_sr126.pdf) (citing a reduction of emissions associated with the alleviation of traffic congestion).



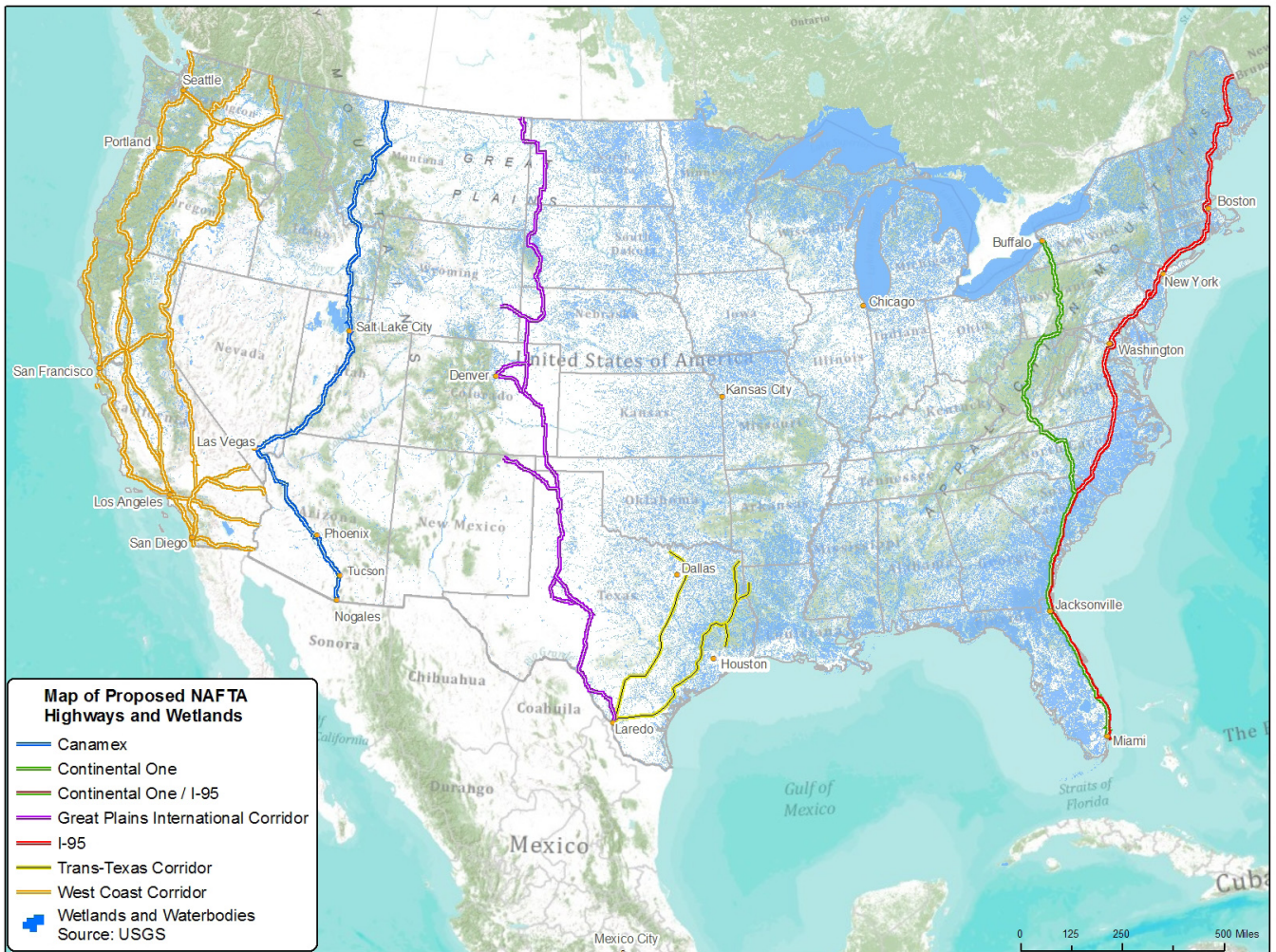
## Impact on Water Quality

NAFTA truck transportation is a source of nonpoint-source water pollution, as leaked fuels and other fluids spill onto roadways and are then washed away and redeposited in waterways. The roads that support NAFTA trade serve as an impervious surface that allows nine times more runoff than does natural surfaces.<sup>26</sup> Additionally, road-construction activities such as clearing, grading, and cut fills also contribute to nonpoint-source runoff, dramatically affecting water quality. Construction of roadways can also require the fill of wetlands, which are vital resources supporting myriad species. The fragmentation of wetlands can ruin habitat for species and forever change the ecology of the landscape. As currently conceived, NAFTA corridors could impact up to 340,000 acres of wetlands and water bodies.

<sup>26</sup> Sierra Club et al., *NAFTA Transportation Corridors*, *supra* note 20 at 17 (citing EPA, *Nonpoint Source Pollution* (1998)).



Oil-contaminated waterway courtesy NOAA



## *Impact on Imperiled Species and Habitat*

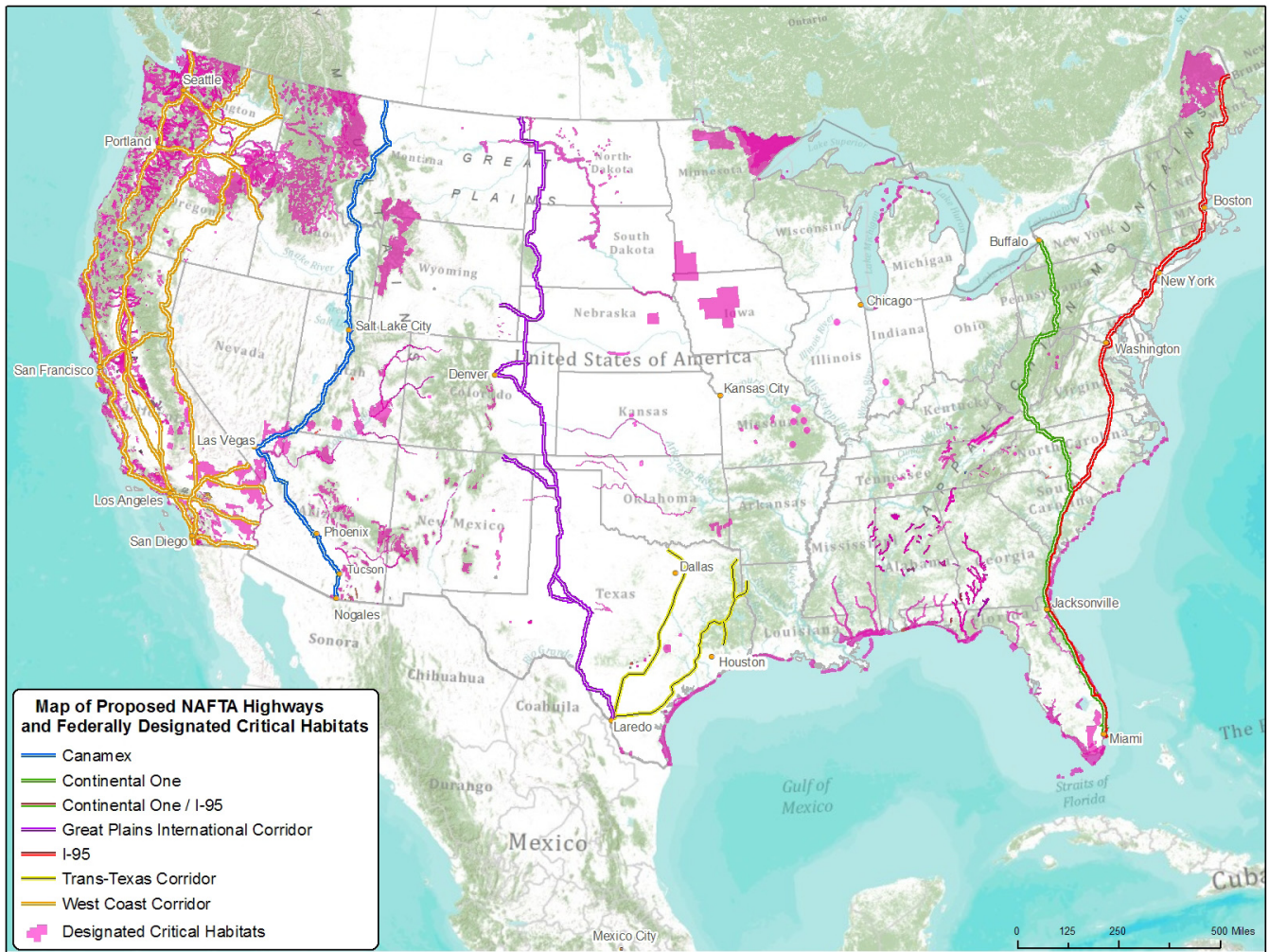
Roads have significant effects on species and their habitats. Road construction results in the loss and fragmentation of habitat: Roads create barriers to species dispersal and genetic diversity and cut wildlife off from habitat and food. Furthermore, roads directly cause species death through vehicle collisions, estimated between 725,000 and 1,500,000 annually.<sup>27</sup> These direct effects are compounded by the indirect effects roads have on species. Road construction contributes to water pollution and wetlands disturbance, which have direct effects on imperiled species. Freight and passenger vehicle travel on highway contributes to global warming which in many cases will further exacerbate the plight of endangered and threatened species. Construction activities and redeveloped roads may intersect the federally-designated critical habitat of 41 threatened and endangered species.



Road-killed Florida panther, an endangered species © Krista Sherwood, TransWild Alliance

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<sup>27</sup> M. Huisjer, *Synthesis of Highway Practice 37-12*, National Cooperative Highway Research Program, NCHRP Projects 20-5.



## Impact on Local Communities

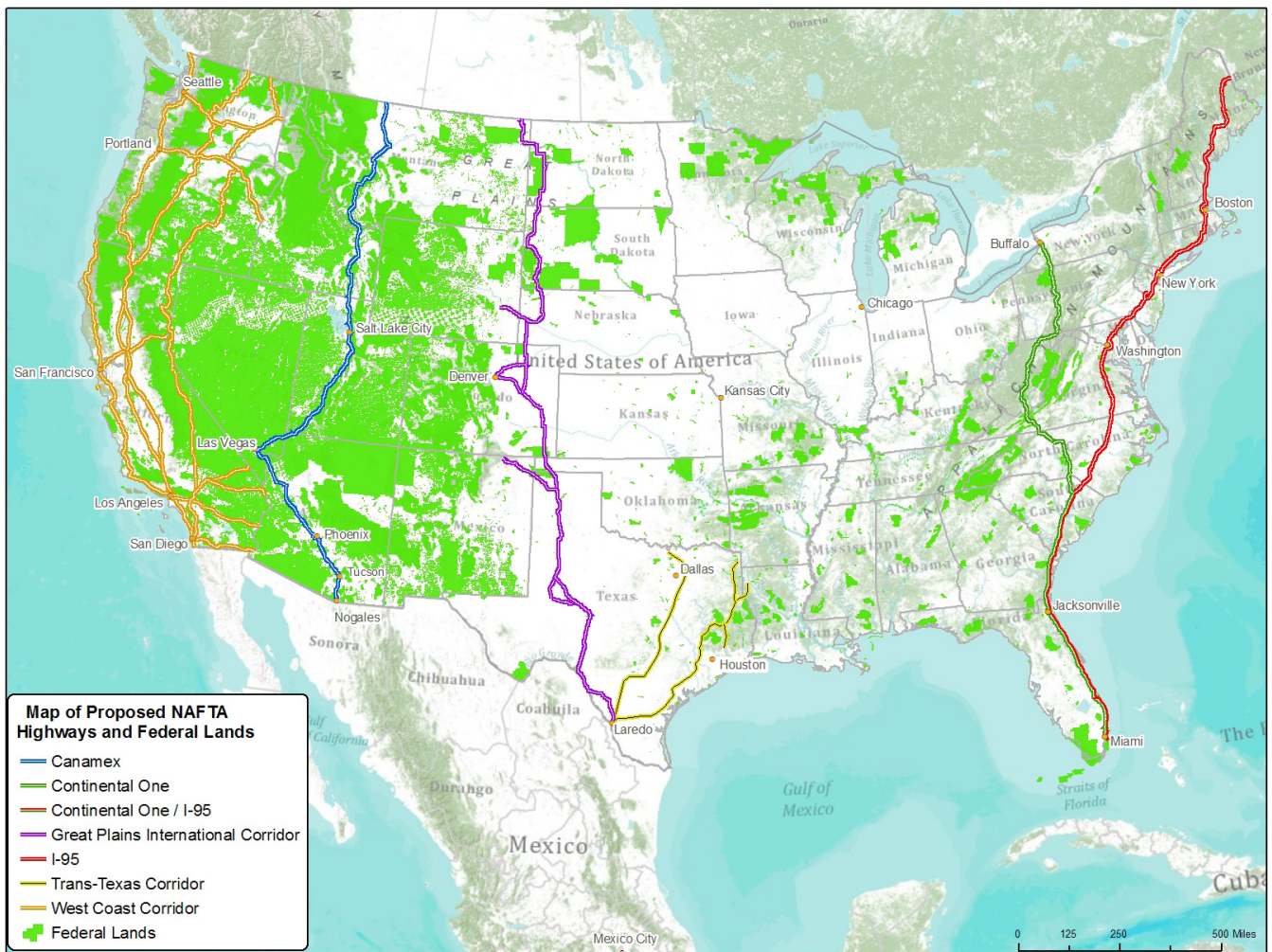
Various sources speculate that the land grab to build the NAFTA corridors will top 500,000 acres, with some sources estimating 1 million acres.<sup>28</sup> While the full extent of the effects on private lands remains to be seen, if all the corridors are constructed as currently planned, they will forever change the character of the American landscape by irreversibly bisecting and potentially destroying 165,000 acres of our nation's recreation areas, 27,000 acres of national wildlife areas, and 1,800,00 acres of farmland.

While each chapter of this guide is dedicated to one law and one project, it is written so that lessons learned from any of the chapters can be applied to any other transportation project.

<sup>28</sup> Richard D. Vogel, *The NAFTA Corridors: Offshoring U.S. Transportation Jobs to Mexico*, 57 Monthly Review (Feb. 2006), available at <http://www.monthlyreview.org/0206vogel.htm>.



Field of bluebonnets © iStockphoto.com/Pamela Moore







## Chapter 2: The Trans-Texas Corridor and the National Environmental Policy Act

The Texas Department of Transportation introduced the Trans-Texas Corridor concept and vision in *Crossroads of the Americas: Trans Texas Corridor*.<sup>29</sup> The Trans-Texas Corridor is a proposed 4,000-mile network of transportation facilities in Texas.<sup>30</sup> The project has been in various stages of planning and development since 2004, and to date there have been hundreds of public meetings and much negative press coverage alleging that the Trans-Texas Corridor is just another name for NAFTA super corridor.<sup>31</sup> Partly in response to negative press coverage, the Texas Department of Transportation is trying to phase out the name “Trans-Texas Corridor” and refer to the highways comprising it by their numbers; however, the public at large still refers to the corridor as the Trans-Texas Corridor or “NAFTA Superhighway.”<sup>32</sup>

The Security and Prosperity Partnership Web site states that it is a myth that the “U.S. Government, working through the SPP, has a secret plan to build a ‘NAFTA Super Highway.’”<sup>33</sup> The U.S. government may not be working exclusively through the SPP to build a NAFTA Super Highway, but it certainly has a program to appropriate money to such high-priority corridors, including the Trans-Texas Corridor. Moreover, the fact that information about the SPP’s Transportation Working Group’s agenda, goals, and recommendations is not publically available makes whatever plans it does have indeed a secret. North America’s SuperCorridor Coalition, Inc. (NASCO), is a nonprofit organization based out of Texas, and was instrumental in obtaining the designation of “Congressional High Priority Corridor” for qualifying parts of the Trans-Texas Corridor for funding under ISTEA, TEA 21, and SAFETEA-LU.<sup>34</sup> NASCO indicates that the transportation corridors, including the Trans-Texas Corridor, are primarily to facilitate NAFTA-related trade.<sup>35</sup>

There are two Trans-Texas Corridor multi-modal transportation and utility projects under the Federal Highway Administration’s consideration: TTC-35, which generally parallels I-35 from north of Dallas/Fort Worth to Mexico; and I-69/TTC, which extends from Texarkana/Shreveport to Mexico (and is a congressionally designated High Priority Corridor through legislative acts in 1991 and 1998).<sup>36</sup> These projects are likely to have wide-ranging environmental impacts, including negative effects on air quality, wetlands, and endangered species and their critical habitat.

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<sup>29</sup> Texas Department of Transportation, *Crossroads of the Americas: Trans Texas Corridor* (June 2002), [http://www.ci.brownsville.tx.us/files/50/trans\\_texas\\_corridor\\_2004.pdf](http://www.ci.brownsville.tx.us/files/50/trans_texas_corridor_2004.pdf).

<sup>30</sup> Federal Highway Administration and Texas Department of Transportation, *TTC-35 Tier One Draft EIS*, at ES-2 (April 2006) [hereinafter FWHA & Tex. DOT, *TTC-35 DEIS*], available at [http://keeptexasmoving.com/var/files/File/TTCPrjtsTTC35/EnvStdyMaps/Tier1DEIS\\_FEIS/Tier\\_1\\_DEIS/document/ttc-35\\_deis.pdf](http://keeptexasmoving.com/var/files/File/TTCPrjtsTTC35/EnvStdyMaps/Tier1DEIS_FEIS/Tier_1_DEIS/document/ttc-35_deis.pdf).

<sup>31</sup> TTC-35 Environmental Milestones, [http://www.keeptexasmoving.com/index.php/ttc\\_35\\_milestones](http://www.keeptexasmoving.com/index.php/ttc_35_milestones); I-69/TTC Environmental Milestones, [http://www.keeptexasmoving.com/index.php/ttc\\_69\\_milestones](http://www.keeptexasmoving.com/index.php/ttc_69_milestones).

<sup>32</sup> Texas Department of Transportation, *Innovative Connectivity in Texas/Vision 2009*, at 5 (2009), available at [http://www.keeptexasmoving.com/var/files/File/innovative\\_connectivity.pdf](http://www.keeptexasmoving.com/var/files/File/innovative_connectivity.pdf); Texas Corridors, [http://www.keeptexasmoving.com/index.php/texas\\_corridors](http://www.keeptexasmoving.com/index.php/texas_corridors).

<sup>33</sup> *SPP Myths vs. Facts*, [http://www.spp.gov/myths\\_vs\\_facts.asp](http://www.spp.gov/myths_vs_facts.asp).

<sup>34</sup> *The Transportation Infrastructure Challenge*, <http://www.nascocorridor.com/commdetail.asp?id=2168>.

<sup>35</sup> *What is NASCO?* <http://www.nascocorridor.com/faqsdetail.asp?id=2178&pageno>.

<sup>36</sup> *Trans-Texas Corridor*, <http://www.keeptexasmoving.com/index.php/xarpages/transtexascorridor>.

The Federal Highway Administration determined that the two Trans-Texas Corridor projects are each independent “programs,” warranting two separate two-tiered analyses under the National Environmental Policy Act.<sup>37</sup> As part of Tier One, the Highway Administration conducted scoping and generated draft environmental impact statements (DEISs).<sup>38</sup> The Tier Two analyses are supposed to go into greater detail and include information regarding precise project locations. The Highway Administration released the DEIS for TTC-35 for public review and comment on April 4, 2006,<sup>39</sup> and that for I-69/TTC on November 13, 2007.<sup>40</sup>

TTC-35 as envisioned would be as many as 1,200 feet wide.<sup>41</sup> The DEIS study area includes 77 counties and generally runs parallel to I-35, I-37, and the proposed I-69.<sup>42</sup> The geographic scope for TTC-35 covers approximately 52,500 square miles,<sup>43</sup> or approximately 20 percent of Texas’ total area. However, the fully built facility would only comprise 0.23 percent of the study area. The Federal Highway Administration stated it selected a large geographic scope for the DEIS Tier One analysis in order to sufficiently evaluate the project’s cumulative effects on the economy.<sup>44</sup>

The study area for I-69/TTC is approximately 650 miles long and generally follows existing U.S. 59 from Texarkana to Laredo, Texas, with connection to the I-69 Corridor near Shreveport, Louisiana, and the Rio Grande Valley following U.S. 77 and U.S. 281.<sup>45</sup> I-69/TTC’s study-area width varies from approximately 20 to 80 miles.<sup>46</sup> Similar to the TTC-35 study area, I-69/TTC’s study area is much larger (encompassing approximately 24,000 square miles) than the fully built I-69/TTC would be (less than 1 percent of the project study area).<sup>47</sup>

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<sup>37</sup> See FWH & Tex. DOT, *TTC-35 DEIS*, *supra* note 30 at 1-6.

<sup>38</sup> *Id.* at 1-6 to 1-7.

<sup>39</sup> TTC-35 Tier One DEIS, [http://www.keeptexasmoving.com/index.php/ttc\\_35\\_tier\\_1\\_deis](http://www.keeptexasmoving.com/index.php/ttc_35_tier_1_deis).

<sup>40</sup> I69TTC-News, I-69/TTC reaches milestone (Nov. 13, 2007), <http://www.keeptexasmoving.com/index.php/articles/200>.

<sup>41</sup> FWH & Tex. DOT, *TTC-35 DEIS*, *supra* note 30.

<sup>42</sup> *Id.* at 1-10 to 1-12.

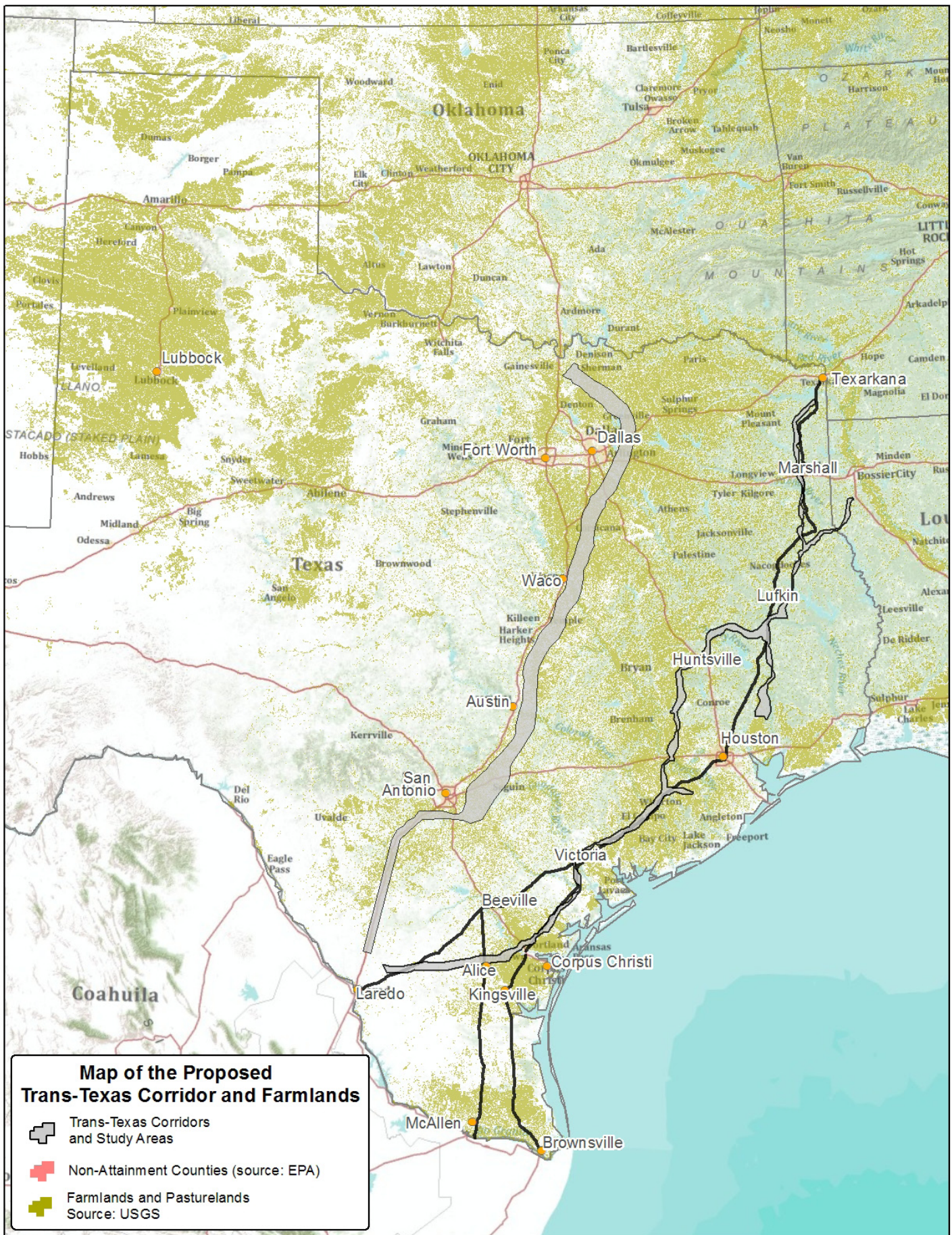
<sup>43</sup> The terms “effect” and “impact” are used synonymously in the Council on Environmental Quality regulations (40 C.F.R. § 1508.8).

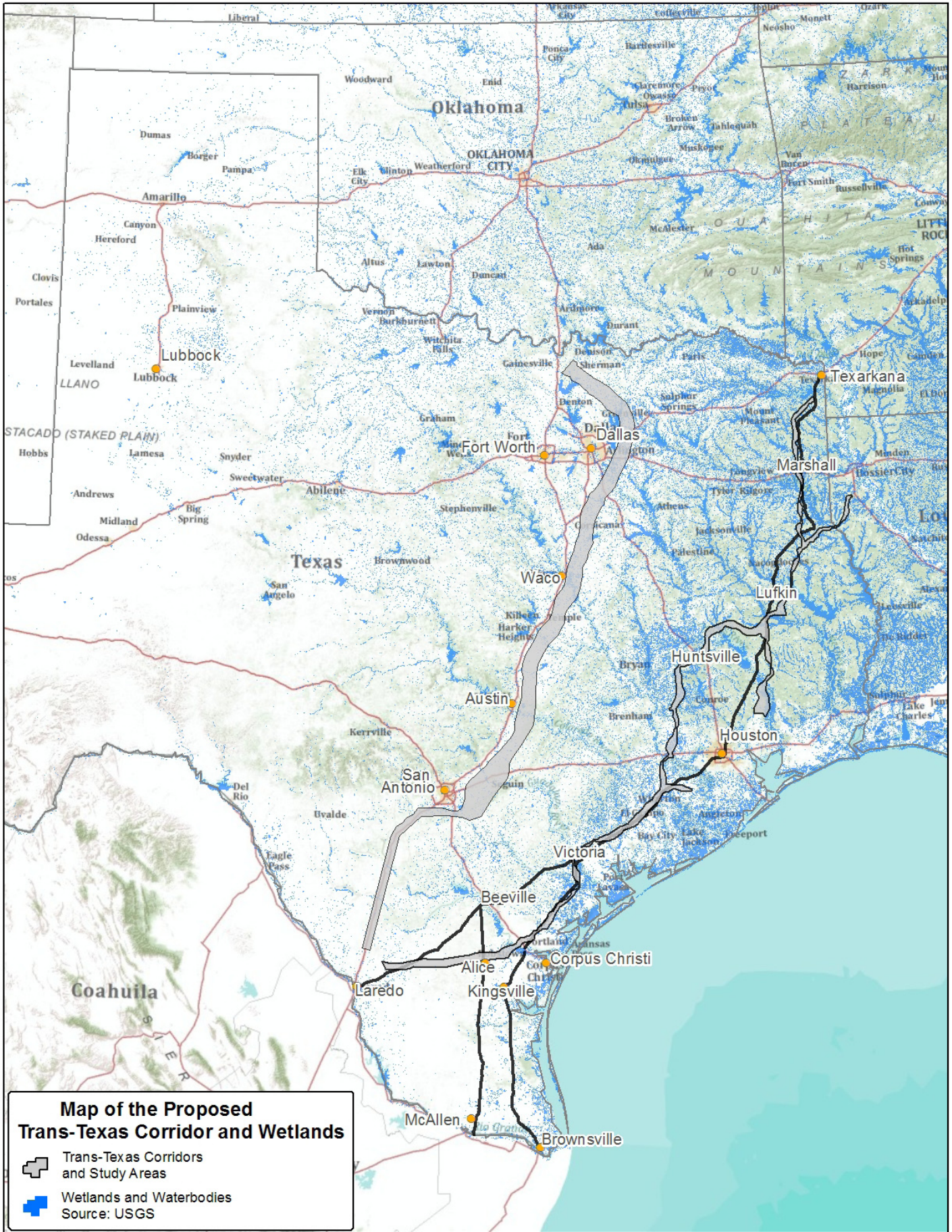
<sup>44</sup> FWH & Tex. DOT, *TTC-35 DEIS*, *supra* note 30 at 5-26.

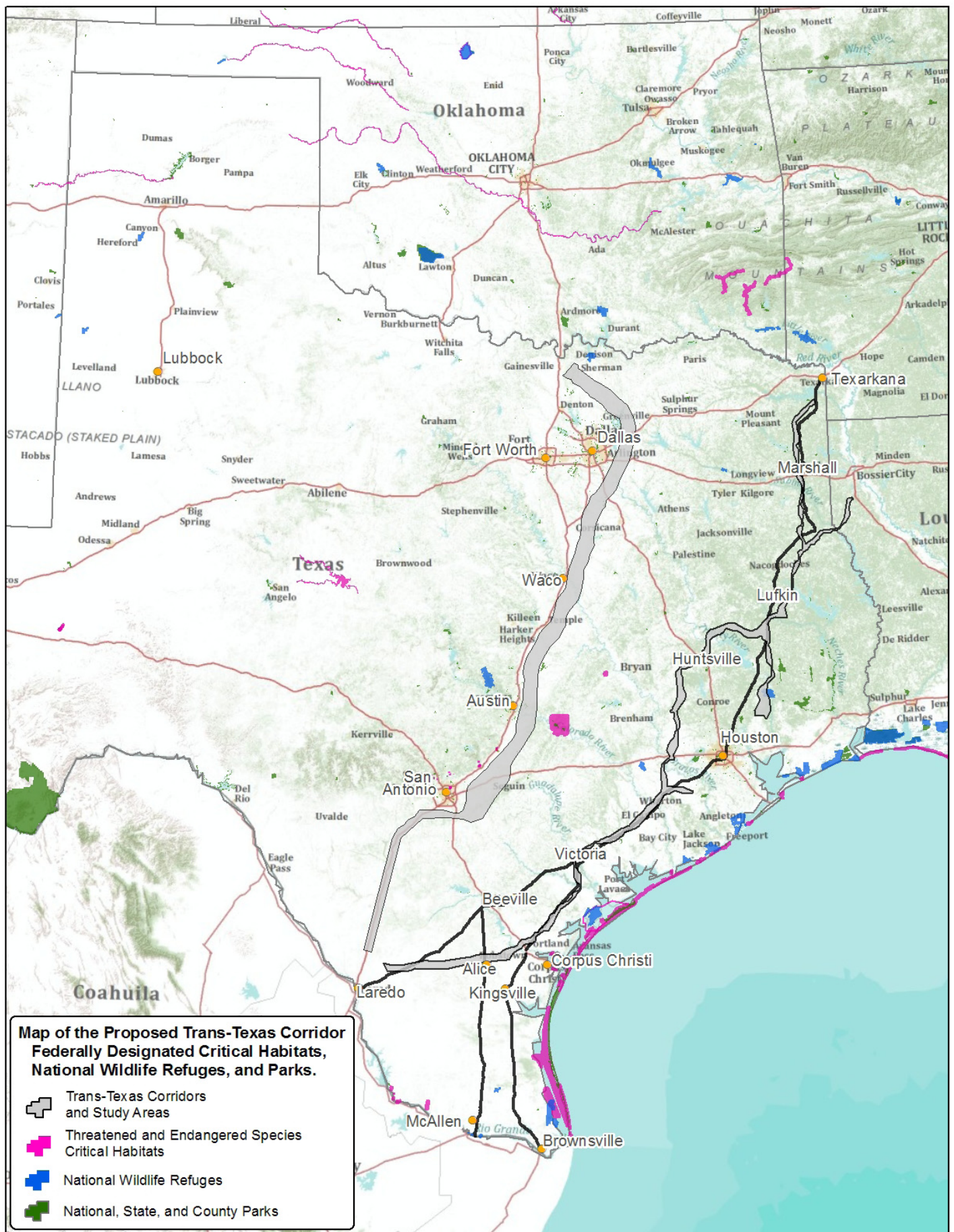
<sup>45</sup> Federal Highway Administration and Texas Department of Transportation, *I-69/Trans-Texas Corridor Study, Tier One Draft Environmental Impact Statement*, at 1-8 (2007) [hereinafter FWH & Tex. DOT, *I-69, Chapter 1*], available at [http://keptexas-moving.com/var/files/File/TTCPrjctsl69TTC/EnvStdyMaps/Tier1DEIS\\_FEIS/Tier\\_1\\_DEIS/document/ch\\_1.pdf](http://keptexas-moving.com/var/files/File/TTCPrjctsl69TTC/EnvStdyMaps/Tier1DEIS_FEIS/Tier_1_DEIS/document/ch_1.pdf). See also *id.* at 1-9, for a map of the I-69/TTC study area.

<sup>46</sup> FWH & Tex. DOT, *I-69, Chapter 1*, *supra* note 45 at 1-8.

<sup>47</sup> *Supra* note 45 at 5-14 (2007).







## *National Environmental Policy Act*

Congress enacted the National Environmental Policy Act (NEPA) with the purpose of helping “public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”<sup>48</sup> It is the policy of the Federal Highway Administration that NEPA act as an umbrella, bringing together all of its legal responsibilities regarding a proposed project.<sup>49</sup> In order to fulfill NEPA’s purpose, agencies must begin the NEPA process “at the earliest possible time.”<sup>50</sup>

NEPA requires any federal agency undertaking, authorizing, or funding a project significantly affecting the quality of the human environment to prepare an environmental impact statement (EIS). The lead agency may first prepare an environmental assessment, and if the agency determines through this assessment that the project will not have a significant effect on the environment, it will issue a “finding of no significant impact” (FONSI). If the agency determines that there *will* be significant impact, the agency must then prepare an EIS. Alternatively, if the agency is planning a major action that it knows will have a significant effect on the quality of the human environment, then the agency need not prepare an environmental assessment and may proceed directly to preparing an EIS.<sup>51</sup>

An agency preparing an EIS begins by publishing a “notice of intent” in the *Federal Register*. The purpose of the notice of intent is to describe the proposed action and alternatives, describe the agency’s scoping process, and provide contact information for an agency individual who can answer questions about the action.<sup>52</sup> An agency must “make diligent efforts to involve the public in preparing and implementing their NEPA procedures,” and public hearings may be held as part of this process.<sup>53</sup> In order to challenge an EIS, a potential plaintiff must exhaust administrative remedies.<sup>54</sup> For this reason, it is important for citizens to participate in comment periods and public hearings in anticipation of litigation.<sup>55</sup>

Next, the agency produces a DEIS. The DEIS must fulfill the requirements set forth in the scoping process, as well as include a discussion of alternatives.<sup>56</sup> A “no action” alternative, as well as a discussion of mitigation measures, must also be included in the DEIS.<sup>57</sup> The lead agency must circulate the DEIS to public agencies and interested persons for a public comment period of at least 45 days.<sup>58</sup> The agency must address all substantive comments in the final environmental

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<sup>48</sup> See 40 C.F.R. § 1500.1(c).

<sup>49</sup> NEPA and Related Procedures for Transportation Decision Making, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites; Proposed Rule, 65 Fed. Reg. 33960, 33978 (May 25, 2000) (to be codified at 23 C.F.R. pts. 771, 1420, and 1430, 49 C.F.R. 622 and 633).

<sup>50</sup> *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985) (internal quotations omitted) (quoting 40 C.F.R. § 1501.2).

<sup>51</sup> 40 C.F.R. § 1501.7.

<sup>52</sup> 40 C.F.R. § 1508.22.

<sup>53</sup> 40 C.F.R. § 1506.6(a), (c).

<sup>54</sup> 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137 (1993).

<sup>55</sup> The Council on Environmental Quality produced a comprehensive citizen’s guide to NEPA, available at [http://ceq.hss.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf).

<sup>56</sup> 40 C.F.R. § 1502.9.

<sup>57</sup> 40 C.F.R. §§ 1502.14(d), (f).

<sup>58</sup> 40 C.F.R. § 1506.10(c).

impact statement (FEIS).<sup>59</sup> Assuming the agency follows all required procedures, it can then adopt the FEIS and make its final decision. The lead agency must then prepare a record of its decision, which includes its decision, a discussion of alternatives, and a statement on whether it has adopted “all practicable means to avoid or minimize environmental harm.”<sup>60</sup>

A DEIS does not constitute final agency action and is therefore not reviewable under the Administrative Procedures Act.<sup>61</sup> Thus, the analysis provided herein is merely flagging potential issues, which the agency still has the opportunity to address in the FEIS. If the Federal Highway Administration fails to remedy the deficiencies found in the DEISs, then there may be a cause of action under the Administrative Procedures Act.

Notably, an EIS was not prepared in contemplation of NAFTA. NEPA did not apply to NAFTA because it was the president, not an agency, who was responsible for submitting NAFTA to Congress for approval.<sup>62</sup> However, as the various highway-improvement plans are ushered along, the responsible agencies will need to produce EISs, which should include an analysis of the projects’ cumulative regional, if not national, impact.

### **Cumulative Impacts**

There are three types of impacts or effects an agency must consider in the DEIS: direct, indirect, and cumulative.<sup>63</sup> Direct effects are caused by the proposed action and occur at the same time and place.<sup>64</sup> Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>65</sup> Cumulative impacts are broadly defined to include incremental actions, which may have a collective impact when combined with other past, present, and reasonably foreseeable future actions.<sup>66</sup>

The Council on Environmental Quality defines a cumulative impact as:<sup>67</sup>

. . . the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

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<sup>59</sup> 40 C.F.R. § 1503.4.

<sup>60</sup> 40 C.F.R. § 1505.2.

<sup>61</sup> *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1475 (1st Cir. 1994); *Nat’l Parks Ass’n v. Norton*, 324 F.3d 1229, 1237-38 (11th Cir. 2003); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>62</sup> *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

<sup>63</sup> 40 C.F.R. § 1508.8.

<sup>64</sup> 40 C.F.R. § 1508.8(a).

<sup>65</sup> 40 C.F.R. § 1508.8(b).

<sup>66</sup> 40 C.F.R. § 1508.7.

<sup>67</sup> *Id.*

The consideration of cumulative impacts is a mandatory duty under NEPA.<sup>68</sup> The agency must “include a ‘useful analysis of the cumulative impacts of past, present, and future projects.’”<sup>69</sup> For future projects, only “reasonably foreseeable” projects must be discussed.<sup>70</sup> For the purposes of cumulative impacts, potential projects are reasonably foreseeable if they are “proposed actions.”<sup>71</sup> Although an agency must consider cumulative effects in an EIS, the agency has discretion in determining the scope,<sup>72</sup> and a court will uphold the scope as long as the agency preparing the EIS has “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>73</sup>

The cumulative effects analysis must provide sufficient detail to allow the decision maker to decide “whether, or how to, alter the program to lessen cumulative impacts.”<sup>74</sup> NEPA requires that a FEIS provide cumulative effects analysis based on actual data.<sup>75</sup> In order to properly consider the cumulative impacts of a project, “some quantified or detailed information” is required; “general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided. . . . The analysis must be more than perfunctory.”<sup>76</sup>

In *Oregon Natural Resources Council v. Marsh*, the Ninth Circuit held that the scope of the analysis of cumulative impacts of a dam project was insufficient, ordering the preparation of an additional EIS, which was to discuss the impacts of the dam project in conjunction with the other dam projects already in the area and all significant environmental factors.<sup>77</sup> The court found that the Army Corps of Engineers had omitted issues of critical importance, such as the effect of multiple dams on turbidity, adequate analysis of the dam’s effects on species, and habitat loss.<sup>78</sup> The court also criticized the Corps for failing to broaden its scope to include public comments, and found that an agency has a duty to respond to *all* comments.<sup>79</sup> The court found that while the scoping process will ordinarily identify most areas under discussion, the Corps cannot “omit a factor from the scope of the EIS discussion *solely* because the factor was not raised as a concern during the scoping process.”<sup>80</sup>

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<sup>68</sup> See *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (citations omitted); see also 40 C.F.R. §§ 1502.16, 1508.7-8.

<sup>69</sup> *Churchill* 1080.

<sup>70</sup> 40 C.F.R. § 1508.7.

<sup>71</sup> *Or. Natural Res. Council v. Marsh*, 832 F.2d 1489, 1497-98, (9th cir. 1987), *rev’d on other grounds*, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989).

<sup>72</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 412-415; *Or. Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492, *citing* 40 C.F.R. §§ 1502.16, 1508.7-8; *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003).

<sup>73</sup> *Selkirk* 336 F.3d at 962, *quoting Wash. Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990).

<sup>74</sup> *Churchill* at 1080.

<sup>75</sup> See *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006).

<sup>76</sup> *Id.*, *quoting Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004).

<sup>77</sup> *Or. Natural Res. Council v. Marsh*, 52 F.3d 1485, 1493 (9th Cir. 1995).

<sup>78</sup> *Id.* at 1489-90.

<sup>79</sup> *Id.* at 1490.

<sup>80</sup> *Id.* (referencing 40 C.F.R. § 1501.7).



## **The Federal Highway Administration's Failure to Include Other Highway Projects in its Cumulative Impacts Analysis**

The Federal Highway Administration failed to adequately assess the cumulative impacts of other current and future highway projects in the Trans-Texas Corridor's study area and region, including the consideration of the cumulative impacts the two Trans-Texas Corridor projects would have on each other. Each DEIS mentions that there are multiple highways and other transportation projects on the horizon, but neither specifically analyzes the other, and there is no meaningful analysis of the cumulative effects of all these transportation projects combined.

The TTC-35 DEIS identified various other actions that may create a cumulative effect, including highway projects, rail lines, and land development.<sup>81</sup> The DEIS lists a number of reasonably foreseeable highway projects, which include construction or alteration of sections of U.S. 59, I-69, U.S. 77, and U.S. 281. I-69/TTC generally parallels these existing highways, but it is unclear if the reasonably foreseeable highway projects included in the DEIS are related to I-69/TTC, and the DEIS does not explicitly list the I-69/TTC project.

The I-69/TTC DEIS identifies some reasonably foreseeable projects as well, including additional highway (nearly 2,500 miles) and rail projects (10) and increased development (approximately 40,000 acres within the study area). But the DEIS does not discuss these reasonably foreseeable projects in any detail and states that the direct and indirect environmental effects of the foreseeable projects would be evaluated under their own environmental studies.<sup>82</sup> The executive summary of the I-69/TTC DEIS does list "completing the TTC-35 Tier One environmental study and selecting a Tier Two study area between Mexico and Oklahoma" as an additional major governmental action in the I-69/TTC study area.<sup>83</sup>

Neither Trans-Texas Corridor DEIS specifically analyzes the cumulative effects of the other project. The FEIS will need to include a meaningful cumulative effects analysis, including the cumulative effect each project will have when considered along with the other Trans-Texas Corridor project. Additionally, any of the other projects associated with these NAFTA corridors will need to be analyzed in consideration of each other.

## **The Highway Administration's Failure to Analyze Greenhouse Gases in its Cumulative Impacts Analysis**

The Council on Environmental Quality issued draft guidance on analyzing greenhouse gases in 1997. It states that all agencies should exercise their judgment in considering the extent to which they assess global climate change when considering a project, and that all agencies should start by analyzing the climate effects of long-range energy, transportation, and forest

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<sup>81</sup> FWH & Tex. DOT, *TTC-35 DEIS*, *supra* note 30 at 5-27. See FWH & Tex. DOT, *TTC-35 – Tier 1 DEIS: Appendix E-1* (Apr. 2006), available at [http://keptexasmoving.com/var/files/File/TTCPrjtsTTC35/EnvStdyMaps/Tier1DEIS\\_FEIS/Tier\\_1\\_DEIS/document/appendix\\_e-1\\_past\\_present\\_reasonably\\_foreseeable\\_future\\_proj.pdf](http://keptexasmoving.com/var/files/File/TTCPrjtsTTC35/EnvStdyMaps/Tier1DEIS_FEIS/Tier_1_DEIS/document/appendix_e-1_past_present_reasonably_foreseeable_future_proj.pdf).

<sup>82</sup> Federal Highway Administration, *I-69/Trans Texas Corridor Tier One Draft Environmental Impact Statement*; *Executive Summary*, at ES-34, (Nov. 2007), available at [http://keptexasmoving.com/var/files/File/TTCPrjtsI69TTC/EnvStdyMaps/Tier1DEIS\\_FEIS/Tier\\_1\\_DEIS/document/executive\\_summary.pdf](http://keptexasmoving.com/var/files/File/TTCPrjtsI69TTC/EnvStdyMaps/Tier1DEIS_FEIS/Tier_1_DEIS/document/executive_summary.pdf); Federal Highway Administration and Texas Department of Transportation, *I-69/Trans-Texas Corridor Tier One Draft Environmental Impact Statement*, at 5-2 (Nov. 2007), available at [http://keptexasmoving.com/var/files/File/TTCPrjtsI69TTC/EnvStdyMaps/Tier1DEIS\\_FEIS/Tier\\_1\\_DEIS/document/ch\\_5.pdf](http://keptexasmoving.com/var/files/File/TTCPrjtsI69TTC/EnvStdyMaps/Tier1DEIS_FEIS/Tier_1_DEIS/document/ch_5.pdf).

<sup>83</sup> *Id.* at ES-34.

management projects. However, the Council has not finalized its guidance.<sup>84</sup>

By making recommendations and filing petitions requesting Council guidance and regulatory changes, environmental groups have been putting pressure on the Council on Environmental Quality to provide climate change guidance for conducting NEPA analysis.<sup>85</sup> An agency should consider cumulative impacts on global warming when a program is likely to have direct and indirect effects that result in the generation of greenhouse gases.<sup>86</sup>

However, to date, only the Ninth Circuit requires an agency to do so. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit stated, “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”<sup>87</sup> Therefore, greenhouse gas analysis is mandatory in the Ninth Circuit, but it remains to be seen whether other jurisdictions, like the Fifth Circuit—where the Trans-Texas Corridor projects are—would require a greenhouse gas analysis.<sup>88</sup>

The potential creation and expansion of transportation and utility corridors is likely to have a large impact on the generation of greenhouse gases and the contribution to global warming. Yet there is no mention of the cumulative effects of additional greenhouse gases in the Trans-Texas Corridor DEISs. In fact, there are some allegations that the project will actually reduce congestion, resulting in ameliorated air quality.<sup>89</sup> The Federal Highway Administration should include an analysis of greenhouse gases in its cumulative impacts analysis. Similarly, this and other agencies conducting EISs for NAFTA corridors should include greenhouse gas emissions in their cumulative impacts analyses.

### **Piecemealing and Independent Utility**

Council on Environmental Quality regulations set forth when broad agency actions must be addressed in a single, programmatic EIS. In general, “proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action *shall* be

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<sup>84</sup> C. Grady Moore, III, *Indirect Impacts and Climate Change: Assessing NEPA’s Reach*, NR & E, at 33 (Spring 2009) (citing Council on Environmental Quality, *Executive Office of the President, Draft Guidance Regarding Consideration of Global Climate Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act*, at 4 (1997), available at <http://www.mms.gov/eppd/compliance/reports/ceqmemo.pdf>).

<sup>85</sup> See Save Our Environment Action Center, *Transition to Green Report* (November 2008), available at <http://www.saveo-urenvironment.org/assets/transition-to-green-full-report.pdf>; see also Natural Resources Defense Council and Sierra Club, *The International Center for Technology Assessment’s Petition Requesting that CEQ Amend Its Regulations to Clarify That Climate Change Analyses Be Included in Environmental Review Documents* (Feb. 28, 2008), available at <http://www.icta.org/doc/CEQ%20Petition%20Final%20Version%202-28-08.pdf>. However, there may also be agency challenges to a greenhouse gas analysis requirement, see C. Grady Moore, III, *Indirect Impacts and Climate Change: Assessing NEPA’s Reach*, NR & E (Spring 2009).

<sup>86</sup> *Ctr. For Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008, holding environmental assessment inadequate for failure to discuss the cumulative impact of the proposed action on global warming).

<sup>87</sup> *Id.*

<sup>88</sup> Norman A. Dupont, *NEPA and Climate Change: Are We at the “Tipping Point”?* NR & E, at 20-21 (Spring 2009), citing *Mayo Found. v. Surface Transport. Bd.*, 472 F.3d 545 (2006) and *N. Slope Borough v. Minerals Mgmt. Serv.*, 2008 WL 110889 at \*3 (D. Alaska Jan. 8, 2008).

<sup>89</sup> FWHIA & Tex. DOT, *TTC-35 DEIS*, *supra* note 30 at 5-9.

evaluated in a single impact statement.”<sup>90</sup> However, agencies shall use the scoping criteria set forth by CEQ in order to make this determination.<sup>91</sup> An agency’s determination of this scope is left up to the agency, and thus whether the agency decides to prepare a programmatic EIS and/or a site-specific EIS is discretionary.<sup>92</sup> As long as the agency is not acting arbitrarily or capriciously in their decision, their decision will stand.<sup>93</sup> Courts have held that “even though individual highway projects are proposed pursuant to a planning scheme, NEPA does not require a programmatic EIS for the entire plan at the time the individual projects are proposed.”<sup>94</sup>

In *City of Tenakee Springs v. Block*, the Ninth Circuit provided a definition of a programmatic EIS: “A programmatic environmental impact statement is a broad-based, long range plan that discusses the overall environmental impacts of a proposed action.”<sup>95</sup> The process of preparing a broad statement and subsequently narrowing the focus of the NEPA analysis is referred to as tiering.<sup>96</sup> The first tier in the programmatic EIS “should focus on broad issues such as mode choice, general location and area-wide air quality and land use implications of alternative transportation systems.” The programmatic EIS should reflect the “broad environmental consequences” and be forward looking.<sup>97</sup> The second tier includes the site-specific EISs.<sup>98</sup>

In determining whether separate actions must be analyzed in the same EIS, including a programmatic EIS, several circuits use an “independent utility” test.<sup>99</sup> A project has independent utility when “the agency might reasonably consider constructing [only the project or] segment in question” without constructing other associated projects or highway segments.<sup>100</sup> In determining the appropriate scope for an EIS, courts have considered whether the facility (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose on an opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects.<sup>101</sup>

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<sup>90</sup> 40 C.F.R. § 1502.4(a) (emphasis added).

<sup>91</sup> *Id.*; 40 C.F.R. § 1508.25.

<sup>92</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976).

<sup>93</sup> *Id.* at 412.

<sup>94</sup> *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 441 (5th Cir. 1981).

<sup>95</sup> *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1403 n.1 (9th Cir. 1985) (citing *Nat’l Wildlife Fed. v. U.S. Forest Serv.*, 592 F. Supp. 931, 940 n. 17 (D. Or. 1984)), *amended on other grounds*, *Nat’l Wildlife Fed. v. U.S. Forest Serv.*, 643 F. Supp. 653 (D. Or. 1984), *order vacated in part, appeal dismissed in part*, *Nat’l Wildlife Fed. v. U.S. Forest Serv.*, 801 F.2d 360 (9th Cir. 1986).

<sup>96</sup> 40 C.F.R. §§ 1502.20, 1508.28.

<sup>97</sup> See *Nat’l Wildlife Fed. v. Appalachian Reg’l Comm’n*, 677 F.2d 883, 888 (finding that a programmatic EIS was not required for a large scale highway project that had already been partially completed and project specific EISs were being conducted) citing *Kleppe*, 427 U.S. at 413).

<sup>98</sup> 40 C.F.R. § 1508.28.

<sup>99</sup> See *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985); see also *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000). The Fifth and Eighth Circuits also use this test, *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981), citing *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); see also *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973).

<sup>100</sup> See *Thomas* 753 F.2d. at 759-60.

<sup>101</sup> *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981), citing *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973); *Named Individual Members of San Antonio Conversation Soc’y v. Tex. State Highway Dep’t*, 446 F.2d 1013 (5th Cir. 1971).

In *Trout Unlimited v. Morton*, the Ninth Circuit stated that the EIS “must cover subsequent” phases of an action where “the dependency” of two phases “is such that it would be irrational . . . to undertake the first phase if subsequent phases were not also undertaken.”<sup>102</sup> The court also stated that an “agency may not escape compliance by proceeding with one action while characterizing the others as remote or speculative.”<sup>103</sup> The Supreme Court, in *Kleppe v. Sierra Club*, found that where several proposals were concurrently pending for coal-related actions with cumulative or synergistic regional environmental impacts, concurrent consideration of their environmental consequences was required.<sup>104</sup> Where multiple actions each have insignificant impacts but together have a substantial impact, a single EIS must be conducted.<sup>105</sup>

However, as a general rule, courts have found that most highway projects have independent utility from each other.<sup>106</sup> In *Piedmont Heights Civic Club, Inc. v. Moreland*, the court held that the agency did not abuse its discretion in determining that the segmented highway sections had independent utility and transportation purposes.<sup>107</sup> The Federal Highway Administration has provided some guidance regarding segmenting and independent utility: The highway section should be “as long as practicable to permit consideration of environmental matters on a broad scope. . . if possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.”<sup>108</sup> Another criterion to be considered is whether the highway segment is long enough to support an adequate discussion of alternatives.<sup>109</sup>

The Federal Highway Administration did a programmatic DEIS for the I-69/TTC and TTC-35, respectively, but it did not do a programmatic DEIS for the larger Trans-Texas Corridor plan, which would have included both I-69/TTC and TTC-35 in a single analysis. In the scoping process for the projects, the agency found that there were “no connected actions as defined in 40 C.F.R. Section 1508.25.” the agency concluded that the I-69/TTC and TTC-35 “are separate and distinct actions with each having logical termini and independent utility.” The agency concluded that these projects are not similar actions as defined by 40 C.F.R. § 1508.25, because they do not have similar project timing or geography, any build-out schedule would be highly speculative, and their scopes (mode and alignment) have not been determined.<sup>110</sup> The I-69/TTC DEIS states that “each individual [Trans-Texas Corridor] project would serve a significant purpose by itself.”<sup>111</sup> The agency summarily concludes that the “context and scope of both projects are being developed in a manner which does not constitute piecemealing or segmentation.”<sup>112</sup>

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<sup>102</sup> *Id.* (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974)).

<sup>103</sup> *Id.* at 760.

<sup>104</sup> *Kleppe v. Sierra Club*, 427 U.S. at 410.

<sup>105</sup> *See id.* at 409-10.

<sup>106</sup> *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981) (citing *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974)).

<sup>107</sup> *Piedmont* at 637 F.2d at 440-41.

<sup>108</sup> *Daly v. Volpe*, 514 F.2d 1106, 1109 (citing Federal Highway Administration Policy and Procedure Memorandum 90 –1 (PPM), 37 Fed. Reg. 21,809 (Oct. 14, 1972, internal quotation marks omitted); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 18 (8th Cir. 1973)).

<sup>109</sup> *Daly* 514 F.2d at 1110 (citations omitted).

<sup>110</sup> FWA & Tex. DOT, *TTC-35 DEIS*, *supra* note 30 at 1-7 to 1-8.

<sup>111</sup> FWA & Tex. DOT, *I-69, Chapter 1*, *supra* note 45 at 1-5.

<sup>112</sup> *Id.* at 1-4; 40 C.F.R. § 1508.

The D.C. Circuit provides two questions to consider when reviewing an official's decision not to prepare a programmatic EIS: (1) Could the programmatic EIS be adequately prospective to assist the decision maker in planning? And (2) Does the decision maker attempt to "segment" the program, unreasonably narrowing its scope?<sup>113</sup> The Federal Highway Administration has discretion in determining when a programmatic EIS is required, and the independent utility test supports segregating projects into separate EISs, where they each have an independent utility. However, one could argue that the scope of the programmatic DEISs for the Trans-Texas Corridor projects did not adequately consider the cumulative impacts of the other essentially concurrent highway and transportation projects, and that these projects should all be considered in one EIS. The Federal Highway Administration argues that the two projects do not share common timing. However, while the timing is not identical for the two projects, the proposed timelines are relatively close, and the projects came out of the same visionary proposal in 2002. Therefore, a court may find that I-69/TTC and TTC-35 should have been analyzed in one programmatic EIS.

### **Administrative Procedures Act Challenges**

The Administrative Procedures Act is the vehicle by which to challenge an inadequate FEIS.<sup>114</sup> In order to make a claim under the Act, five requirements must be met: (1) there must be an "agency action,"<sup>115</sup> (2) that agency action must not be excluded from review,<sup>116</sup> (3) the challenger must have suffered a legal wrong,<sup>117</sup> (4) the action must be final,<sup>118</sup> and (5) administrative remedies must be exhausted.<sup>119</sup> An agency EIS is reviewed under the arbitrary-and-capricious standard,<sup>120</sup> and courts defer to a "fully informed and well-considered"<sup>121</sup> agency decision.

Even though the DEIS constitutes an agency action, a DEIS is not a final agency action.<sup>122</sup> Therefore, a DEIS is not reviewable. A legal challenge can only be brought on the FEIS after a record of decision is issued. The DEISs for the Trans-Texas Corridor appear to be inadequate. The DEISs segregate the two corridor projects, they do not consider greenhouse gases, and the scope and adequacy of their cumulative impacts analysis may be subject to challenge if they are not significantly modified in the FEIS.

The agency has considerable discretion to determine the scope of cumulative impacts and to determine which projects to include in a programmatic EIS. For these reasons, it is difficult

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<sup>113</sup> *Nat'l Wildlife Fed. v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981).

<sup>114</sup> *See Churchill County v. Norton*, 276 F.3d 1060, 1071 (citing 5 U.S.C. § 706(2)(A)), *N.W. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1066 (9th Cir. 1995).

<sup>115</sup> 5 U.S.C. § 551(13); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

<sup>116</sup> 5 U.S.C. § 701(a).

<sup>117</sup> 5 U.S.C. § 702.

<sup>118</sup> 5 U.S.C. § 704.

<sup>119</sup> *Id.*; *Darby v. Cisneros*, 509 U.S. 137, 144 (1993).

<sup>120</sup> *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1988)), *overruled on different grounds, Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)).

<sup>121</sup> *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (quoting *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986)) (internal quotation marks omitted).

<sup>122</sup> *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1475 (1st Cir. 1994); *Nat'l Parks Ass'n v. Norton*, 324 F.3d 1229, 1237-38 (11th Cir. 2003); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

to challenge an agency's decision on the grounds of inadequate scope. However, there is case law to support a challenge of this sort, especially where a project was improperly segmented or piecemealed, precluding a meaningful analysis. Additionally, NEPA requires a cumulative-impacts analysis to include enough detail to allow decision makers to make informed decisions. The DEISs provide inadequate cumulative impacts analyses, and if this is not remedied in the FEISs, there will likely be a violation of NEPA. Furthermore, while NEPA does not explicitly require an analysis of greenhouse gases, there is an argument that greenhouse gases should be considered in the cumulative-impacts analysis. A potential plaintiff will have to have exhausted administrative remedies and wait until the Federal Highway Administration publishes the FEISs to challenge them under the Administrative Procedures Act in federal court.

## Chapter 3: The West Coast Corridor and the California Environmental Quality Act

Although the West Coast Corridor (WCC) Coalition formed in 2003, two years prior to the formation of the Security and Prosperity Plan, some believe the Security and Prosperity Partnership is promoting the WCC.<sup>123</sup> The WCC follows I-5 and is approximately 1,500 miles long.<sup>124</sup>

The WCC Coalition advocates for the construction of the WCC and consists of governmental and civic members from Alaska, Washington, Oregon, and California. The goals of the WCC Coalition are to keep the U.S.-Canada border open for trade, travel, and tourism, as well as to develop a shared vision for transportation along the corridor.<sup>125</sup> The WCC Coalition has its origin in the Corridor Outreach Initiative, launched in 2001 with funding from the U.S. Department of Transportation Borders and Corridors Program with the goal of extending corridor cooperation from Eugene, Oregon to Ensenada, Mexico.

The federal government currently funds the WCC Coalition. In 2005, the coalition received \$500,000 to “identify and advocate policies, strategies, projects, and funding to improve the movement of freight and goods through, from, and within the West Coast transportation system, and to mitigate the congestion and community impacts that arise from freight movement.”<sup>126</sup> In 2006, it received a federal earmark of \$1.2 million for continued operations and administration.<sup>127</sup>

One of the goals of the WCC Coalition is to develop a high-priority project list for the WCC system.<sup>128</sup> In 2008, the WCC Coalition financed a report identifying high-priority transportation projects.<sup>129</sup> Through this report, the WCC Coalition further defined the West Coast Corridor system as “Highway 99 in British Columbia; Highways 97 and 395 in Washington, Oregon and California; Highways 99 and 101 in California; and Highway 1 in Baja California,” as

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<sup>123</sup> Alliance for Democracy, *Security and Prosperity Partnership of North America: SuperCorridors Linking Mexico, the U.S. and Canada, Fact Sheet #4* (Apr. 2008), available at [www.thealliancefordemocracy.org/pdf/SPP/AfDSPPFlyer04.pdf](http://www.thealliancefordemocracy.org/pdf/SPP/AfDSPPFlyer04.pdf); Alliance for Democracy, *Security and Prosperity Partnership of North America: SuperCorridors Linking Mexico, the U.S. and Canada, Fact Sheet #2* (Feb. 2008), available at [www.thealliancefordemocracy.org/pdf/SPP/AfDSPPFlyer02.pdf](http://www.thealliancefordemocracy.org/pdf/SPP/AfDSPPFlyer02.pdf).

<sup>124</sup> The West Coast Corridor is also known as Corridor 30. It was the first high-priority corridor funded under the 1998 TEA-21 and provides for the development of I-5 through California, Oregon, and Washington, as well as I-905 in San Diego County between I-805 and the Otay Mesa port of entry.

<sup>125</sup> West Coast Corridor Coalition, *From B.C. to B.C. ...and Beyond: The Story of the West Coast Corridor Coalition*, at 4, available at <http://www.bettertransport.info/cascadia/WCCCoverview.pdf>.

<sup>126</sup> Press release, Congressman Rick Larsen’s Online Office, Committee Passes Transportation Reauthorization Bill with Millions for 2nd District Priorities (Mar. 2, 2005), [http://www.house.gov/list/hearing/wa02\\_larsen/morenews/pr\\_03022005\\_Transbill.shtml](http://www.house.gov/list/hearing/wa02_larsen/morenews/pr_03022005_Transbill.shtml).

<sup>127</sup> MPO/RTPO/WSDOT Coordinating Committee, *Summary Notes: February 19, 2008*, at 1 (Feb. 27, 2007), available at <http://www.wsdot.wa.gov/NR/rdonlyres/ECBB2425-9D95-41A7-AC06-B8A2FB5698E2/0/022707CCSummaryNotes.pdf>.

<sup>128</sup> San Diego’s Regional Planning Agency, West Coast Corridor Coalition, <http://www.sandag.org/index.asp?projectid=315&fuseaction=projects.detail>; *Id.* at 17.

<sup>129</sup> Glenn Pascall, *The West Coast Corridor System: Phase II Report*, (Oct. 2003), available at <http://www.sandag.org/index.asp?publicationid=1326&fuseaction=publications.detail>. See generally Glenn Pascall, *The West Coast Corridor System: Phase I Report: Building a Strategy for Secured Mobility*, at 19-21 (June 2003) [hereinafter Pascall, *Phase I*], available at <http://www.sandag.org/index.asp?publicationid=1325&fuseaction=publications.detail>.

well as Interstate 5.<sup>130</sup> In addition to these north-south routes, the report identified as important to the WCC system various east-west connectors, including “Highway 1 in Canada, Interstate 90 in Washington, Interstate 84 in Oregon, and Interstates 80, 40, 15, 10 and 8 in California.”<sup>131</sup>

The purpose of assembling the high-priority projects list was to have a unified list of “projects of Corridor System significance” that could be uniformly endorsed by West Coast transportation officials for funding under future TEA-21 reauthorization.<sup>132</sup> The WCC Coalition itself identifies the series of highways, roads, and ports as a corridor system, understanding and recognizing that the seemingly separate parts work collectively as a whole to function as a corridor system.<sup>133</sup> This is all despite the U.S. government’s assurance that it is not planning on nor does it have the authority to build or name any highway as a NAFTA corridor—claiming that the local efforts to plan NAFTA-related highway projects are not federally driven initiatives.<sup>134</sup>

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<sup>130</sup> Pascall, *Phase I*, *supra* note 129 at 7.

<sup>131</sup> *Id.*

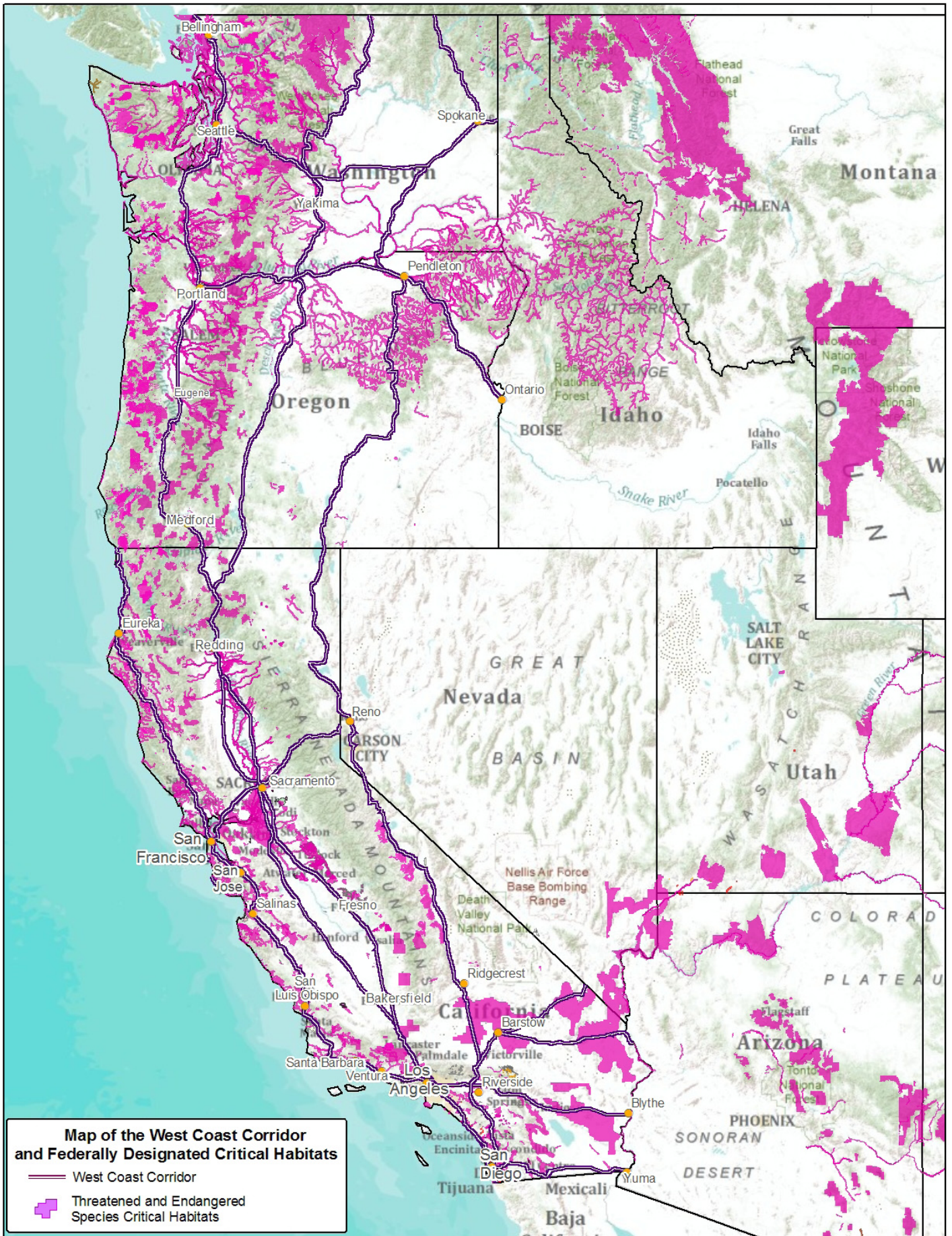
<sup>132</sup> *Id.* at 19, 21.

<sup>133</sup> *Id.* at 7.

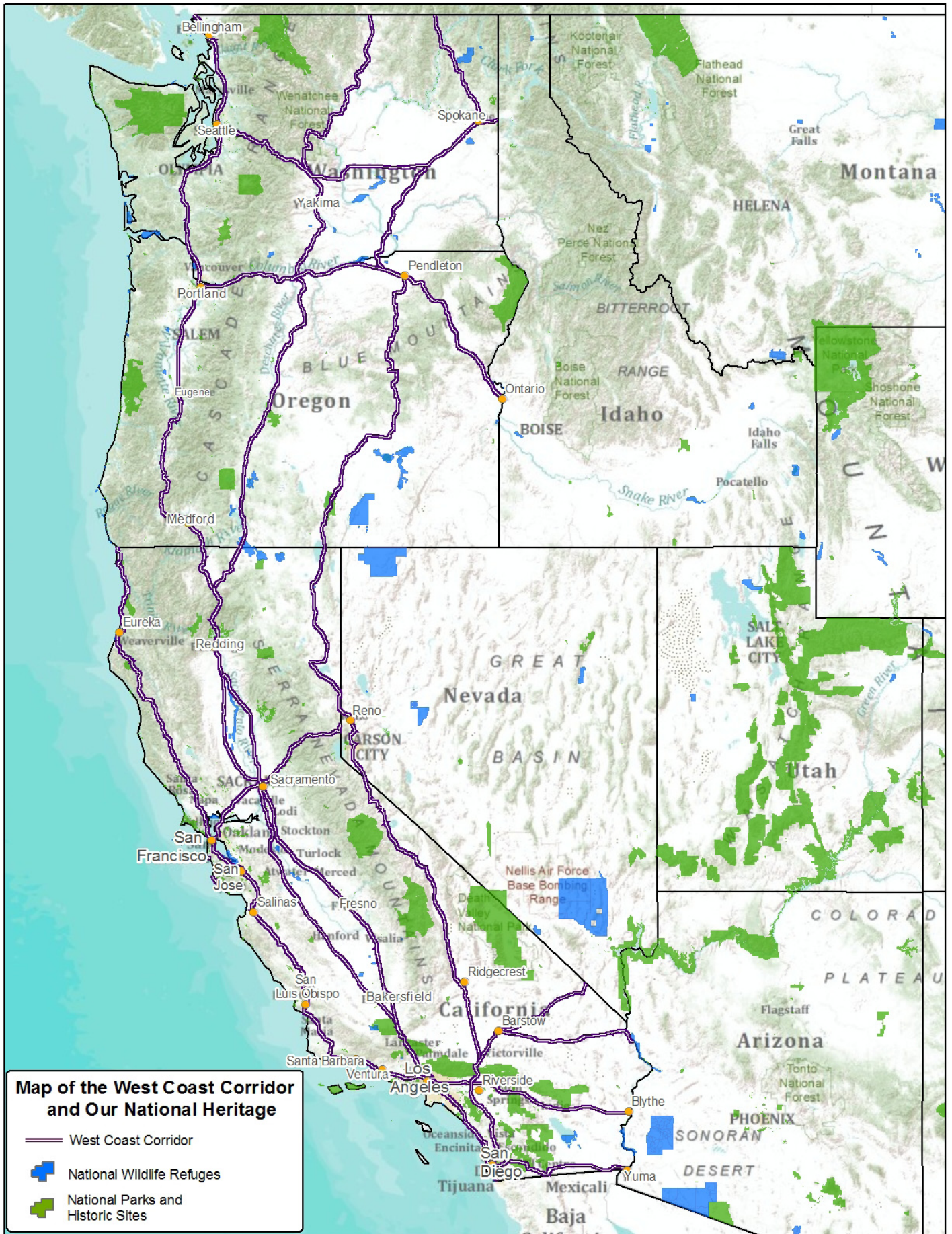
<sup>134</sup> *SPP Myths vs. Facts*, [http://www.spp.gov/myths\\_vs\\_facts.asp](http://www.spp.gov/myths_vs_facts.asp).











## *WCC Projects in California*

The WCC Coalition identified more than 75 high-priority projects in California, many of which are currently in the planning or construction stages.<sup>135</sup> The following California Environmental Quality Act analysis is based on a select group of those projects. The projects were selected because they are in the planning stages and do not have environmental impact reviews (EIRs) yet, the California Transportation Commission selected these projects for Tier One funding from the Trade Corridor Improvement Fund, and the projects may have significant effects on the environment, namely air quality.

The Trade Corridor Improvement Fund is a product of the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (also known as “Proposition 1B”).<sup>136</sup> California voters passed Proposition 1B in 2006, which includes \$2 billion to the California Transportation Commission for infrastructure improvements on federally designated “Trade Corridors of National Significance.”<sup>137</sup> The California Transportation Commission allocates the funds for highway construction and rail improvements based on a nomination and screening process.<sup>138</sup> It evaluates projects based on the statutory mandates of Proposition 1B, which include placing an emphasis on improving corridor mobility while reducing emissions of diesel particulate, CO<sub>2</sub>, NO<sub>x</sub>, and other pollutants.<sup>139</sup> On April 10, 2008, the California Transportation Commission adopted its initial set of Trade Corridor Improvement Fund projects, with planned construction start dates to occur in 2013.<sup>140</sup> Despite the state mandate to adopt projects that reduce emissions, of the 79 projects adopted, 25 projects “did not include sufficient information to make an assessment” of local air quality impacts, and six projects reported a “reasonably high likelihood of producing a negative localized air quality impact.”<sup>141</sup>

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<sup>135</sup> See Cambridge Systematics, Inc., HDR, Inc., & Sarah Catz, West Coast Corridor Coalition Trade and Transportation Study (Apr. 2008), available at [http://www.wsdot.wa.gov/NR/rdonlyres/5A019EA4-50EF-4286-96F9-05398B52608A/0/\\_DR1\\_WCCC\\_TradeandTransportationStudy\\_COMPLETEweb.pdf](http://www.wsdot.wa.gov/NR/rdonlyres/5A019EA4-50EF-4286-96F9-05398B52608A/0/_DR1_WCCC_TradeandTransportationStudy_COMPLETEweb.pdf).

<sup>136</sup> Trade Corridor Improvement Fund (TCIF), <http://www.catc.ca.gov/programs/tcif.htm>.

<sup>137</sup> *Id.*

<sup>138</sup> CEQA does not apply to the development or adoption of regional or state transportation improvement programs, though it does apply to individual projects, California Environmental Quality Act § 21080(b)(13), Cal. Pub. Res. Code § 21080(b)(13), CEQA Guidelines § 15276(a).

<sup>139</sup> Strategic Growth Plan Bond Accountability, *Trade Corridors Improvement Fund*, at 6 (2007), available at [http://www.bondaccountability.dot.ca.gov/bondacc/documents/TCIF\\_Guidelines.pdf](http://www.bondaccountability.dot.ca.gov/bondacc/documents/TCIF_Guidelines.pdf).

<sup>140</sup> Trade Corridors Improvement Fund, *Adopted Program of Projects* (2008), available at [http://www.catc.ca.gov/programs/TCIF/Adopted\\_TCIF\\_Program\\_041008.pdf](http://www.catc.ca.gov/programs/TCIF/Adopted_TCIF_Program_041008.pdf).

<sup>141</sup> California Transportation Commission, *Adopted TCIF Program – Updated Review Findings*, (Apr. 2008), available at [http://www.catc.ca.gov/programs/TCIF/Adopted\\_TCIF\\_Program\\_Updated\\_Review\\_Findings\\_040808.pdf](http://www.catc.ca.gov/programs/TCIF/Adopted_TCIF_Program_Updated_Review_Findings_040808.pdf).

The following Trade Corridor Improvement Fund Tier One projects were also identified by the WCC Coalition as high-priority projects:<sup>142</sup>

Seventh Street Grade Separation	(I)
Outer Harbor Intermodal Terminals	(I)
I-580 Eastbound Truck-climbing Lane	(+)
Tehachapi Trade Corridor Rail Improvement Project	(I)
Track and Tunnel Improvements at Donner Summit	(+)
I-80 Eastbound Cordelia Truck Scales Relocation	(+)
State Route 47 Expressway – Schuyler Heim Bridge Replacement	(-)
Alameda Corridor East: Gateway-Valley View	(+)
I-110 Fwy Access/SR 47/I110 NB Connector	(I)
C Street Access Ramps Improvements	(I)
South Wilmington Grade Separation	(+)
Gerald Desmond Bridge Replacement	(+)
Los Angeles Ports Rail System Tier I	(+)
Sunset Avenue Grade Separation	(+)
State Route 905	(+)
State Route 11/Otay Mesa East Port of Entry	(-)
Colton Crossing Flyover	(I)

Of these projects, six of the 17 projects are not accompanied by enough information to determine whether they will have local air quality impacts, and two of the projects will create negative local air quality impacts.

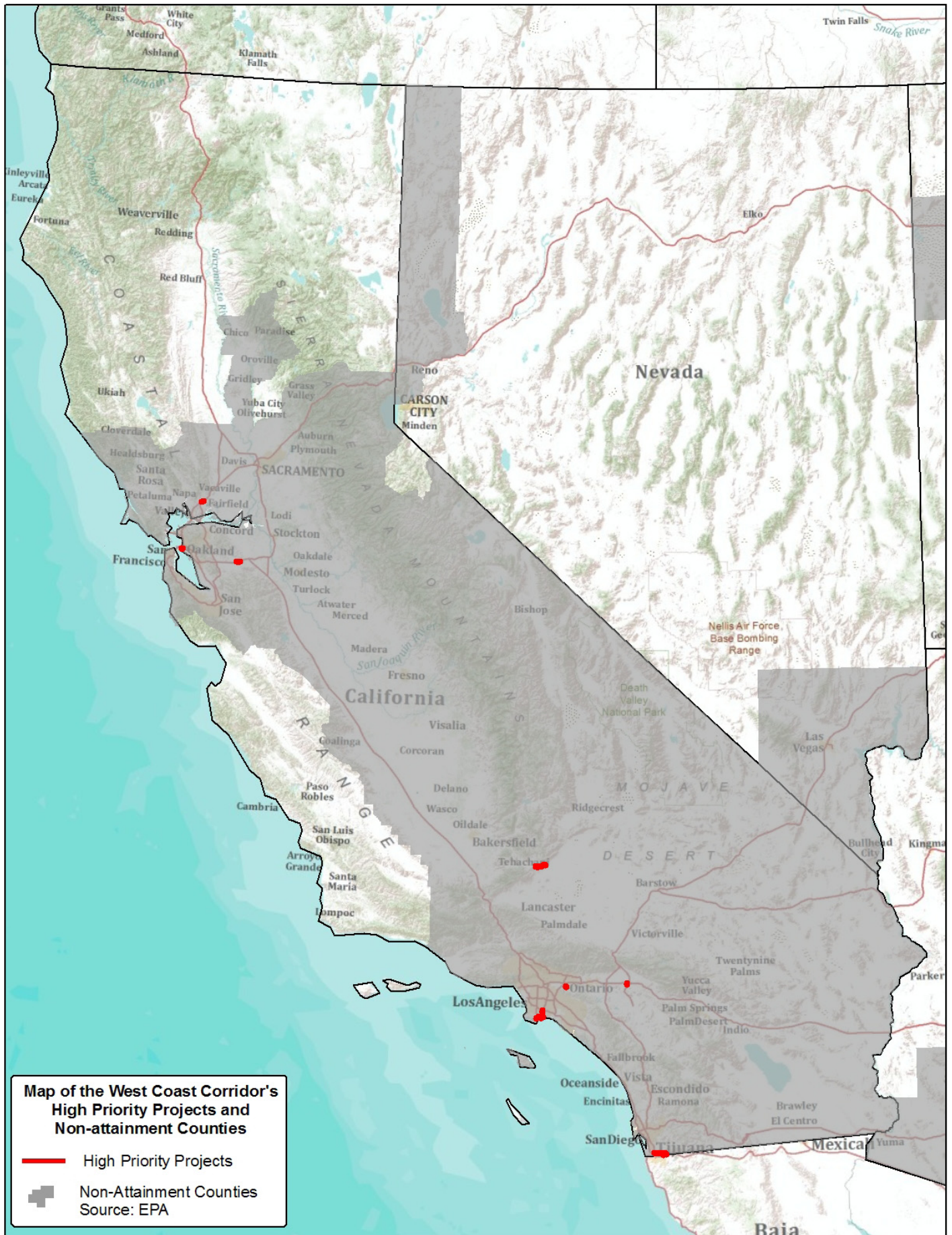
Although the California Transportation Commission adopted these projects at the same time, and they are all scheduled to begin construction in 2013, it is unlikely that the projects will be addressed as part of the same larger project in an EIR. Certainly, when anticipated future projects are independent of each other or have independent utility, the future projects can be addressed in a cumulative impact analysis instead of in one EIR.<sup>143</sup> However, each projects' EIR will need to include a cumulative-impacts analysis of the other projects' effects.

Unfortunately, California Senate Bill 97 has placed a moratorium on litigation regarding climate change analysis for all projects funded by Proposition 1B, which ends January 1, 2010, so any analysis of these projects under California law will not need to include an evaluation on climate change impacts if completed before January 2010.

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<sup>142</sup> *Id.* “(+)” Project has a reasonably high likelihood of producing a beneficial localized air quality impact; “(I)” Project nomination did not include sufficient information to make an assessment of localized impact; “(-)” Project has a reasonably high likelihood of producing a negative localized air quality impact.

<sup>143</sup> *Bozung v. Local Agency Formation Comm’n*, 13 Cal. 3d 263, 284 n.27 (1975).



## California Environmental Quality Act

The California legislature created the California Environmental Quality Act (CEQA) to aid public agencies in identifying, avoiding, and mitigating the significant environmental effects of their actions.<sup>144</sup> State and local agency-proposed and -approved projects must go through the CEQA process. The lead agency begins the environmental review process by determining whether the activity in question is a project subject to the CEQA. An activity is a project under CEQA if it involves discretionary approval and has the potential for either a direct physical change or a reasonably foreseeable indirect physical change in the environment—and this includes activities funded or permitted by a public agency.<sup>145</sup> Next, the agency must determine whether the project is statutorily or categorically exempt.<sup>146</sup> If an activity is a project and is not exempt, the lead agency must then perform an “initial study” to identify potential environmental impacts of the project and determine whether the impacts are significant.<sup>147</sup> If there are no significant impacts, the lead agency prepares a “negative declaration.” If there are significant impacts, but the project is revised to avoid or mitigate the impacts, the lead agency produces a “mitigated negative declaration.” However, if there is a fair argument that the project will result in significant effects even after mitigation, the lead agency must produce an EIR.

### Significant Effects

CEQA defines a “significant effect” as “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance.”<sup>148</sup> The statute further describes certain kinds of physical impacts as necessarily significant if (1) the project has the potential to harm the environment for short-term gain at the expense of long-term harm, (2) the project’s effects are individually limited but cumulatively considerable, (3) the project will cause substantial direct or indirect effects on humans, or (4) the project has the potential to harm fish or wildlife species.<sup>149</sup>

If there are significant effects, the lead agency first issues a notice of preparation of environmental impact report, which gives the public 30 days to review and submit comments on the project. Then the agency produces a draft EIR and again provides an opportunity for the public to comment—generally lasting 45 to 60 days. The lead agency collects comments and responds to them in the final EIR. The agency then certifies the EIR and files a notice of determination to approve the project. After this point, a potential plaintiff has 30 days to file suit.<sup>150</sup>

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<sup>144</sup> CEQA §§ 21000-21177.

<sup>145</sup> CEQA § 21065.

<sup>146</sup> Statutory exemptions listed at CEQA §§ 21080-21080.33; categorical exemptions are defined at CEQA § 21084. Projects that create or increase capacity of high-occupancy vehicle lanes already in use are statutorily exempt, CEQA § 15275. Railroad grade separation projects that reconstruct or eliminate existing grade crossings are exempt, CEQA § 15282(g). Projects restriping roads to relieve traffic congestion are exempt, CEQA § 15282(j). Department of Transportation land acquisition within statewide or regional priority corridors identified in § 65081.3 are exempt, CEQA § 15282(o).

<sup>147</sup> CEQA Guidelines § 15064.

<sup>148</sup> CEQA Guidelines § 15382.

<sup>149</sup> CEQA §§ 21083(b)(1)-(3); CEQA Guidelines § 15065.

<sup>150</sup> CEQA Process Flow Chart, [http://ceres.ca.gov/topic/env\\_law/ceqa/flowchart/index.html](http://ceres.ca.gov/topic/env_law/ceqa/flowchart/index.html).



## **Piecemealing, Independent Utility, and Tiering**

To avoid piecemealing, lead agencies must fully analyze each project in a single environmental review. Thus, the term *project* “is given a broad interpretation in order to maximize protection of the environment.”<sup>151</sup> By not piecemealing, the lead agency ensures that “environmental considerations [do] not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.”<sup>152</sup> Piecemealing can be avoided through tiering. Tiering is the coverage of “general matters” and environmental effects in an environmental impact report for a policy, plan, program, or ordinance.<sup>153</sup> Subsequent site-specific EIRs incorporate the environmental findings of the tiered EIR and focus on environmental impacts that can be mitigated or were not previously analyzed by the tiered EIR. Where a different agency moves forward with one of the projects, it can refer back to the other agency’s tiered EIR.<sup>154</sup>

The precise legal test for piecemealing developed by the California Supreme Court is that “an EIR must include an analysis of the environmental effects of future expansion or other action if (1) it is a reasonably foreseeable consequence of the initial project and (2) a future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”<sup>155</sup> However, the scope of this test has been limited when it comes to highway projects. The California Court of Appeals has held that it is permissible to focus an EIR solely on one small piece of what is arguably a larger highway project. In *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego*,<sup>156</sup> the court explained the concept of “independent utility” whereby, in that case, the EIR treated one freeway segment within a long-term, multi-segment regional plan to expand the freeway system as a single project. The court upheld the EIR, reasoning that although the project was part of a larger plan, the one segment would serve a viable purpose even if the later segments were never built, and therefore the project was of independent utility. While the different segments of the highway project need not be addressed in the same EIR, they must be treated as probable future projects for purposes of assessing cumulative impacts.<sup>157</sup>

## **Cumulative Impacts**

Even where a lead agency concludes that its project will not cause any significant environmental effects—and would therefore qualify for a negative declaration—if the project will cause an impact that will exacerbate an existing environmental condition, an EIR may be required for the cumulative effects of the project.<sup>158</sup> The CEQA defines “cumulative impact” as “two or more individual effects which, when considered together, are considerable or which

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<sup>151</sup> *McQueen v. Bd. of Dirs. of the Mid-Peninsula Reg'l Open Space Dist.*, 202 Cal. App. 3d 1136, 1143 (Cal. Ct. App. 6th Dist. 1988).

<sup>152</sup> *Burbank-Glendale-Pasadena Airport Auth. v. Hensler*, 233 Cal. App. 3d 577, 592 (Cal. Ct. App. 2d Dist. 1991).

<sup>153</sup> CEQA § 21068.5.

<sup>154</sup> CEQA § 21094(d).

<sup>155</sup> *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 396 (1988).

<sup>156</sup> *Del Mar Terrace Conservancy v. City Council*, 10 Cal. App. 4th 712, 732-33 (Cal. Ct. App. 2d Dist. 1992).

<sup>157</sup> *Id.* at 732-35, 737-39.

<sup>158</sup> CEQA Guidelines § 15064(h)(1).

compound or increase other environmental impacts.”<sup>159</sup> According to the CEQA guidelines, an EIR must be prepared if the cumulative impact may be significant and the effects of the project are cumulatively considerable. The CEQA guidelines define “cumulatively considerable” to mean that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”<sup>160</sup> Therefore, cumulative impacts may be identified in the EIR as either a list of past, present, and probable future projects, or as a prior environmental document that contains local conditions contributing to the cumulative impact.

### **Joint Environmental Impact Reports and Environmental Impact Statements**

In projects for which both CEQA and NEPA analyses are required, a joint EIR/EIS may be prepared. However, it must satisfy the requirements of both laws. To do so, it must include CEQA’s suggested mitigation measures and analysis of growth-inducing impacts, as well as NEPA’s identification of mitigation measures. It must also include the relevant greenhouse gas analysis. Where a federal agency has analyzed a project under NEPA before the CEQA lead agency has done its CEQA analysis, the lead agency can rely on the NEPA documents in lieu of preparing new CEQA documents.<sup>161</sup> Conversely, when the lead agency has prepared CEQA documents before the federal agency has done its NEPA analysis, the federal agency may not rely on the CEQA documents unless the federal agency has been actively participating in the CEQA process.<sup>162</sup>

### **California Environmental Quality Act Guidelines and Greenhouse Gases**

The California Governor’s Office of Planning and Research drafted CEQA guidelines for the “mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions,” which the California Resources Agency must adopt by 2010.<sup>163</sup> The Office of Planning and Research has also issued informal guidance for lead agencies while the regulations are being finalized.<sup>164</sup> The Office identifies a three-step process for identifying a project’s greenhouse gas effects: (1) identify and quantify the greenhouse gas emissions, (2) assess the significance of the emissions’ impact on the environment, and (3) identify mitigation measures to reduce the impact of those emissions. Additionally, all CEQA documents must include an analysis on air quality impacts, independent from climate change impacts.

Under CEQA, an environmental document must analyze the effects of the current project along with the effects of probable future projects. The CEQA guidelines define a probable future project as, among other things, one that is included or adopted in a capital improvement program, general plan, regional transportation plan, or other similar plan. The Trade Corridor Improvement Fund projects selected by the California Transportation Commission fall into this

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<sup>159</sup> CEQA Guidelines § 15355.

<sup>160</sup> CEQA Guidelines § 15064(h)(1).

<sup>161</sup> CEQA § 21083.7; 40 CFR § 1506.3.

<sup>162</sup> 42 USC § 102(2)(D); *see also Sierra Club v. U.S. Army Corps. of Eng’rs*, 701 F.2d 1011, 1037-38 (2d Cir. 1983).

<sup>163</sup> *CEQA Guidelines and Greenhouse Gases*, <http://www.opr.ca.gov/index.php?a=ceqa/index.html>.

<sup>164</sup> State of California, Governor’s Office of Planning and Research, *CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review* (June 2008), available at <http://www.opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf>.

category mandating cumulative impacts analysis. The California Department of Transportation requires that in preparing an environmental document, the lead agency must define the “resource study area” for the project, which is the area within which the lead agency analyzes the impacts. The lead agency must identify a separate, and typically more broad, resource study area for each resource of concern included in the cumulative-impacts analysis. Different resources analyzed can include: land use, air quality, wetlands and water quality, plant and animal species, cultural resources, community, and traffic/transportation.<sup>165</sup>

In the case of the California projects identified by both the WCC Coalition and the California Transportation Commission for Trade Corridor Improvement Fund funding, the agency will likely need to analyze the cumulative impacts of the various Trade Corridor Improvement Fund projects—particularly impacts on air quality, as air quality was a specific concern of the legislature. Consequently, the resource study area for the proposed projects will likely span nearly all of California. An advocate should participate in the CEQA process as early as possible to ensure that these projects do not negatively impact California’s air quality. Other states have similar state NEPA processes,<sup>166</sup> and should be considered in challenging the WCC or other NAFTA corridor projects.

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<sup>165</sup> California Department of Transportation, *Guidance for Preparers of Cumulative Impact Assessments: Defining Resource Study Areas*, at 5 (June 2005), available at [http://www.dot.ca.gov/ser/cumulative\\_guidance/defining\\_resource.htm](http://www.dot.ca.gov/ser/cumulative_guidance/defining_resource.htm).

<sup>166</sup> Other states with NEPA-like statutes include Connecticut, the District of Columbia, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Puerto Rico, South Dakota, Virginia, Washington, and Wisconsin.

## Chapter 4: CANAMEX and the Endangered Species Act

The CANAMEX Corridor was created to assist the efficient transportation of goods, services, people, and information between Canada, Mexico, and the United States. Its stated purpose is to help NAFTA related trade, tourism, and economic activity within the region.<sup>167</sup> Congress designated the CANAMEX Corridor a high-priority corridor in 1995 under the national Highway Systems Designation Act.<sup>168</sup> According to that designation, the CANAMEX Corridor runs from Nogales, Arizona through Las Vegas, Nevada, to Salt Lake City, Utah, to Idaho Falls, Idaho to Montana to the Canadian border. It generally follows I-19 from Nogales to Tucson, then I-10 from Tucson to Phoenix and U.S. Route 93 in the vicinity of Phoenix to the Nevada border. From Nevada, the CANAMEX Corridor follows U.S. Route 93 from the Arizona border to Las Vegas and I-15 from Las Vegas to the Utah border. From the Utah border through Montana to the Canadian border, the CANAMEX Corridor follows I-15.<sup>169</sup>

In 1999, the governors of Arizona, Nevada, Utah, Montana, and Idaho signed a memorandum of understanding creating the CANAMEX Corridor Coalition. The Arizona Department of Transportation received \$1 million from TEA 21, National Corridor Planning and Development funds in 1999 to develop a comprehensive plan for the CANAMEX Corridor,<sup>170</sup> which the CANAMEX Corridor Coalition adopted in 2001.<sup>171</sup> In 2002, the Arizona governor's CANAMEX task force received \$86 million for the Hoover Dam Bypass project.<sup>172</sup> In 2003, the task force obtained an additional \$13.75 million for the Hoover Dam Bypass, CyberPort, and new safety inspection facilities in Nogales and Douglas.<sup>173</sup> Currently, \$6 billion in highway improvements are planned for the CANAMEX Corridor.<sup>174</sup>

### *The Endangered Species Act*

The Endangered Species Act was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.”<sup>175</sup> The Supreme Court's review of the Endangered Species Act's “language, history, and structure” convinced the Court “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.”<sup>176</sup> As the Court found, “[t]he plain intent of Congress in enacting this

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<sup>167</sup> Canamex Corridor Coalition, <http://www.canamex.org/index.asp>.

<sup>168</sup> National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 332(a)(1)(B) at § 1105(c)(5)(D)(26), 109 Stat. 568 (1995).

<sup>169</sup> See also Economics Research Associates, Wilbur Smith Associates, & Comgate Telemangement Limited, *CANAMEX CORRIDOR WORKING PAPER TASK III: TRANSPORTATION STRATEGIES AND ECONOMIC IMPACT ANALYSIS* (Aug. 2001), available at <http://www.canamex.org/PDF/WorkingPaper3.pdf>.

<sup>170</sup> *What is CANAMEX? Background*, <http://www.canamex.org/background.asp>.

<sup>171</sup> *What is CANAMEX? Accomplishments*, <http://www.canamex.org/accomplishments.asp>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *What is CANAMEX? “Smart Corridor”*, [http://www.canamex.org/smart\\_corridor.asp](http://www.canamex.org/smart_corridor.asp).

<sup>175</sup> 16 U.S.C. § 1531.

<sup>176</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>177</sup>

In order to fulfill the substantive purposes of the Endangered Species Act, federal agencies are required to engage in consultation with the U.S. Fish and Wildlife Service to “ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical.”<sup>178</sup> Section 7 consultation, as it is called, is required for “any action [that] may affect listed species or critical habitat.”<sup>179</sup> Agency “action” is defined in the Endangered Species Act’s implementing regulations to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.”<sup>180</sup>

When a proposed action may affect a protected species, consultation must occur and be completed before the federal action may take place.<sup>181</sup> During the course of consultation, the Fish and Wildlife Service may “suggest modifications” to the action to “avoid the likelihood of adverse effects” to the listed species.<sup>182</sup> Upon completion of consultation, the Service issues a “biological opinion” that determines whether the agency action is likely to jeopardize the species or destroy or adversely modify its critical habitat.<sup>183</sup> If the Service makes such a jeopardy finding, the agency may not proceed with the action unless it adopts reasonable and prudent alternatives as specified in the biological opinion that will avoid jeopardy and destruction or adverse modification of critical habitat.<sup>184</sup>

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<sup>177</sup> *Id.* at 184.

<sup>178</sup> 16 U.S.C. § 1536(a)(2) (Section 7 consultation); *see also Am. Bird Conservancy, Inc. v. Fed. Comm’n’s Comm’n.*, 516 F.3d 1027, 1034 (D.C. Cir. 2008).

<sup>179</sup> 50 C.F.R. § 402.14.

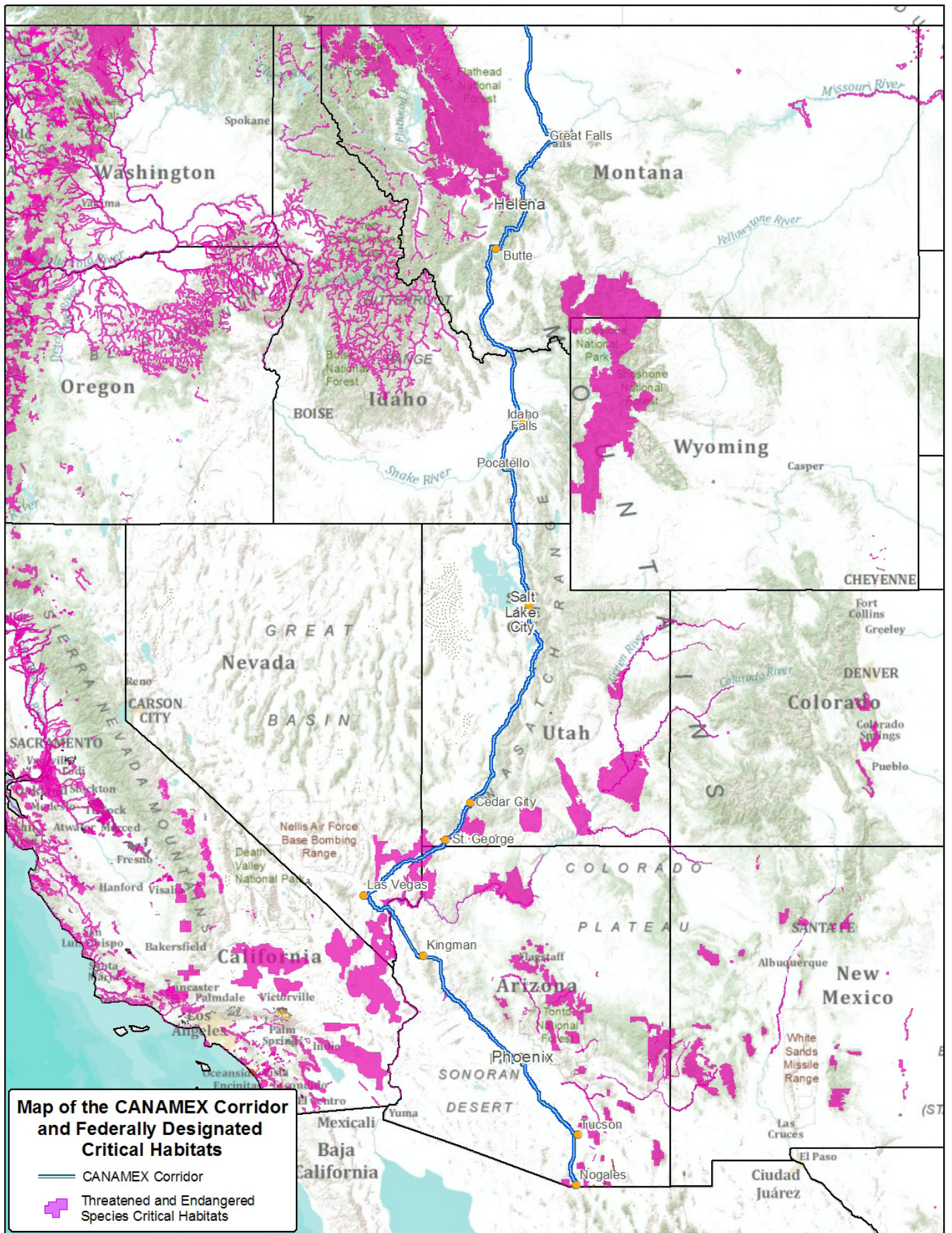
<sup>180</sup> 50 C.F.R. § 402.02; *see also Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008); *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998).

<sup>181</sup> *Am. Bird Conservancy*, 516 F.3d at 1034; *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Conner v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

<sup>182</sup> 50 C.F.R. § 402.13.

<sup>183</sup> 16 U.S.C. § 1536(b)(3)(A); *see also* 50 C.F.R. § 402.02.

<sup>184</sup> 16 U.S.C. § 1536(b).



## *Boulder City Bypass*

The Boulder City Bypass is part of the CANAMEX Corridor and creates a new highway circumnavigating Boulder City, Nevada to the south near the Nevada-Arizona border. Phase 1 of the project extends I-515 to U.S. 95, and Phase 2 bypasses Boulder City from U.S. 95 to the Hoover Dam Bypass. In 2005, the Federal Highway Administration prepared an environmental impact statement as required by the National Environmental Policy Act.<sup>185</sup>

Among the alternative actions discussed in the EIS, the chosen alternative (Alternative D) would impact the largest area of wildlife habitat.<sup>186</sup> Nonetheless, the agency concluded that the project's purpose and need, including social and economic benefits, outweighed the negative environmental impacts.<sup>187</sup>

The Boulder City Bypass will create a new freeway around Boulder City through pristine desert habitat. The highway will be built in desert tortoise habitat with moderately dense populations of the species, which is protected as "threatened" under the Endangered Species Act. The highway will be adjacent to federally designated desert tortoise critical habitat.

Desert tortoises have lived in the deserts of California, Arizona, Nevada, and Utah since the Pleistocene era. In the early years of the 20th century, they still thrived within the Southwest's arid landscapes: As many as 1,000 tortoises per square mile once inhabited the Mojave. But by the end of the century, this population of the desert tortoise had to be listed as a threatened species under the Endangered Species Act. Livestock grazing, urban development, off-road vehicles, and infrastructure development continue to degrade the tortoise's vanishing habitat. The desert tortoise has 6.4 million acres of designated critical habitat in California, Nevada, Utah, and Arizona.

A portion of the area slated for the bypass encroaches on lands covered by the Clark County Multispecies Habitat Conservation Plan (MSHCP). This habitat conservation plan allows incidental "take," meaning harm or injury, to federally listed species resulting from nonfederal activities, such as the construction of the Boulder City Bypass. The plan sets out measures, including a per-acre fee remittance, that may be required for the issuance of an incidental take permit for listed species.

Since, in the Southwest, the CANAMEX Corridor runs through several areas with desert tortoise habitat, various other projects in the corridor will have impacts on the tortoise—namely, the Boulder City Bypass, adjacent to the Hoover Dam Bypass, which calls for the construction of a new bridge crossing the Colorado River.

In its EIS, the Federal Highway Administration concluded that there would be cumulative

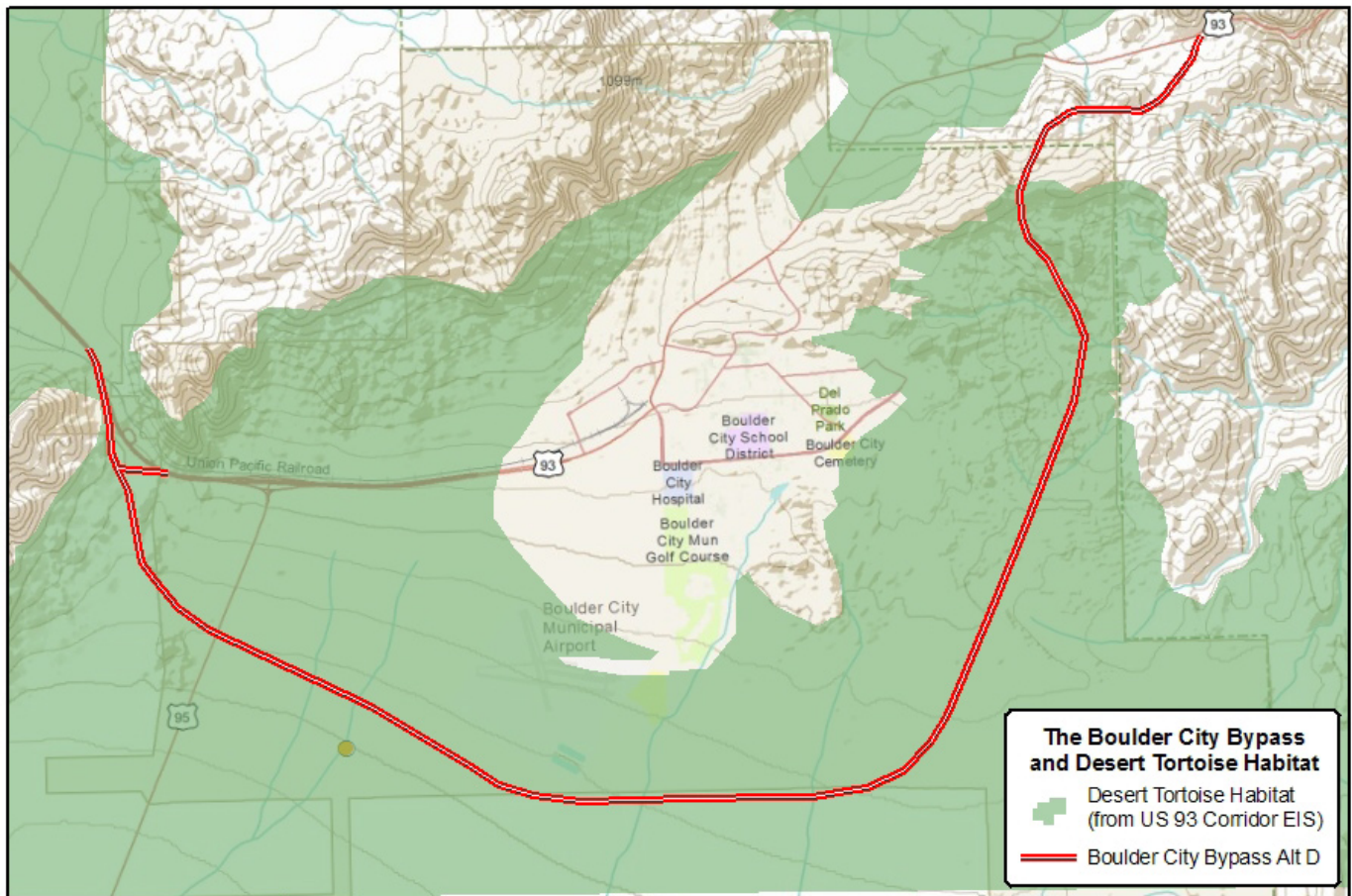
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<sup>185</sup> Nevada Department of Transportation, *Boulder City/U.S. 93 Corridor Study: Final Environmental Impact Statement and Section 4(f) Evaluation* (Apr. 2005), available at [http://www.bouldercitybypass.com/feis\\_toc.html](http://www.bouldercitybypass.com/feis_toc.html).

<sup>186</sup> Nevada Department of Transportation, *Boulder City/U.S. 93 Corridor Study: Final Environmental Impact Statement and Section 4(f) Evaluation: Volume 1*, at 6-24 (Apr. 2005), available at <http://www.bouldercitybypass.com/images/vol-i/chapter-06.pdf>.

<sup>187</sup> Federal Highway Administration, *Record of Decision: FWHA-NV-EIS-00-02-F Boulder City/U.S. 93 Corridor Study Clark County, Nevada*, at 8 (Dec. 2005) [hereinafter FWHA, *Boulder City ROD*], available at <http://www.bouldercitybypass.com/images/BCBypassRod.pdf>.

effects on the desert tortoise from, among other things, power infrastructure, the Hoover Dam Bypass, and future U.S. 93 and U.S. 95 highway-improvement projects. A biological opinion has not yet been prepared for the Boulder City Bypass;<sup>188</sup> however, the preparation of a biological opinion is forecasted in the EIS and record of decision.<sup>189</sup>



### ***The Biological Opinion Must Consider the CANAMEX Corridor When Analyzing the Environmental Baseline and Cumulative Effects of the Boulder City Bypass***

The Endangered Species Act requires the Fish and Wildlife Service to prepare a biological opinion for the Boulder City Bypass project because the project “may affect” the Mojave desert tortoise. There is a credible argument that the Service must analyze the impacts to the desert tortoise in conjunction with the past, present, and future plans for the CANAMEX Corridor in its biological opinion.

In making its jeopardy determination in the biological opinion, the Fish and Wildlife Service is required to evaluate the status of the listed species and critical habitat, the effects of the

<sup>188</sup> Personal communication, Julie Ervin-Holoubek, Nevada Department of Transportation (March 2, 2009).

<sup>189</sup> Federal Highway Administration, *Boulder City ROD*, *supra* note 187 at 10.



action, and cumulative effects.<sup>190</sup> “Effects of the action” include both direct and indirect effects of an action “that will be added to the environmental baseline.”<sup>191</sup> The environmental baseline includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area.”<sup>192</sup> Cumulative effects are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.”<sup>193</sup> Notably, “action area” means all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action.<sup>194</sup>

The Service may need to take the past and future infrastructure plans for the CANAMEX Corridor into consideration when evaluating whether the Boulder City Bypass will jeopardize the desert tortoise. This analysis is called for by the Endangered Species Act in both its environmental baseline and cumulative effects evaluations. The key inquiry is whether the action’s effects would “tip the species into jeopardy.”<sup>195</sup> “Even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.”<sup>196</sup> The proper baseline analysis is “not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency’s proposed actions *in the present and future human and natural contexts.*”<sup>197</sup> The proper baseline analysis here includes the infrastructure development of the CANAMEX Corridor because that is the context in which this project is proceeding.

Therefore, the Endangered Species Act requires an analysis of the impacts of the CANAMEX Corridor development. Since the CANAMEX Corridor passes through many areas that are desert tortoise habitat, it should be evaluated in the baseline and cumulative effects inquiry of the biological opinion. However, this approach is somewhat limiting because it focuses only on impacts to the desert tortoise—and not all listed species—because the tortoise is the species affected by the Boulder City Bypass. Without a programmatic Endangered Species Act consultation, it may be challenging to get a whole picture of how the CANAMEX Corridor impacts all listed species and their habitats.

### ***Programmatic Endangered Species Act Consultation***

The Tenth Circuit, in whose jurisdiction the Boulder Basin project of the CANAMEX Corridor falls, takes a narrow view of what constitutes a program requiring ESA consultation. In *Forest Guardians v. Forsgren*, the Tenth Circuit concluded that a land-use plan for a national forest was only a precursor to “agency action” requiring Endangered Species Act consultation because “specific activities, programs, and/or projects are necessary to implement the plan.”<sup>198</sup> The court

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<sup>190</sup> 50 C.F.R. §§ 402.14(g)(2)-(3).

<sup>191</sup> 50 C.F.R. § 402.02.

<sup>192</sup> *Id.*

<sup>193</sup> 50 C.F.R. § 402.02 (2008).

<sup>194</sup> 50 C.F.R. § 402.02.

<sup>195</sup> *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008).

<sup>196</sup> *Id.* at 930.

<sup>197</sup> *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093(9th Cir. 2005) (emphasis added).

<sup>198</sup> *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1158 (10th Cir. 2007).

reasoned that although the act of approving, amending, or revising a land-use plan constitutes “action,” the implementation of the plan is not an agency action because it is a *visionary* document providing guidance rather than approving, executing, or authorizing the irreversible commitment of resources.<sup>199</sup> In light of the Tenth Circuit’s finding that a land-use plan is not a programmatic action, the vague and amorphous planning activities that the Arizona and federal governments have undertaken towards the CANAMEX Corridor and the Security and Prosperity Partnership are unlikely to rise to the status of “agency action” under the Endangered Species Act.

Note, however, that the Ninth Circuit, in whose jurisdiction other parts of the CANAMEX Corridor are located, “has undeniably interpreted [the] ESA to require consultation on programmatic actions and rules, including consultation at the planning stage, not just the site-specific stage.”<sup>200</sup> The approval of programs constitutes agency action under the ESA.<sup>201</sup> Therefore if, in the future, the government takes an affirmative action approving a program, regulation, or plan for the CANAMEX Corridor, this could trigger the consultation requirement of the Endangered Species Act. Short of an agency such as the Federal Highway Administration approving a program for the CANAMEX Corridor, it would be difficult to define the specific federal action triggering a programmatic consultation with respect to the entire SPP or CANAMEX Corridor.

In sum, the Endangered Species Act could provide a tool to evaluate the cumulative impacts of the CANAMEX Corridor on listed species. However, it may imply a somewhat piecemeal approach because it would be difficult to compel any federal agency to consult on the entire CANAMEX Corridor, much less the corridors supported by the SPP. Instead, the analysis would likely take place on site-specific projects and would need to take the larger CANAMEX Corridor into consideration when conducting its environmental baseline and cumulative-impacts analysis. Because of this limitation, it would be strategic to only bring this case on a project for which there are favorable factors, such as many different affected species or a species that is affected by many of the site-specific projects within the corridor.

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<sup>199</sup> *Id.* at 1156.

<sup>200</sup> *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1095 (N.D. Cal. 2007).

<sup>201</sup> *Lane County Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (finding that an interim timber-management program, which set timber-management standards and outlined the criteria used to develop timber sales, was a program subject to Endangered Species Act consultation); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1051-52 (9th Cir. 1994) (holding that programmatic documents that set out guidelines for resource management, such as identifying lands for timber sales, allowable harvest targets, and schedules for timber production, are agency action requiring ESA consultation).

## Chapter 5: I-95 Corridor and the Clean Air Act

The I-95 Corridor Coalition formed in 1993 as a coalition of transportation agencies, toll authorities, and other private and governmental actors spanning from Maine to Florida, concerned with mobility, safety, and efficiency along the corridor. I-95 is the major north-south freeway on the East Coast running from Miami to Maine. It also serves as a connector to other main highways, including I-10, I-20, I-40, I-64 and I-85. In 2007, the I-95 Corridor Coalition, along with Florida, Georgia, North Carolina, South Carolina, and Virginia, applied to the U.S. Department of Transportation for funding to make I-95 a “Corridor of the Future.” The proposal called for the reconstruction and expansion of a 1,054-mile stretch of I-95 from Florida to Washington, D.C., including widening sections of I-95 from four or six lanes to eight lanes, and the widening or total replacement of nearly all the bridges along the corridor, along with the installation of Intelligent Transportation Systems along the corridor.<sup>202</sup> The Department of Transportation approved the application, making I-95 corridor a “Corridor of the Future” and, through the I-95 Corridor Coalition, authorizing \$21 million in interstate-maintenance discretionary funds for improvements and \$800,000 in transportation, community, and system preservation funds for the North Carolina Interstate Congestion Detection System.<sup>203</sup>

The I-95 Corridor Coalition recognizes the complexity of the planning and funding needs of corridor improvements and suggests a program structure “that transcends what individual states, acting alone, could accomplish,”<sup>204</sup> though it does not provide or suggest a list of projects to “accelerate improvements in long-distance passenger travel and freight movement.” The I-95 Corridor is approximately 1,917 miles long and runs through 15 states.<sup>205</sup>

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<sup>202</sup> Federal Highway Administration, *Corridors of the Future Fact Sheet*, <http://www.fhwa.dot.gov/pressroom/fsi95.htm>.

<sup>203</sup> *Id.*

<sup>204</sup> I-95 Corridor Coalition, *National Surface Transportation Program Authorization Positions*, at 2 (2008), available at [http://www.i95coalition.net/i95/Portals/0/Public\\_Files/Congressional%20files/I-95%20CC\\_Authorization%20Positions\\_2008.pdf](http://www.i95coalition.net/i95/Portals/0/Public_Files/Congressional%20files/I-95%20CC_Authorization%20Positions_2008.pdf).

<sup>205</sup> *I-95 Corridor Facts*, <http://www.i95coalition.net/i95/Home/I95CorridorFacts/tabid/173/Default.aspx>.



## *The Clean Air Act*

The Environmental Protection Agency establishes National Ambient Air Quality Standards (NAAQS) through the Clean Air Act. The NAAQS define the acceptable levels for ozone, carbon monoxide, particulate matter, sulfur dioxide, nitrogen oxides, and lead. States are given the authority to develop state implementation plans (SIPs) to come into compliance with the NAAQS, and they must submit data to the EPA annually so it can determine whether the states attain the standards. Specifically, each state must create a “plan which provides for implementation, maintenance, and enforcement” of the NAAQS and include enforceable emissions limitations and timetables for compliance.<sup>206</sup> Once approved by the EPA and adopted by the state, SIPs are enforceable by the state, EPA, or through a citizen suit.<sup>207</sup> However, courts can only enforce SIP strategies, and not SIP goals.<sup>208</sup> Additionally, parties cannot force a modification of a SIP, but they can bring suits “to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS.”<sup>209</sup>

The SIP determines the total allowable NAAQS from stationary sources, on-road mobile sources, and other source categories. “Motor vehicle emissions budget” is the name given to highway and transit vehicle use and emissions.<sup>210</sup> As part of a SIP, a state may elect to include transportation control measures to reduce air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.<sup>211</sup>

The Federal Aid Highway Program provides funding for certain highway projects.<sup>212</sup> The program is administrated by the Federal Highway Administration and requires urban areas with populations greater than 50,000 to have a metropolitan planning organization that provides for comprehensive transportation planning.<sup>213</sup> Such organizations must have long-range transportation plans and transportation improvement programs. Transportation improvement programs must conform to the SIP, and the Highway Administration cannot fund a transportation project that is not included in the transportation improvement program.<sup>214</sup> In nonattainment areas, the metropolitan planning organization sends the FHWA and Federal Transit Administration (“FTA”) its transportation improvement program for review. The agencies then determine whether the transportation improvement program meets the requirements of the CAA, including whether it has a projected emissions that falls within the motor vehicle emissions budget.<sup>215</sup>

If a state is in nonattainment, the state must resubmit its SIP to demonstrate effective planning for attainment. If the EPA determines that the SIP is insufficient or that the state has

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<sup>206</sup> 42 U.S.C. § 7410(a)(2)(A).

<sup>207</sup> 42 U.S.C. § 7604(a).

<sup>208</sup> *Trustees for Alaska v. Fink*, 17 F.3d 1209, 1212 (9th Cir. 1994).

<sup>209</sup> *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1258 (1st Cir. 1996).

<sup>210</sup> 40 C.F.R. § 93.101.

<sup>211</sup> *See* 40 C.F.R. § 93.101.

<sup>212</sup> 23 U.S.C. §§ 103, 120, 144(g).

<sup>213</sup> 23 U.S.C. §§ 134(a)-(b).

<sup>214</sup> 42 U.S.C. § 7506(c)(1).

<sup>215</sup> 42 U.S.C. § 7506(c)(2).

not implemented the SIP, it can impose sanctions in the form of highway sanctions or offsets.<sup>216</sup> Highway sanctions include the EPA prohibiting the Secretary of Transportation from awarding grants under Title 23.<sup>217</sup>

For new or expanded highway projects with a significant increase in diesel levels, a hotspot analysis is conducted to ensure that Federal Highway Administration projects do not contribute to any new localized fine particulate or PM<sub>2.5</sub> violations or increase the frequency or severity of any existing violations in nonattainment areas.<sup>218</sup> The Federal Highway Administration performs a quantitative analysis demonstrating that requirements have been met.<sup>219</sup>

Citizens may bring suit against any person or government entity “alleged to have violated or be in violation of . . . an emission standard or limitation under this chapter.”<sup>220</sup> An emission standard or limitation is “a schedule or timetable of compliance, emission limitation, standard of performance or emission standard . . . which is in effect under this chapter . . . or under an applicable implementation plan.”<sup>221</sup> An advocate could ask for enforcement action regarding a state’s SIP due to nonattainment regarding mobile sources, an inadequate transportation improvement program, or failure to conduct a hotspot analysis. An inadequate hotspot analysis could be challenged under the Administrative Procedures Act.

The I-95 Corridor construction may contribute to the failure of a state to meet its NAAQS, or it could contribute to the failure of a SIP to mitigate the interstate transportation of pollution. The Corridor traverses 20 states, each with its own SIP. Action could be brought to seek Clean Air Act enforcement in any of those states failing to comply with the Clean Air Act due to the construction and operation of NAFTA corridors.

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<sup>216</sup> Clean Air Act §§ 179(b)(1)-(2), 42 U.S.C. §§ 7509(b)(1)-(2).

<sup>217</sup> *See also* Clean Air Act §§ 179, 110(m), 182(c)(5), 182(d)(1), 187(b)(2).

<sup>218</sup> 40 C.F.R. § 93.116(a).

<sup>219</sup> PM<sub>2.5</sub> and PM<sub>10</sub> Hot-spot Analyses in Project-level Transportation Conformity Determinations for the New PM<sub>2.5</sub> and Existing PM<sub>10</sub> National Ambient Air Quality Standards, 71 Fed. Reg. 12467, 12469 (Mar. 10, 2006) (to be codified at 40 C.F.R. pt. 93).

<sup>220</sup> 42 U.S.C. § 7604(a)(1).

<sup>221</sup> 42 U.S.C. § 7604(f)(1).

## Chapter 6: The Continental One International Trade and Travel Corridor and the National Historic Preservation Act and Section 4(f) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a Legacy for Users (SAFETEA-LU)

Continental One is a proposed intermodal trade corridor that, if completed, would span the 1,500 miles from Toronto to Miami through the construction of new roads and the expansion of existing roads.<sup>222</sup> Continental One would begin at the Peace Bridge to Canada on U.S. Route 219 in Buffalo and run through New York, Pennsylvania, Maryland, and West Virginia, ending in Virginia just south of Bluefield.<sup>223</sup> From there, the corridor would traverse part of VA-100 to connect it to Interstate 77.<sup>224</sup> This would connect the corridor to Interstate 26 and eventually to Interstate 95, the North-South Highway linking Buffalo to Miami.<sup>225</sup> Continental One would create a direct and interconnected international corridor between Toronto and Miami.<sup>226</sup>

The Continental One organization, formerly the Route 219 Association, obtains funding from both public and private sources that totaled \$600,000 between 1998 and 2004, with 70 percent coming from Pennsylvania.<sup>227</sup> Additionally, the organization has received two federal grants for \$1.5 million each, one to the Pennsylvania Department of Transportation to conduct a comprehensive study of the proposed corridor, and the other to the New York Department of Transportation to increase public awareness of Continental One and conduct a comprehensive study of trade and travel corridors.<sup>228</sup> If the Department of Transportation were to name Continental One a high-priority corridor, it would become eligible for additional federal funding.<sup>229</sup>

Most portions of the corridor are already constructed, and the largest portions of the projected corridor are in New York and Pennsylvania.<sup>230</sup> While the funding needed is extensive (an additional \$750 million), without designation as a trade and travel corridor, federal funding cannot be made available.<sup>231</sup>

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<sup>222</sup> Atlantica Lags Other North American Regions in Thinking Beyond Traditional Boundaries, [www.atlantica.org/atlanticastory.asp?cmPageID=102](http://www.atlantica.org/atlanticastory.asp?cmPageID=102).

<sup>223</sup> University at Buffalo Urban Design Project, *The Western New York Scenic Byway*, at IV-24 (2007), available at [http://scenic.ap.buffalo.edu/report/WNYSSB\\_IV\\_Transportation\\_Characteristics.pdf](http://scenic.ap.buffalo.edu/report/WNYSSB_IV_Transportation_Characteristics.pdf).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Ed Rogers, *Hopping on the Superhighway: Hamilton Mayor Urges Link to Free-Trade Route . . . At the Crossroads*, *Spectator*, at A4, June 29, 1999.

<sup>227</sup> Continental 1 FAQs, <http://www.continental1.org/FAQ.asp>.

<sup>228</sup> About Continental 1, <http://www.continental1.org/corridor.asp>.

<sup>229</sup> James Fink, *On the Road to Continental One*, *Bus. First of Buffalo* (Feb. 10, 2009), available at <http://www.bizjournals.com/buffalo/stories/2009/02/09/daily18.html>.

<sup>230</sup> Kathy Kellogg, *Vote Nears Funding of Rte. 219 Study*, *Buffalo News*, Sept. 8, 2008, (paraphrasing Mark Glesk, Continental One Board Member).

<sup>231</sup> *Id.*

There is very little linking Continental One to the Security and Prosperity Partnership.<sup>232</sup> However, several Web sites and EISs associated with the corridor indicate that the corridor is being envisioned as a NAFTA superhighway.<sup>233</sup>

## *Continental One in New York*

In New York, Route 219 has been undergoing expansion since 1979.<sup>234</sup> Route 219 in New York is from Interstate 90 south to Springville, and crews are currently finishing an expansion of the highway portion of the expressway another four miles south, beginning at Springville.<sup>235</sup> Current construction is on a segment including four miles south of Springville.<sup>236</sup> The project costs \$121 million and includes a dual span bridge; it was scheduled to be completed in late 2009.<sup>237</sup>

The state plans to upgrade the current highway, a two-lane rural arterial, south all the way to Interstate 86.<sup>238</sup> An FEIS and record of decision were issued by the New York State Department of Transportation in cooperation with the Federal Highway Administration.<sup>239</sup> The project will cross the towns of Concord, Ashford, Ellicottville, and Great Valley, the villages of Springville and Ellicottville, the city of Salamanca, and lands of the Seneca Nation.<sup>240</sup>

From Salamanca, a four-lane divided highway — albeit with crossroads and driveways — leads to Bradford, Pa., where U.S. 219 becomes a freeway again.<sup>241</sup> Another key development in the completion of New York's segment of Continental One would be the construction of a new span of the Peace Bridge, which connects Canada to the United States via Buffalo, New York.<sup>242</sup>

## *Continental One in Pennsylvania*

A construction map of Pennsylvania regional projects indicates where current and

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<sup>232</sup> Alliance for Democracy, *SPP Corridors Linking Mexico, the U.S. and Canada*, <http://afd-headlines.blogspot.com/2008/03/spp-supercorridors-linking-mexico-us.html>.

<sup>233</sup> See, e.g., Alliance for Democracy, *Security and Prosperity Partnership of North America: SuperCorridors Linking Mexico, the U.S. and Canada, Fact Sheet #2* (Feb. 2008) available at <http://www.thealliancefordemocracy.org/pdf/SPP/AfDSPPFlyer02.pdf>; Joan Browning, *Is the Lewisburg-Fairlea-Ronceverte Bypass Part of the Continental One World Trade and Travel Corridor?* (Oct. 26, 1998), <http://www.joanbrowning.com/WhereIStand/219%20article%203a%2010%2026%2098.doc>.

<sup>234</sup> See Continental 1, New York 219 Status, <http://www.continental1.org/ny219status.asp> (stating that completion of the first expansion occurred in 1979).

<sup>235</sup> NY DOT, US Route 219, <https://www.nysdot.gov/regional-offices/region5/projects/us-route-219>; James Fink, *supra* note 229.

<sup>236</sup> Continental 1, New York 219 Status, *supra* note 234.

<sup>237</sup> *Id.*

<sup>238</sup> Christopher Michel, *Massa visits Salamanca, holds town hall meeting*, The Salamanca Press, June 4, 2009, available at [http://www.continental1.org/files/Massa\\_visits\\_Salamanca\\_6.4.09.pdf](http://www.continental1.org/files/Massa_visits_Salamanca_6.4.09.pdf).

<sup>239</sup> NY DOT, US Route 219, <https://www.nysdot.gov/regional-offices/region5/projects/us-route-219>.

<sup>240</sup> AARoads, U.S. 219, <http://www.aaroads.com/high-priority/corr21.html>.

<sup>241</sup> *Id.*

<sup>242</sup> Fink, *supra* note 229.



upcoming construction are scheduled to occur.<sup>243</sup> Some portions of U.S. 219 have already been upgraded to a four-lane, limited-access facility in southwestern Pennsylvania.<sup>244</sup> Reconstruction of U.S. 219 in Bradford and Johnsonburg has been completed, while a second phase is fully funded, is now under construction, and is expected to be completed in 2010.<sup>245</sup>

Construction along the entire stretch of highway from Somerset to the Maryland border will cost approximately \$650 million.<sup>246</sup> PennDOT had essentially scrapped the project in 2008,<sup>247</sup> but the project is back on PennDOT's 12-year-plan.<sup>248</sup> Route 219 from Somerset to I-68 still requires additional funding of \$35 million prior to the start of construction in 2010.<sup>249</sup> Proponents are still moving forward with this segment while acquiring the remaining construction funds.<sup>250</sup> Construction on 219 from Meyersdale to I-68 in Maryland will follow the completion of Somerset to I-68 and will cost \$300 million.<sup>251</sup>

### *Continental One in Maryland*

The Maryland Transportation Department is considering alternatives in a "feasibility study" on expanding and relocating a 2.54 mile section of Route 219.<sup>252</sup> It plans to convert the two-lane highway into a four-lane, divided, limited-access roadway from I-68 to the Maryland-Pennsylvania line.<sup>253</sup> However, the project has not left the planning phase and currently, construction is not funded.<sup>254</sup>

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<sup>243</sup> Penn. Department of Transportation, Highway Construction Advisory Map, <http://www.dot7.state.pa.us/constructionAdvisory/altMain.htm>.

<sup>244</sup> Press Release, PENNDOT District 9, Studies underway on Route 219, Meyersdale to I-68 Project Team begins work on Transportation Improvement, (May 15, 2002), available at [http://www.us219.com/south/news/May\\_02.pdf](http://www.us219.com/south/news/May_02.pdf).

<sup>245</sup> *Continental One Launches New Website*, Continental 1, Mar. 2009, at 2, available at [http://www.continental1.org/files/March\\_2009\\_Newsletter.pdf](http://www.continental1.org/files/March_2009_Newsletter.pdf).

<sup>246</sup> Rick Miller, *Officials Have Two Weeks to Reach Decision on Route 219*, *Olean Times Herald*, Jan. 19, 2008, available at [http://concernedcitizens.homestead.com/files/Rt219/Rt\\_219\\_news\\_OTH\\_1-19-08.htm](http://concernedcitizens.homestead.com/files/Rt219/Rt_219_news_OTH_1-19-08.htm).

<sup>247</sup> Kecia Bal, *PennDOT bumps 219 project*, *Tribune-Democrat*, June 13, 2008, available at [http://www.tribune-democrat.com/archivesearch/local\\_story\\_164225246.html](http://www.tribune-democrat.com/archivesearch/local_story_164225246.html).

<sup>248</sup> Pennsylvania 219 Status, <http://www.continental1.org/pa219status.asp>. Previously conducted environmental studies expire in 2009, Bal, *supra* note 247.

<sup>249</sup> Pennsylvania 219 Status, *supra* note 248.

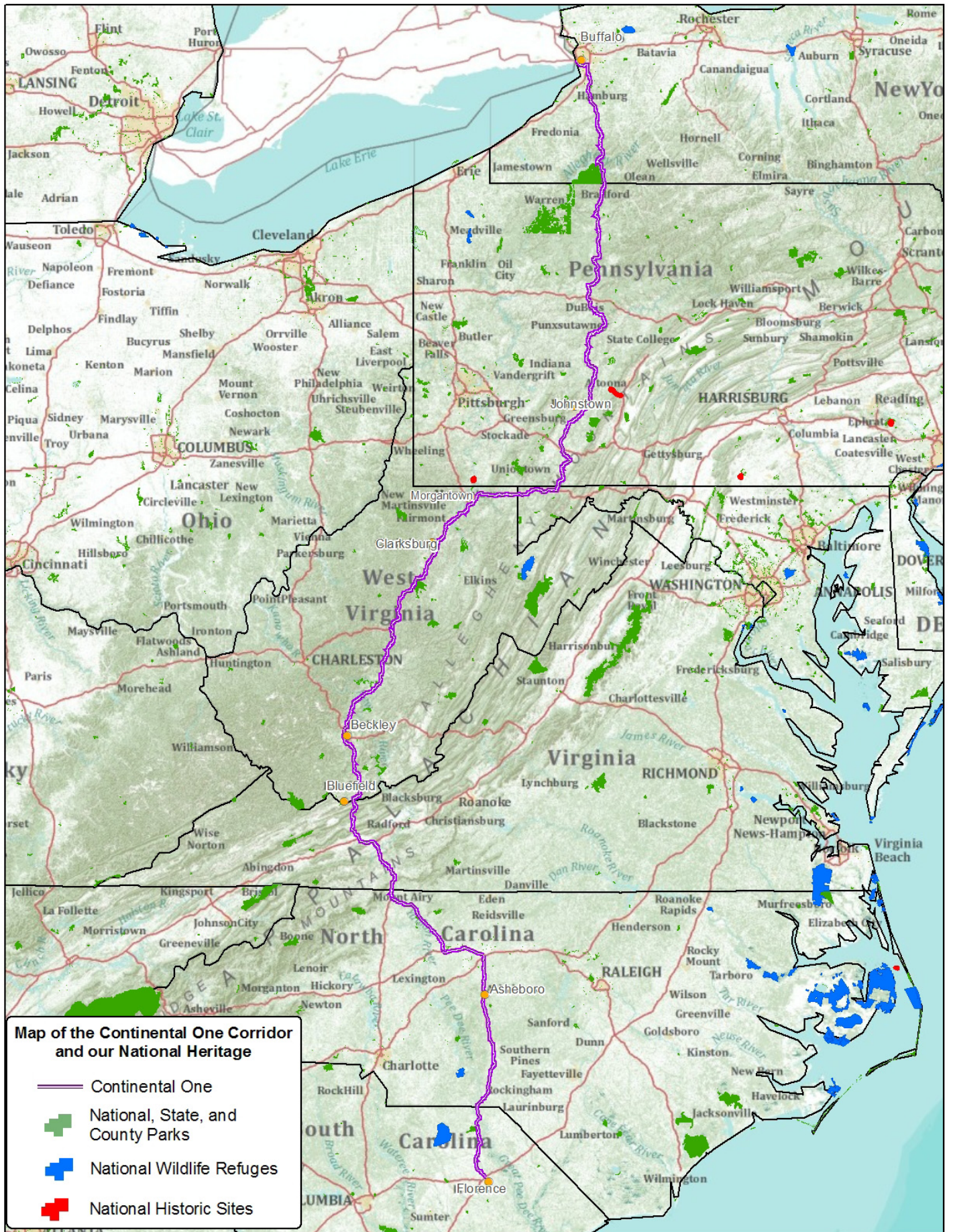
<sup>250</sup> Personal communication with James Pruss, project manager (April 14, 2009).

<sup>251</sup> Pennsylvania 219 Status, *supra* note 248. See generally US 219: Meyersdale to I-68, <http://www.us219.com/south/>.

<sup>252</sup> Maryland Department of Transportation, U.S. 219 North, Chestnut Ridge Road, <http://www.sha.state.md.us/WebProjectLifeCycle/ProjectInformation.asp?projectno=GA6461111#>.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*



## *The National Historic Preservation Act and Section 4(f) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a Legacy for Users (SAFETEA-LU)*

### **The National Historic Preservation Act**

Federally funded highway projects must comply with federal historic preservation laws, section 106 of the National Historic Preservation Act and section 4(f) of the Department of Transportation Act of 1966 (currently known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a Legacy for Users “SAFETEA-LU”).<sup>255</sup>

Under the National Historic Preservation Act, the lead agency must consider the effects of a proposed project on “any district, site, building, structure, or object that is included in or eligible for inclusion on the National Register.”<sup>256</sup> Additionally, the lead agency must give the Advisory Council on Historic Preservation a reasonable opportunity to comment on the proposed project.<sup>257</sup> Therefore, the National Historic Preservation Act imposes a procedural, rather than substantive, mandate.

Although only procedural, the statute provides for the creation of a regulator framework that guides agencies in assessing projects’ impacts on historic properties. First, the agency determines if the project “is a type of activity that has the potential to cause effects on historic properties.”<sup>258</sup> Then the agency identifies the state historic preservation officer who should be involved in the National Historic Preservation Act process.<sup>259</sup> In consultation with the state historic preservation officer, the agency makes a “reasonable and good faith effort” to identify the historic properties that could be affected by the proposed project.<sup>260</sup> The agency then assesses adverse effects, involves the public, and finally attempts to resolve the adverse effects by developing and evaluating alternatives to the project “that could avoid, minimize, or mitigate adverse effects on historic properties.”<sup>261</sup>

### **Section 4(f)**

In an effort to preserve the natural beauty of the American countryside, Congress included a special provision in the U.S. Department of Transportation Act of 1966.<sup>262</sup> Section 4 of the DOT Act serves to protect our public parks and recreation areas, wildlife and waterfowl refuges, and historic sites by prohibiting transportation projects from using these areas unless there are no

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<sup>255</sup> 16 U.S.C. § 470(f); 49 U.S.C. § 303(c).

<sup>256</sup> 16 U.S.C. § 470(f).

<sup>257</sup> *Id.*

<sup>258</sup> 36 C.F.R. § 800.3(a).

<sup>259</sup> *Id.*

<sup>260</sup> 36 C.F.R. § 800.4.

<sup>261</sup> 36 C.F.R. § 800.6(a).

<sup>262</sup> 49 U.S.C. § 1653(f); Federal Highway Administration, Overview of Section 4(f), <http://environment.fhwa.dot.gov/4f/index.asp>.

feasible and prudent alternatives and all possible mitigation is utilized.<sup>263</sup>

Section 4(f) applies to all federally funded highway projects.<sup>264</sup> It mandates that a federal project requiring the use of certain land may be approved only if (1) there is no prudent and feasible alternative to using that land and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.<sup>265</sup> Therefore, section 4(f) is a substantive mandate. Aside from NEPA, Section 4(f) is the most frequently litigated environmental statute in the Federal Highway Program. It is also the most frequent cause of court injunctions delaying highway projects.<sup>266</sup>

Originally codified at 49 U.S.C. §1653(f) of the Department of Transportation Act of 1966, Section 4(f) has led to several more recent versions, including 23 U.S.C. § 138 and 49 U.S.C. § 303 (collectively “Section 4(f)”).<sup>267</sup> Currently, 23 U.S.C. § 138 and 49 U.S.C. § 303(c) both protect parks and other significant recreational resources from highway encroachment and prohibit the taking of certain publicly owned lands for highways unless an agency can show that there are no prudent and feasible alternatives to the use of the land.<sup>268</sup> Their wording is almost identical, with 49 U.S.C. § 303 applying to the Department of Transportation and all its related agencies—the Federal Highway Administration, Federal Transit Administration, Federal Railroad Administration, and Federal Aviation Administration—and 23 U.S.C. § 138 applying only to the Federal Highway Administration.<sup>269</sup>

Section 4(f) states that, when the Secretary of Transportation finds that a project’s effects are not *de minimis*, the Secretary may approve a transportation program or project only if “(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.”<sup>270</sup> A “feasible and prudent” avoidance alternative is one that “avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.”<sup>271</sup>

This results in the following process for proponents of highway construction projects: (1) determine whether 4(f) resources will be affected and whether the federal government is a responsible party; (2) if resources will be affected, determine whether impact will be *de minimis*; (3) if impact will not be *de minimis*, evaluate feasible and prudent alternatives; (4) if these

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<sup>263</sup> See 49 U.S.C. § 1653(f).

<sup>264</sup> However, SAFETEA-LU gives the department of transportation the ability to categorically exclude proposed actions, SAFETEA-LU § 6000, 23 U.S.C. § 139. Categorical exclusion allows projects to proceed without an EIS or even an environmental assessment, 40 C.F.R. § 1508.4.

<sup>265</sup> 49 U.S.C. § 303(c).

<sup>266</sup> *Section 4(f) Final Rule: New Guidance on a Complex Regulation*, Federal Highway Administration, , *Successes in Stewardship*, (US DOT & Federal Highway Administration), Mar. 2008 [hereinafter FWHA, *Section 4(f) Final Rule*], available at <http://www.environment.fhwa.dot.gov/strmlng/newsletters/mar08nl.asp>.

<sup>267</sup> Federal Highway Administration, *FWHA Section 4(f) Policy Paper*, at 1 (Mar. 1, 2005) [hereinafter FWHA, *Policy Paper*], available at <http://www.environment.fhwa.dot.gov/4f/4fpolicy.pdf>.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* 23 U.S.C. § 138 and 49 U.S.C. § 303 lack a practical distinction.

<sup>270</sup> 49 U.S.C. § 303; see also 23 U.S.C. § 138(a).

<sup>271</sup> FWHA, *Section 4(f) Final Rule*, *supra* note 267.

alternatives exist, then opt for the alternative, but if not, do all possible planning to minimize harm to the resource.<sup>272</sup>

While § 4(f) is “one of the most frequently cited issues in litigation against transportation agencies,” the evaluation and documentation it requires is typically addressed as part of the NEPA analysis.<sup>273</sup> In fact, the test for “use” under Section 4(f) and its predecessor, 49 U.S.C. § 1653(f), is roughly equivalent to the test under the National Environmental Policy Act of 1969 (42 USCS §§ 4321 et seq.) for whether major federal action significantly affects quality of human environment.<sup>274</sup> Still, the 4(f) analysis may require more than just review and approval of an EIS under NEPA,<sup>275</sup> and the 4(f) evaluation must be completed before the agency issues its record of decision.<sup>276</sup>

23 CFR § 774.7(b), added in March 2008, added a guideline for determining that impacts will be de minimis:<sup>277</sup>

A de minimis impact determination under § 774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are de minimis as defined in § 774.17; and that the coordination required in § 774.5(b) has been completed.

Since there is no provision for a private cause of action in SAFETEA-LU’s Section 4(f), the Administrative Procedures Act provides the authority for a court to review decisions under the statute. The Administrative Procedures Act creates a presumption of agency reviewability and states that a reviewing court may set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>278</sup> Section 4(f) sets a new statute of limitations of 180 days to challenge the final approval of highway and transit projects. The limitations period begins with publication of a notice in the *Federal Register* announcing a final decision, in the form of a record of decision or a Clean Water Act section 404 permit. If no notice of limitation is issued, it is discretionary, and the normal five-year statute of limitation applies.<sup>279</sup>

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<sup>272</sup> See Center for Environmental Excellence, Section 4(f), [http://environment.transportation.org/environmental\\_issues/section\\_4f/](http://environment.transportation.org/environmental_issues/section_4f/).

<sup>273</sup> *Id.*

<sup>274</sup> *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 442 (5th Cir. 1985).

<sup>275</sup> See *Stop H-3 Ass’n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976); see also FWHA, *Policy Paper*, *supra* note 276 at 3-4.

<sup>276</sup> 23 C.F.R. § 771.135(b); 23 C.F.R. § 771.135(l); 49 U.S.C. § 303(d)(2); see *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transport.*, 545 F.3d 1147 (9th Cir. 2008) (holding an agency must complete the § 4(f) evaluation for the entire project prior to issuing a record of decision).

<sup>277</sup> See Parks, Recreation Areas, Wildlife and Waterfowl Refuges and Historic Sites, 73 Fed. Reg. 13368, 13376 (March 12, 2008) (to be codified at 23 C.F.R. pts. 771 and 774, 49 C.F.R. 662).

<sup>278</sup> 5 U.S.C. § 706(2)(A).

<sup>279</sup> See Clean Water Act § 404(h)(1)(A)(ii).

## *Section 4(f) and Springville to Salamanca*

The plan calls for the construction of a new four-lane divided freeway between Springville and Salamanca. The estimated cost of construction for this portion of 219 is \$612.6 million. The New York Department of Transportation received \$40 million from the TEA-21 § 1602 high-priority projects program, and \$.5 million from the § 1118 national corridor planning and development program. Each of these programs requires a state/federal match of 20/80. One of the top reasons local and state transportation officials overwhelmingly supported the project was its stated purpose to help facilitate increased trade with Mexico and Canada.

The FEIS for the Springville to Salamanca portion of Route 219 discusses the properties that will be impacted by the freeway construction. The FEIS indicates that the freeway construction for this 28-mile segment will impact 168.5 hectares of farmland—including 12 farms of national historic value and 13 hectares of wetlands—touching 77 federally protected wetland areas, and will require the acquisition of 855 hectares of right-of-way, forcing the relocation of 63 residences. This is all within the 28-mile project area.

The 12 historic farms are properties that are eligible for inclusion in the National Register of Historic Places. The FEIS indicates that only the properties where impacts could not be avoided are discussed, noting that “several potential 4(f) properties were avoided.”<sup>280</sup> One of the properties was subject to much dispute and eventual litigation.<sup>281</sup> The plaintiffs wanted the Federal Highway Administration to prepare a supplemental EIS because the DEIS did not analyze their property under Section 4(f). The Western District of New York held that preparation of a SEIS was discretionary, and that the Federal Highway Administration had not abused its discretion in not publishing one.

All projects in the Continental One Corridor will need to undergo NEPA analysis, and lands that include wetlands, park lands, land of national historic value, and wildlife and waterfowl refuges will need to undergo Section 4(f) and possibly National Historic Preservation Act analysis. This analysis should consider the cumulative affects of the combined Continental One projects on these national treasures.

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<sup>280</sup> Federal Highway Administration and New York Department of Transportation, *U.S. Route 219: Final Design Report/Final Environmental Impact Statement/Final Section 4(f) Evaluation*, at 7-5 (Jan. 2003), available at <https://www.nysdot.gov/regional-offices/region5/projects/us-route-219/repository/feis.pdf>. The state historic preservation officer identified 52 properties eligible for inclusion on the National Register of Historic Places. *Id.* at 7-15.

<sup>281</sup> *William Norton v. Fed. Highway Admin.*, 2002 U.S. Dist. LEXIS 17350 (W.D. N.Y. Aug. 8, 2002).

## Chapter 7: The Great Plains International Trade Corridor and the Clean Water Act

The Great Plains International Trade Corridor (GPITC) is a 2,333-mile corridor that runs through Texas, New Mexico, Oklahoma, Colorado, Nebraska, Wyoming, South Dakota, North Dakota, and Montana.<sup>282</sup> The GPITC links Mexico, the United States, and Canada by connecting three high-priority corridors:<sup>283</sup>

- the Ports-to-Plains Trade Corridor from Laredo, Texas to Denver, Colorado (1,390 miles)
- the Heartlands Expressway from Denver, Colorado to Rapid City, South Dakota (498 miles)
- the Theodore Roosevelt Expressway from Rapid City, South Dakota to Raymond, Montana (445 miles)

Although the promoters of these three corridors have worked together for several years, the official Ports-to-Plains Trade Corridor Alliance (PPTCA) only formed when the Ports-to-Plains Trade Corridor and the Heartlands Expressway promoters united in 2008;<sup>284</sup> the Theodore Roosevelt Expressway promoters joined them in 2009.<sup>285</sup> The alliance hopes to use its political strength to promote its combined economic and transportation interests.<sup>286</sup> The PPTCA has a board of directors, a dedicated staff, and a broad range of investors.

Despite the alliance bringing several groups under a single organizational and marketing entity, each of the three corridors retains its own advocates. The Theodore Roosevelt Expressway Association (TREA) promotes the Theodore Roosevelt Expressway, and private donations and federal support fund it. It has secured financial commitments from chambers of commerce and private businesses and its Web site is informative and current.<sup>287</sup> The Heartland Expressway Coalition (HEC) is an informal organization of committees from each state in the Heartlands Expressway corridor, with the executive director of the Panhandle Area Development District heading it. The HEC also solicits funds from membership, but asks for significantly less financial support per individual than does the TREA.<sup>288</sup> Its Web site is not current, and locating

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<sup>282</sup> Cambridge Systematics, Inc., *Great Plains International Trade Corridor Assessment: Connecting America's Energy and Agricultural Heartland*, at ES-1, (2008) [hereinafter Cambridge Systematics, Inc., *GPITCA*], available at [http://www.portstoplains.com/key\\_research/FR1\\_TxDOT\\_Great%20Plains%20Intl\\_Assessment\\_FINAL.pdf](http://www.portstoplains.com/key_research/FR1_TxDOT_Great%20Plains%20Intl_Assessment_FINAL.pdf).

<sup>283</sup> A high-priority corridor is entitled to special federal funding, in addition to the state's standard federal highway funds, Cambridge Systematics, Inc., *GPITCA*, *supra* note 282 at 1-1.

<sup>284</sup> *Ports-to-Plains Trade Corridor Alliance, Ports-to-Plains and Theodore Roosevelt Expressway Announce New Cooperative Agreement; A Powerful New Advocacy & Economic Development Partnership*, at 1 (2008), [http://files.e2ma.net/25394/assets/docs/final\\_ptp\\_tre\\_alliance.pdf](http://files.e2ma.net/25394/assets/docs/final_ptp_tre_alliance.pdf).

<sup>285</sup> *Ports-to-Plains Trade Corridor Alliance, Ports-to-Plains, Theodore Roosevelt Expressway and Heartland Expressway Announce New Alliance Agreement; A Powerful New Advocacy and Economic Development Partnership*, at 1 (2009), [http://www.portstoplains.com/PTP\\_News/PTP\\_Alliance\\_Mar09.pdf](http://www.portstoplains.com/PTP_News/PTP_Alliance_Mar09.pdf).

<sup>286</sup> *Id.*

<sup>287</sup> Theodore Roosevelt Expressway, About Us, <http://www.treexpressway.com/AboutUs.aspx>.

<sup>288</sup> Heartland Expressway contributions equal to or in excess of \$1,000 are entitled to Gold Membership, *Progressive 15, Heartland Expressway Fund*, available at <http://www.progressive15.org/documents/HeartlandExpresswayFundMembershipForm.pdf>. Theodore Roosevelt Expressway also has a Gold Membership at \$1,000, but further has levels for \$5,000, \$10,000, and \$25,000, Theodore Roosevelt Expressway, Theodore Roosevelt Expressway Membership Form, available at <http://www.treexpressway.com/images/TREMembershipForm.pdf>.

information about the Heartlands Expressway is more difficult than locating information about the Theodore Roosevelt Expressway.<sup>289</sup> The Ports-to-Plains Coalition (PTPC) promotes the Ports-to-Plains Trade Corridor and consists of representatives from the transportation departments from the four affected states, as well as a consulting team.

The PPTCA's goals are to connect trade centers, enhance international trade, initiate economic growth, and provide connectivity to existing interstate highways. To accomplish these aims, the PPTCC's plan proposes upgrading existing highways to four-lane divided facilities.

The PPTCA's objectives align with those of the Security and Prosperity Partnership and NAFTA. While neither the Security and Prosperity Partnership nor NAFTA explicitly mandates the construction of the GPITC, the construction of the GPITC will directly advance the goals of both the SPP and NAFTA. In fact, the GPITC is referred to as a "NAFTA" corridor on the Ports-to-Plains and Heartland Expressway Web sites and in the Great Plains International Corridor Assessment (GPITCA). The Great Plains, also called the Breadbasket, generate \$5.5 billion in exports and imports alone to Canada by way of Montana.<sup>290</sup> The GPITC will traverse nine states that produce a combined \$44.3 billion in agricultural goods, more than 22 percent of the U.S. total.<sup>291</sup> This major agricultural center has few major thoroughfares and requires increased avenues of transportation for trade as the economy grows. Because there are so few routes to and from Canada and Mexico, this route is currently one of the main trade corridors in North America: It contains the second-busiest crossing and generates \$166.7 billion in trade with Mexico and Canada,<sup>292</sup> nearly 20 percent of U.S. NAFTA trade.<sup>293</sup> Trade occurring on the GPITC accounts for 14 percent of the total gross domestic product at \$1.7 trillion.<sup>294</sup> The projected cost of the GPITC is \$2.87 billion.<sup>295</sup> Congress has already provided more than \$270 million in highway money for the entire GPITC.<sup>296</sup>

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<sup>289</sup> Heartland Expressway, <http://www.heartlandexpressway.com>. See generally Ports-to-Plains Trade Corridor Alliance, <http://www.portstoplains.com> (presenting current information for the three GPITC segments).

<sup>290</sup> Louisa Barber, *Officials Discuss Importance of Trade Corridor Alliance for State*, *Sydney Herald*, June 2, 2009, available at <http://www.sidneyherald.com/articles/2009/06/02/news/doc4a258970e84cc804091804.txt>.

<sup>291</sup> Ports-to-Plains Trade Corridor Alliance, About Us [hereinafter PPTCA About Us], <http://www.portstoplains.com/About.aspx>.

<sup>292</sup> *Id.* In 2007, Canada and Mexico were the top two importers of U.S. agricultural goods. Their market share is larger than the next six markets combined, Foreign Agricultural Service, U.S. Department of Agriculture, Fact Sheet: NAFTA (2008), available at <http://www.fas.usda.gov/info/factsheets/NAFTA.asp>. The United States is the number-one export market for these two countries, Foreign Agricultural Service, USDA, Benefits of NAFTA PowerPoint presentation, at 3 (2006), [http://www.fas.usda.gov/itp/Policy/nafta/NAFTA\\_Overview\\_2006\\_files/frame.htm](http://www.fas.usda.gov/itp/Policy/nafta/NAFTA_Overview_2006_files/frame.htm).

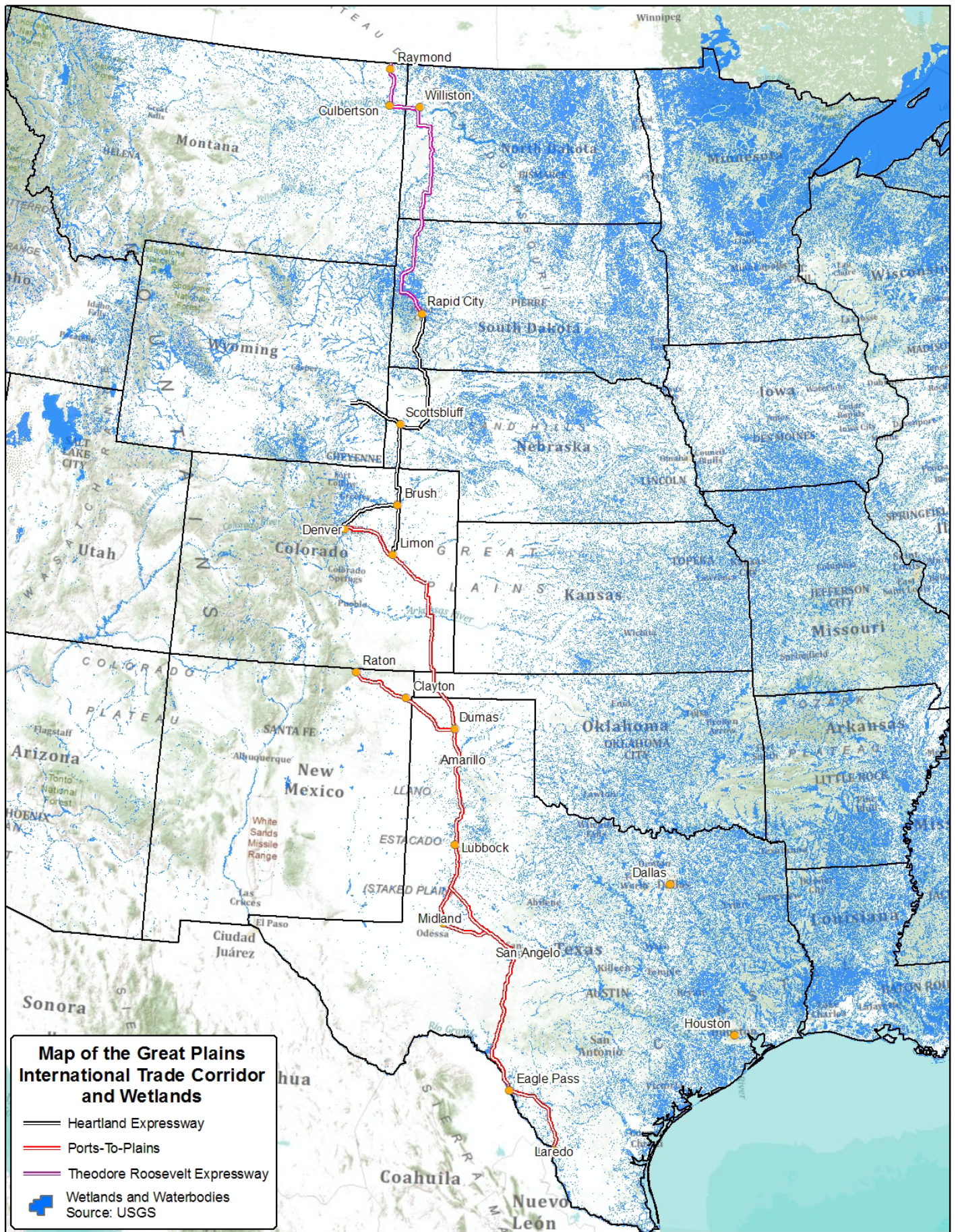
<sup>293</sup> PPTCA About Us, *supra* note 304. NAFTA trade constitutes 33 percent of U.S. trade total, Adrienne Selko, *NAFTA: Learning to Love Thy Neighbor*, *Indu. Week Mag.*, February 1, 2009, available at <http://www.nascocorridor.com/articlesdetail.asp?id=2436&pageno=1>.

<sup>294</sup> PPTCA About Us, *supra* note 291.

<sup>295</sup> Ports-to-Plains Corridor, *Ports to Plains Corridor Development and Management Plan: Study Overview* 157 (2004), available at <http://www.dot.state.co.us/ports2plains/reports/graphics/CDMP/6.0.pdf>.

<sup>296</sup> Ports-to-Plains Trade Corridor Alliance, Advocacy, <http://www.portstoplains.com/Advocacy.aspx>.





## The Ports-to-Plains Corridor<sup>297</sup>

The Ports-to-Plains Corridor begins in Laredo, Texas on U.S. 83. U.S. 83 runs north to Carrizo Springs, where it connects to U.S. 277.<sup>298</sup> At Big Spring, the route bifurcates: the direct path goes to Lamesa along U.S. 87, while the other path uses S.H. 349 to Midland/Odessa before reaching Lamesa.<sup>299</sup> The corridor then follows I-27 from Lamesa through Lubbock to Amarillo,<sup>300</sup> subsequently branching out west to New Mexico via U.S. 64/87 from Clayton to Raton.<sup>301</sup> The main route continues through Dumas, Texas, along U.S. 64/87 through Boise City, Oklahoma, through Springfield, Lamar, and Kit Carson. In Kit Carson, the corridor follows U.S. 40 to Limon and connects to I-70 in Denver.<sup>302</sup>

In Texas, there are multiple planned improvements. The Texas Department of Transportation plans to widen 12 miles of U.S. 277 from two to four lanes north of Eagle Pass between F.M. 1588 and 1665.<sup>303</sup> Plans call for widening S.H. 158 along 14 miles between U.S. 87 and the Glasscock county line.<sup>304</sup> There are plans to build a reliever route around Midland and to widen U.S. 87 to four lanes along 35 miles from Moore County through Dalhart and Hartley.<sup>305</sup>

Plans to widen U.S. 64/87 are ongoing in New Mexico, including an ongoing and planned expansion of 81 miles between Raton and Clayton.<sup>306</sup> There are plans to purchase two additional lanes of right-of-way along U.S. 287 north of Boise City up to Colorado. Improvements to U.S. 287 in Colorado are nearly complete.<sup>307</sup>

## The Heartland Expressway

The Heartland Expressway has a projected completion date of 2015 and cost of \$664 million.<sup>308</sup> It has two southerly starting points.<sup>309</sup> From Denver, I-76 goes north 498 miles to Brush, where it connects with the Limon branch at S.H. 71.<sup>310</sup> From Limon, S.H. 71 connects the north

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<sup>297</sup> Initial authorization of the corridor was through the Transportation Equity Act of the 21st Century-21 in 1998 to run “from the Mexican border via I-27 to Denver, Colorado,” Transportation Equity Act for the 21st Century § 1211(i)(1)(D)(ii)(G)(38). Congress authorized \$2.9 million for a feasibility and route study to connect Lubbock with I-10 through I-20, Intermodal Surface Transportation Efficiency Act of 1991 § 1106(a)(2)(61).

<sup>298</sup> Cambridge Systematics, Inc., *GPITCA*, *supra* note 282 at 2-1.

<sup>299</sup> Ports-to-Plains Trade Corridor Map, [http://www.portstoplains.com/Our\\_Maps.aspx](http://www.portstoplains.com/Our_Maps.aspx). *Contra* Cambridge Systematics, Inc., *GPITCA*, *supra* note 282 (showing the fork may occur just past Sterling City, taking S.H. 158 to Midland/Odessa).

<sup>300</sup> Cambridge Systematics, Inc., *GPITCA*, *supra* note 282.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 2-4.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Governor Richardson’s Investment Partnership, GRIP U.S. 64/87 – Raton to Clayton <http://nmgrip.com/projects.asp?project=14915>.

<sup>307</sup> Cambridge Systematics, Inc., *GPITCA*, *supra* note 282.

<sup>308</sup> Heartland Expressway FAQs, <http://heartlandexpressway.com/faqspfv.htm>.

<sup>309</sup> The Heartland Expressway is also known as Corridor 14, Cambridge Systematics, Inc. and R.J. Rivera Associates, Inc., *Trans-Texas Corridor Rural Development Opportunities: Ports-to-Plains Case Study*, at 35 (2007), available at [http://www.portstoplains.com/key\\_research/TxDOT\\_TTC\\_Rur\\_Dev\\_Ops\\_Final.pdf](http://www.portstoplains.com/key_research/TxDOT_TTC_Rur_Dev_Ops_Final.pdf).

<sup>310</sup> Cambridge Systematics, Inc., *GPITCA*, *supra* note 282.

end of the Ports-to-Plains Corridor and goes north to Brush.<sup>311</sup> From there, S.H.71 moves north to Scottsbluff, Nebraska.<sup>312</sup> The mainline corridor follows S.H. 62A and then travels along U.S. 385 into South Dakota, connecting S.H. 79 to Rapid City.<sup>313</sup> A secondary line breaks off at Scottsbluff on U.S. 26 towards Wyoming and connects to I-25.<sup>314</sup> Additionally, there are plans to construct Kimball Bypass, which will create a four-lane connection from S.H. 71 north of Kimball, Nevada to U.S. 385 and east to Scottsbluff.<sup>315</sup>

### **The Theodore Roosevelt Expressway**

The Theodore Roosevelt Expressway begins in Rapid City, South Dakota on I-90 going north to Spearfish, where it connects to U.S. 85.<sup>316</sup> U.S. 85 runs north Williston, North Dakota, then running west along U.S. 2 to Culbertson, Montana.<sup>317</sup> In Culbertson, the corridor follows S.H. 16 north through the Port of Raymond, where it connects to Canadian highways.<sup>318</sup>

There are plans to widen 22 miles of U.S. 2 from two to four lanes between North Dakota and Culbertson.<sup>319</sup>

### **Case Study: Culbertson East to North Dakota**

Expansion plans for U.S. 2, a small part of the Theodore Roosevelt Expressway, have existed for several years, and recent analyses by the Montana Department of Transportation and the Federal Highway Administration make it a useful case study. The Montana Department of Transportation and the Highway Administration produced an environmental assessment on February 2008 for a project that plans to widen a 22-mile section of U.S. 2 from Culbertson, Montana to North Dakota from two to four lanes.<sup>320</sup> The Montana Department of Transportation and Highway Administration distributed the environmental assessment to federal, state, and local agencies; circulated a notice of availability among local news and radio stations; sent individual mailers to local businesses or people who had previously attended public meetings or expressed interest; and placed additional copies in public locations for public review.<sup>321</sup> The final document noted or incorporated written public comments and concerns presented at public

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 2-1 to 2-2.

<sup>313</sup> *Id.* at 2-2.

<sup>314</sup> *Id.*

<sup>315</sup> Steve Frederick, *Governor Moves Up Expressway Projects*, *Star Herald*, May 4, 2008, available at <http://www.starherald.com/articles/2008/05/04/local%20news/19659173.txt>.

<sup>316</sup> Cambridge Systematics, Inc., *GPITCA*, *supra* note 282.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> Montana Department of Transportation, *2008-2012 Final STIP*, at 61 (2008), available at [http://www.mdt.mt.gov/publications/docs/stip/2008stip\\_final.pdf](http://www.mdt.mt.gov/publications/docs/stip/2008stip_final.pdf).

<sup>320</sup> Montana Department of Transportation and Federal Highway Administration, *Culbertson East to North Dakota Environmental Assessment and Section 4(f) Evaluation*, at 4 (2008) [hereinafter Mont. DOT & FWHA, *Culbertson EA*], available at [http://www.mdt.mt.gov/pubinvolve/docs/eis\\_ea/ea\\_culbertsoneast.pdf](http://www.mdt.mt.gov/pubinvolve/docs/eis_ea/ea_culbertsoneast.pdf).

<sup>321</sup> Montana Department of Transportation and Federal Highway Administration, *Culbertson East to North Dakota Finding of No Significant Impact: Environmental Assessment and Section 4(f) Evaluation*, at 3-4 (2008) [hereinafter Mont. DOT & FWHA, *Culbertson FONSI*], available at [http://www.mdt.mt.gov/pubinvolve/docs/eis\\_ea/fonsi\\_culbertsoneast.pdf](http://www.mdt.mt.gov/pubinvolve/docs/eis_ea/fonsi_culbertsoneast.pdf).

hearings.<sup>322</sup>

The environmental assessment specifically addresses areas of potential impact to water: surface water, irrigation, water quality, wetlands, water bodies, wildlife resources, and habitat.<sup>323</sup> There are 33 drainage areas, and six of these areas are places where the highway either crosses the surface water or is near surface water.<sup>324</sup> There is also a dam in the eastern end of the corridor, and the project requires lowering of its height.<sup>325</sup> Drinking water derives from three sources; two are surface-water sources and one is groundwater.<sup>326</sup> A waterline provides drinking water as well as water for commercial, industrial, and agricultural purposes.<sup>327</sup> The highway will cross the waterline six times.<sup>328</sup> The environmental assessment ascertained that there are 58 wetlands in the project area.<sup>329</sup> A biological resources report (BRR) determined that 234 to 238 species might occur in the study area.<sup>330</sup>

The assessment found six creeks in the study area that have an impaired water designation; only five had a determined location.<sup>331</sup> The six creeks with impaired water designations did not undergo further analysis because the environmental assessment determined they were beyond the project area.<sup>332</sup>

The environmental assessment determined that of the creeks in the project area, two are ephemeral, Shotgun Creek and Red Bank Creek, and a third is likely to be ephemeral, Clover Creek.<sup>333</sup> The Montana Department of Transportation concluded in the environmental assessment that these three creeks do not have the necessary flow to sustain fish populations.<sup>334</sup> It found that Little Muddle Creek has walleye, from its mouth upstream to its convergence with Shotgun Creek,<sup>335</sup> and unidentified fingerlings exist in the culvert outlet on Little Muddy Creek.<sup>336</sup>

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<sup>322</sup> *Id.*

<sup>323</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 31-44.

<sup>324</sup> *See id.* at 31.

<sup>325</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 32.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* The Dry Prairie Waterline carries water from Culbertson eastward to Bainville.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 34.

<sup>330</sup> *See id.* at 41. The species distribution is as follows: 176 species of birds, 47 species of mammals, six to nine species of reptiles, five to six species of amphibian, Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320.

<sup>331</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 56.

<sup>332</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320.

<sup>333</sup> *Id.* at 42. Clover Creek will likely receive diverted storm water runoff from Culbertson to prevent pooling along the highway by the developed Storm Water Pollution Prevention Plan (per CWA § 402). *Id.* at 64.

<sup>334</sup> *Id.* at 42.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

The environmental assessment predicts that bridge construction will not have a direct impact on the creeks.<sup>337</sup> However, the road will affect accessibility and water quality for irrigation.<sup>338</sup> The environmental assessment claims that the Montana Department of Transportation will mitigate any effect through replacement of irrigation ditches, headgates, berms, and other facilities as needed.<sup>339</sup> The land adjacent to the eastern portion of the highway may additionally require relocation of channels and pipe extensions.<sup>340</sup> Before undertaking any modifications, the Montana Department of Transportation plans to consult with farm, ranch, and ditch owners.

After evaluating the potential environmental impacts and concluding they were not significant, the Montana Department of Transportation and the Federal Highway Administration issued a FONSI in August 2008.



<sup>337</sup> *Id.* at 34. The Bainville – East and West project, an improved two-lane project (two 12-foot travel lanes and two eight-foot shoulders), will construct the Shotgun Creek bridge, Montana Department of Transportation, *Bainville – East & West Categorical Exclusion Request*, at 2 (2005) [hereinafter Mont. DOT, *Bainville CE*]. The plan will also straighten out some of the curves of the road, Mont. DOT & US DOT, *Culbertson FONSI*, *supra* note 321 at 62. The Federal Highway Association approved the Bainville – East and West project for categorical exclusion on November, 18, 2005, Distribution Cover Letter for Bainville – East and West Scope of Work Report, November 21, 2005.

<sup>338</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 33. Construction will affect numerous dikes in the area.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

## *The Clean Water Act*

Roads change the topography of the natural landscape. They may alter percolation patterns, cause soil erosion, or increase the introduction of particulate matter and pollutants to the nearby area. Conventional asphalt is nonporous, so water either pools on the road or becomes runoff. As the water drains, it assimilates particulate matter and pollutants and carries them into the ground, and consequently to water sources. The effect of this influx into local water sources varies—from largely leaving seasonal water bodies unaffected, to changing the habitability of standing water for native species, to making drinking water unpalatable or possibly not potable. Smaller projects primarily deal with small, discrete effects on bodies of water. While these effects seem trivial when viewed independently, the cumulative impact of projects spanning large areas is often significant and requires evaluation.

Before road construction may begin, studies determine the feasibility of the project, assess the environmental impact of the project, trigger the acquisition of permits, and ensure adherence to relevant laws. Clean Water Act analysis may be required for transportation projects, even when interference with surface water is not readily discernable.<sup>341</sup> The purpose of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>342</sup> Pursuant to this goal, the Army Corps of Engineers may “issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into navigable waters at specified disposal sites.”<sup>343</sup> Congress defines navigable waters as “the waters of the United States, including the territorial seas.”<sup>344</sup> “Waters of the United States” include wetlands adjacent to waters used in interstate commerce, and their tributaries.<sup>345</sup>

The Clean Water Act establishes a protocol for maintaining and establishing water quality standards that are applicable to all water bodies. The EPA, states, and tribes set goals and water quality standards. State and interstate agencies and the EPA monitor water bodies.<sup>346</sup> If the water body fails to meet the water quality standards, then § 303(d) of the Clean Water Act requires the state to establish a priority ranking for these waters considering the severity of pollution and the water uses.<sup>347</sup> A state or tribe develops strategies and controls to establish a total maximum daily load (TMDL)<sup>348</sup> and implements them under various sections of the Clean Water Act.<sup>349</sup>

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<sup>341</sup> See generally Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387.

<sup>342</sup> 33 U.S.C. § 1251(a).

<sup>343</sup> 33 U.S.C. § 1344(a).

<sup>344</sup> 33 U.S.C. § 1362(7).

<sup>345</sup> 33 C.F.R. § 328.3(a)(7).

<sup>346</sup> EPA, *Water Quality Handbook*, at 7.2.1 (2nd Ed., 1994) (1983), available at <http://www.epa.gov/waterscience/standards/handbook/chapter07.html#section2>. See also EPA, *Guidance for State Water Monitoring and Wasteload Allocation Programs* (1985) available at <http://www.epa.gov/waterscience/models/library/wapguidance.pdf>.

<sup>347</sup> 33 U.S.C. § 1313(d).

<sup>348</sup> 33 U.S.C. § 1314(l). TMDL is the amount of a specific pollutant that a water body can assimilate and still meet the water-quality standard, EPA, *Handbook for Developing Watershed Plans to Restore and Protect Our Waters*, at 2-2 (2008), available at [http://www.epa.gov/owow/nps/watershed\\_handbook/pdf/handbook.pdf](http://www.epa.gov/owow/nps/watershed_handbook/pdf/handbook.pdf).

<sup>349</sup> EPA, *Watershed Academy Web: Introduction to the Clean Water Act*, at 3 (2008) [hereinafter EPA, *Watershed Academy*], <http://www.epa.gov/watertrain/pdf/IntrotoCWA.pdf>. The applicable Clean Water Act sections for this chapter are 401, 402, and 404, see *id.* The EPA approves TMDLs, 33 U.S.C. § 1313(d)(2).

## **Clean Water Act Section 401 Permit Requirement**

Section 401 requires an individual conducting any activity that may result in discharge into navigable waters to apply for a federal license or permit to do so.<sup>350</sup> The certification sets limits or conditions to assure compliance with federal, state, or tribal law related to water quality. Certification is required only if the discharge will increase a water body's pollutant load.<sup>351</sup> State agencies issue 401 certification; in Montana, it is the Department of Environmental Quality (DEQ).

Typically, an applicant must submit to the DEQ a complete description of the project, including the volume and nature of the discharge, a description of the existing site, and a description of the proposed methods to monitor the discharge.<sup>352</sup> However, the Montana DEQ provides an exemption for projects that have received Montana Pollutant Discharge Elimination System (MDPES) 402 permits.<sup>353</sup> According to the environmental assessment, the Montana Department of Transportation does not plan to apply for a 401 permit.<sup>354</sup>

## **Clean Water Act Section 402 Permit Requirements**

Section 402 of the Clean Water Act authorizes the National Pollutant Discharge Elimination System (NPDES) program. The NPDES "controls water pollution by regulating point sources that discharge pollutants into waters of the United States."<sup>355</sup> Clean Water Act Section 301 prohibits any discharge of pollutants except as permitted; Section 402 governs permits regarding the point source discharge.<sup>356</sup> Essentially, the NPDES issues "pollutant badges" that allow a water to meet its designated water quality standards, provided the discharge does not exceed the permit's allotted amount.<sup>357</sup> Either the EPA or a state EPA-approved program grants the discharge permit. In Montana, the DEQ approves the permit process through the MDPES program.

### Municipality Storm Water Requirements

A municipal discharge "require[s] controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."<sup>358</sup> Storm-water permit programs developed by municipalities aim at controlling storm-water runoff from local roads and highways. The Culbertson East to North Dakota project begins in the city of Culbertson, and includes five blocks; one block has curbs and gutters and four do not.<sup>359</sup> Currently, the storm water pools on the street before evaporating, necessitating an alternative to the existing street

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<sup>350</sup> 33 U.S.C. § 1341(a)(1); Mont. Admin. R. 17.30.101(2).

<sup>351</sup> EPA, *Watershed Academy*, *supra* note 349 at 4.

<sup>352</sup> Mont. Admin. R. 17.30.103 (1)-(2) .

<sup>353</sup> Mont. Admin. R. 17.30.105(2)(b). Exceptions also include 402 permits attained under Mont. Admin. R. 17.30.13.

<sup>354</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 335 at 60.

<sup>355</sup> EPA: National Pollutant Discharge Elimination System (NPDES), <http://cfpub.epa.gov/NPDES/>.

<sup>356</sup> EPA, *Watershed Academy*, *supra* note 349 at 34.

<sup>357</sup> *Id.* at 28.

<sup>358</sup> 33 U.S.C. § 1342(p)(3)(B)(iii).

<sup>359</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 33.

grades.<sup>360</sup> The project's environmental assessment proposes using a storm drain to divert the runoff outside of town to a sedimentation pond before draining into Clover Creek.<sup>361</sup>

Municipal storm water does not require a permit by the EPA unless the city has a population of more than 100,000.<sup>362</sup> In 2007, Culbertson had a population of 694,<sup>363</sup> so the traditional 402 permit does not apply. Instead, the new storm-water drain falls under the definition of a small municipal separate storm sewer system (MS4).<sup>364</sup> For a MS4 that serves fewer than 1,000 people, the DEQ may waive permit requirements provided that (1) MS4 discharge does not significantly add to the pollutant loadings of a connected, regulated MS4, and (2) the discharge will not affect TMDL waters.<sup>365</sup> Culbertson's new storm-water drain fulfills both these requirements: It is a discrete system and it will drain into a sedimentation pond before returning to a nonimpaired water, Clover Creek.

### Storm-water Requirements for Construction

A storm-water pollution prevention plan (SWPP plan) is required for construction sites. A SWPP plan has three components to address erosion and sediment: site assessment, identification of potential pollutant sources, and formulation of best management practices (BMPs).<sup>366</sup> Categorically, BMPs have two approaches, structural and nonstructural. Structural BMPs include fences, sedimentation ponds, erosion control blankets; nonstructural BMPs consist of sweeping sidewalks, picking up debris and garbage, equipment maintenance, and training staff on erosion and control practices.<sup>367</sup>

The environmental assessment indicates that the Montana Department of Transportation plans to implement a SWPP plan through permitting with the Montana DEQ, but the environmental assessment does not disclose specifics of the plan.<sup>368</sup>

### Clean Water Act Section 404 Permit Requirement

Placing a highway through wetlands will require the use of fill to stabilize the highway above the wetlands. There are 58 wetlands in the study area of the Culbertson environmental assessment.<sup>369</sup> The "preferred alternative" will directly impact 36 of them, a total of 3.8 acres.<sup>370</sup> Therefore, the Montana Department of Transportation and the Federal Highway Administration will require a permit under Section 404.

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> 33 U.S.C. § 1342(p)(2).

<sup>363</sup> Culbertson, Montana—Detailed Profile, <http://www.city-data.com/city/Culbertson-Montana.html>.

<sup>364</sup> Mont. Admin. R. 17.30.1102(23).

<sup>365</sup> Mont. Admin. R. 17.30.1107(10).

<sup>366</sup> Montana Department of Environmental Quality, *Storm Water Requirements for Construction Activity* at 3 (2008), available at <http://www.deq.mt.gov/wqinfo/WPBFForms/SWCinfo.pdf>.

<sup>367</sup> EPA, *Developing Your Storm Water Prevention Plan: A Guide for Construction Sites*, at 3 (2007), available at [http://www.epa.gov/npdes/pubs/sw\\_swppp\\_guide.pdf](http://www.epa.gov/npdes/pubs/sw_swppp_guide.pdf).

<sup>368</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 34.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 38.



Section 404(b) concerns permits for discharging dredged or fill material.<sup>371</sup> This includes dredge or fill material from farming or forest activities; construction or maintenance of transportation structures, dams, stock ponds, drainage ditches; and use of fill material in construction sites that do not directly place it into navigable waters.<sup>372</sup> The Army Corps of Engineers can only grant a 404 permit if the state agency has waived or issued the 401 permit. The 401 permit is usually conditional, so the 404 permit must incorporate any conditions.

Section 404(b)(1) provides that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative . . . which would have less adverse impact on the aquatic ecosystem. . . .”<sup>373</sup> A practicable alternative is one that is both available and “capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”<sup>374</sup> The developer bears the burden of proving that no alternative is available.<sup>375</sup> In approving permits for projects that are in an aquatic zone, yet not water dependent, the Corps “must rebut the presumption that there are practicable alternatives with less adverse environmental impact.”<sup>376</sup> An aquatic site possesses “special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values,” and includes wetlands.<sup>377</sup> A water-dependent activity “require[s] access or proximity to or siting within the special aquatic site to fulfill its basic purpose . . . .”<sup>378</sup> A project is not water dependent simply because the applicant desires to build on wetlands; it must literally not be buildable elsewhere.<sup>379</sup> The Culbertson project, although built through wetlands, is not water dependent. The highway does not need to transverse the wetlands to fulfill its purpose, even though the Montana Department of Transportation found that avoidance of all wetlands is not feasible.<sup>380</sup> The Corps will need to rebut the presumption that the Culbertson project could be built where it would not affect the 36 wetlands.

If the Corps determines the project complies with Section 404(b), it “will grant the permit unless issuance would be contrary to the public interest.”<sup>381</sup> The agency must weigh public, private, economic, and environmental factors, and it has discretion in how to do so.<sup>382</sup> Essentially, Section 404 calls for a step-wise analysis: (1) avoidance of impacts to the maximum extent practicable, (2) minimization of any effects by designing projects as small as practicable, and (3)

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<sup>371</sup> Clean Water Act of 1972 § 404(b), 33 U.S.C. § 1344(b). Section 404 permits are subject to § 402.

<sup>372</sup> 33 U.S.C. § 1344(f)(1).

<sup>373</sup> 40 C.F.R. § 230.10(a).

<sup>374</sup> 40 C.F.R. § 230.10(a)(2).

<sup>375</sup> 40 C.F.R. § 230.10(a)(2).

<sup>376</sup> *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1262 (10th Cir. 2003). The EPA and the Fish and Wildlife Service enforce specific Sections of 404, Office of Water, EPA, *Regulatory Requirements*, at 1-2 (2009) [hereinafter EPA, *Regulatory Requirements*], available at [http://www.epa.gov/owow/wetlands/pdf/reg\\_authority\\_pr.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf). “[F]or most discharges that will only have minimal adverse effects, a general permit may be suitable.” “An individual permit is required for potentially significant impacts,” *Id.* at 1 (italics omitted).

<sup>377</sup> 40 C.F.R. § 230.3(q-1); 40 C.F.R. § 230.41 “An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2).

<sup>378</sup> 40 C.F.R. § 230.10(a)(3).

<sup>379</sup> *Sierra Club v. Flowers*, 526 F.3d 1353, 1367 (11th Cir. 2008).

<sup>380</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 38.

<sup>381</sup> 33 C.F.R. § 323.6(a).

<sup>382</sup> 33 C.F.R. §§ 320.4(a)(2)-(3).

utilization of compensatory mitigation.<sup>383</sup> Additionally, the issuance of a 404(b) permit is a major federal action and therefore triggers a NEPA analysis, a department of transportation Section 4(f) analysis, and an Endangered Species Act Section 7 analysis.<sup>384</sup>

The rule on compensatory mitigation for losses of aquatic resources legalizes the longstanding national goal of “no net loss” of wetlands.<sup>385</sup> Compensatory mitigation may occur in three ways: establishment of a new aquatic site, restoration of a pre-existing location, or enhancement or restoration of existing sites.<sup>386</sup> The Montana Department of Transportation plans to create new wetlands at an undetermined site.

The intent of the compensatory mitigation rule is to ensure permanent protection for all mitigation sites; however, the variability of state and local laws affords different legal protection for compensatory mitigation sites.<sup>387</sup> To minimize the possibility of allowing future construction of a highway where a new wetland has been established, the EPA and the Corps state, “where practicable, a conservation easement or restrictive covenant should establish in an appropriate third party (e.g., governmental or nonprofit resource-management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.”<sup>388</sup> The Montana Department of Transportation hopes to mitigate wetland impact on site. Corps-approved off-site locations will supplement insufficient on-site opportunities.<sup>389</sup>

### **Corps Discretion under Section 404(b)**

When assessing the proffered application, the Corps “must ensure that the proposed fill material will not cause any significantly adverse effects on human health; welfare, aquatic life, and aquatic ecosystems; or recreational, aesthetic, or economic values.”<sup>390</sup> To achieve the objective, the Corps must evaluate the available options to avoid wetlands, minimize potential wetland impacts, and provide compensation for unavoidable impacts.<sup>391</sup>

The Corps has wide discretion in its decision making but is subject to review under the Administrative Procedures Act. The reviewing court determines whether the agency is “within the bounds of reasoned decision-making”<sup>392</sup> in assessing whether the agency’s decision was

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<sup>383</sup> EPA, *Watershed Academy*, *supra* note 367 at 54.

<sup>384</sup> *See generally* chapter 2 (discussing NEPA); *see generally* chapter 4 (discussing the Endangered Species Act); *see generally* chapter 6 (discussing 4(f) of the Department of Transportation Act).

<sup>385</sup> 40 C.F.R. § 230. *See generally* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19594 (Apr. 10, 2008) [Compensatory Mitigation], available at [http://www.epa.gov/owow/wetlands/pdf/wetlands\\_mitigation\\_final\\_rule\\_4\\_10\\_08.pdf](http://www.epa.gov/owow/wetlands/pdf/wetlands_mitigation_final_rule_4_10_08.pdf).

<sup>386</sup> Compensatory Mitigation, *supra* note 385.

<sup>387</sup> *Id.* at 19646.

<sup>388</sup> *Id.*; 33 C.F.R. § 332.7(a)(1).

<sup>389</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 41; Mont. DOT & FWHA, *Culbertson FONSI*, *supra* note 321 at 68.

<sup>390</sup> *Audobon Naturalist Soc’y of the Cent. Atl. States, Inc. v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. S. Div. 2007).

<sup>391</sup> EPA, *Regulatory Requirements*, *supra* note 376 at 1.

<sup>392</sup> *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983).

arbitrary and capricious.<sup>393</sup> A permitting decision is arbitrary and capricious if the agency relied on “factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>394</sup>

### **Piecemealing**<sup>395</sup>

Piecemealing, as has been defined by the court, is “an attempt by an agency to divide artificially a ‘major Federal action’ into smaller components to escape the application of NEPA to some of its segments”; it applies when the Corps undergoes a NEPA analysis in contemplation of issuing a 404 permit.<sup>396</sup> A four-part test determines whether the agency properly segmented the project; the agency must meet all four criteria. A court looks at whether “the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.”<sup>397</sup> Piecemealing must be avoided, because when viewed individually, the small segment assessments only analyze whether there is a practicable alternative for that segment. This type of analysis misses options that are less damaging practical alternatives available for the overall project.<sup>398</sup>

For example, the Montana Department of Transportation regards the Bainville – East and West project as a separate undertaking from the Culbertson East to North Dakota project, even though both projects concern the same piece of highway on U.S. 2. The Bainville undertaking makes U.S. 2 an improved two-lane highway with two 12-foot travel lanes and two eight-foot shoulders.<sup>399</sup> The Culbertson project incorporates the Bainville project, with a finished plan for a four-lane highway; the improved lanes from the latter will become the westbound lanes, and the former will create two 12-foot (eastbound) travel lanes with eight-foot and four-foot shoulders.<sup>400</sup> The Culbertson project assumes the successful completion of the Bainville project.

At the time of the Bainville analysis in 2005, the Montana Department of Transportation elected to keep it separate from the Culbertson project because of “the relatively short length of the project and because reconstruction to four lanes cannot be justified at this time based on traffic capacity or safety needs.”<sup>401</sup> Yet the 2008 Culbertson environmental assessment imputed safety as a determining factor in its expansion, although the Bainville project had a start date in 2009. The U.S. 2/M.T. 16 Transportation Regional Economic Development Study occurred in 2007, between the Bainville and Culbertson assessments. The study found that the accident rate on Montana highways in the Theodore Roosevelt Expressway corridor was higher than those that

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<sup>393</sup> 5 U.S.C. § 706(2)(A).

<sup>394</sup> *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287-88 (4th Cir. 1999).

<sup>395</sup> Piecemealing is also called “improper segmentation.”

<sup>396</sup> *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 236 (5th Cir. 2007); *Save Barton Creek Ass’n v. Fed. Highway Admin.*, 950 F.2d 1129, 1139 (5th Cir. 1992).

<sup>397</sup> *O’Reilly*, 477 F.3d at 236 (summarizing 23 C.F.R. § 771.111(f)).

<sup>398</sup> *Id.*, citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985).

<sup>399</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 12.

<sup>400</sup> *See id.* at 14.

<sup>401</sup> Mont. DOT, *Bainville CE*, *supra* note at 320 at 3.

were not in the expressway.<sup>402</sup> There was no discussion of the increase in the accident rates over the two-year period.

The term “logical termini” refers to the reasonable endpoints for a project and can include “major crossroads, population centers, major traffic generators, or similar highway control elements,”<sup>403</sup> The Culbertson project is on U.S. 2 from North Dakota to Culbertson (S.H. 16); the Bainville – East and West project runs from North Dakota to three miles east of Bainville on U.S. 2.<sup>404</sup> Therefore, the projects have different logical termini. Independent utility exists where “one project will serve a significant purpose even if a second related project is not built.”<sup>405</sup> The promotion of safety is a significant purpose.<sup>406</sup> Because both projects promote improved safety,<sup>407</sup> the Montana Department of Transportation reasons that each project has independent utility. It is possible that the Montana Department of Transportation is foreclosing the opportunity to consider alternatives by segmenting these two projects. The Culbertson Preferred Alternative is dependent on the adoption of the Bainville project. By having a predetermined route, the Theodore Roosevelt Expressway restricts the Montana Department of Transportation’s ability to select alternatives that may have fewer adverse effects on the environment. The Montana Department of Transportation claims it will not irretrievably commit federal funds. It stated it would “not expend any resources on the U.S. highway 2 project that would jeopardize any future highway projects.”<sup>408</sup> In the environmental assessment, the Montana Department of Transportation determined that the use of state matching funds and earmarked federal-aid highway funds would not endanger future undertakings, including closely related projects.<sup>409</sup>

Piecemealing abuse parses a cumulative impact analysis’s finding of significance and possibly obviates the need for an EIS analysis by allowing the issuance of a FONSI. A court would likely find that the Montana Department of Transportation did not abuse its discretion because of the projects’ appearance of logical termini and independent utility. If the Corps has similarly segmented the projects, a court would likely find that it too did not abuse its discretion. However, a court could take into consideration evidence that the agency relied on factors not intended by Congress. One Montana Department of Transportation official stated, “We found over time that in order to get something built, it is better to look at smaller sections of highways.”<sup>410</sup> A court could construe this statement as the department’s intent to circumvent the intention of NEPA. However, as long as a federal action meets the four criteria for proper

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<sup>402</sup> Montana Department of Transportation & HDR | HLB Decision Economics, Inc. *Transportation Regional Economic Development: Theodore Roosevelt Expressway, Summary and Conclusions*, at 7-8 (2007) available at [http://www.mdt.mt.gov/pubinvolve/us2tred/docs/envscans/tred\\_conclusions\\_final.pdf](http://www.mdt.mt.gov/pubinvolve/us2tred/docs/envscans/tred_conclusions_final.pdf).

<sup>403</sup> *Burkholder v. Wykle*, 268 F. Supp. 2d 835, 847 n.17 (No. D. Ohio 2002); *Conservation Law Found. v. Fed. Highway Admin.*, 827 F. Supp. 871, 878 (D. R.I. 1993).

<sup>404</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320. The Bainville project ends at RP 656.3, Montana Department of Transportation, *Invitation for Bids: Letting of January 29, 2009*, at 2 (2009), available at [http://mdt.mt.gov/other/contract/external/archives/INVITATION\\_FOR\\_BIDS/2009/01\\_JAN-29.PDF](http://mdt.mt.gov/other/contract/external/archives/INVITATION_FOR_BIDS/2009/01_JAN-29.PDF).

<sup>405</sup> *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.C. Cir. 2005), quoting *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987).

<sup>406</sup> *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 961 (7th Cir. 2003).

<sup>407</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 14, 23.

<sup>408</sup> Mont. Code Ann. § 60-2-133(3).

<sup>409</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 15.

<sup>410</sup> Mont. DOT & FWHA, *Culbertson FONSI*, *supra* note 320 at 67.

segmentation, intent is a non-issue.<sup>411</sup>

## **Cumulative Impacts**

The Culbertson environmental assessment identifies indirect and cumulative impacts. Indirect impacts include those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>412</sup> Cumulative impacts are the collective impacts from past, present, and reasonably foreseeable actions.<sup>413</sup> A cumulative impacts analysis must include: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and reasonably foreseeable proposed—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.<sup>414</sup>

The Ninth Circuit defines “reasonably foreseeable” as including only “proposed actions.”<sup>415</sup> Not yet proposed projects are too speculative for inclusion.<sup>416</sup> The Culbertson environmental assessment acknowledges possible substantial cumulative impacts when including other Montana Department of Transportation projects in the region.<sup>417</sup> Therefore, the environmental assessment’s cumulative analysis correctly describes the future expansion of S.H. 16. and mentions other projects in the area.

The Ninth Circuit also states that in the proper analysis of cumulative impacts, “general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”<sup>418</sup> The environmental assessment’s cumulative impact analysis predicted no additional impacts beyond those already under consideration, including affects to water quality.<sup>419</sup> Unfortunately, the assessment did not provide specifics for these claims. Without quantification, the analysis fails to “satisfy the admonition in *Neighbors of Cuddy Mountain* that ‘general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.’”<sup>420</sup>

The Culbertson environmental assessment states that the Bainville – East and West project transverses 11.6 acres of wetlands and requires 97 acres of additional right-of-way.<sup>421</sup>

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<sup>411</sup> *Save Barton Creek Ass’n*, 950 F.2d 1129, 1143 (5th Cir. 1992).

<sup>412</sup> 40 C.F.R. § 1508.8(b).

<sup>413</sup> 40 C.F.R. § 1508.7.

<sup>414</sup> *D’Olive Bay Restoration & Pres. Comm., Inc. v. U.S. Army Corps of Eng’rs*, 513 F. Supp. 2d 1261, 1292-93 (So. D. Ala. 2007), citing *Ga. River Network v. U.S. Army Corps of Eng’rs*, 334 F. Supp. 2d 1329 (D. Ga. 2004); *Grand Canyon Trust v. Fed. Aviation Admin.*, 351 U.S. App. D.C. 253, 290 F.3d 339, 345 (D.C. Cir. 2002); *Stewart v. Potts*, 126 F. Supp. 2d 428, 437 (S.D. Tex. 2000).

<sup>415</sup> *Lands Council v. Powell*, 395 F.3d 1019, 1023 (9th Cir 2005).

<sup>416</sup> *Id.*

<sup>417</sup> See Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 53, for a list of these projects.

<sup>418</sup> *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004), quoting *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d 1108, 1128 (9th Cir. 2004).

<sup>419</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 432.

<sup>420</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

<sup>421</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 54, 56.

However, since the Montana Department of Transportation issued a categorical exclusion for the Bainville – East and West project, there is no substantive analysis of the effects of that project.<sup>422</sup> Unfortunately, the only analyses of the environmental impact of the Bainville project occurred in the Transportation Regional Economic Development Study and the Culbertson environmental assessment. The Corps must consider the cumulative effects of the Culbertson project combined with the Bainville project and any other past, present, or proposed projects.

An interested individual could challenge the Corps' decision to issue a permit on the basis of an inadequate NEPA analysis or any of the other 404 requirements previously outlined. The Clean Water Act provides legal remedies for violations of the permit or the approval process. Under Section 505 of the Clean Water Act, a citizen may commence a lawsuit on her behalf against the United States, or a federal or state agency for violation of an effluent standard or limitation under the Act, or for an order issued by the administrator or state concerning the standard or limitation.<sup>423</sup> Relevant to this discussion, a citizen may file suit for a violation of an effluent standard or limitation for certification, permit approval, or a condition thereof under Sections 401 or 402—or an alleged failure to perform an act or duty under Section 404 that is not within the administrator's discretion could be brought under the Administrative Procedures Act.<sup>424</sup> If the administrator or state is already prosecuting for compliance with the effluent standard, limitation, or order, a citizen may enjoin.<sup>425</sup> Additionally, the administrator can intervene in any action that it is not party to.<sup>426</sup>

## *The GPITC and the Clean Water Act*

The Culbertson east to North Dakota project is just small section of the GPITC, yet it requires 180 acres of additional right-of-way,<sup>427</sup> including the permanent conversion of approximately 30 acres of farmland.<sup>428</sup> The Culbertson environmental assessment ascertained that no mitigation is legally required, but it will employ BMPs to limit environmental disturbances.<sup>429</sup>

The expansion of U.S. 2 is mainly to facilitate continuity as part of the Theodore Roosevelt Expressway.<sup>430</sup> This section of highway comprises less than 1 percent of the total road in the GPITC and only required an environmental assessment. Environmental assessments may have

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<sup>422</sup> 23 C.F.R. § 771.117(d), Mont. Admin. R. 18.2.261, Mont. Code Ann. §§ 75-1-103, 75-1-201.

<sup>423</sup> Clean Water Act of 1972 § 505, 33 U.S.C. § 1965(a)(1). A citizen is a person(s) who having an interest or may be adversely affected, 33 U.S.C. § 1965(g).

<sup>424</sup> 33 U.S.C. § 1965(f) (discussing permits that control effluent standard or limitation); 33 U.S.C. § 1965(a)(2).

<sup>425</sup> 33 U.S.C. § 1965(b)(1)(B).

<sup>426</sup> 33 U.S.C. § 1965(c)(2).

<sup>427</sup> Mont. DOT & FWHA, *Culbertson EA*, *supra* note 320 at 54.

<sup>428</sup> *Id.* at 55. Ten acres of Prime Farmland if Irrigated and twenty acres of Farmland of Statewide Importance, *id.* Farmland of Statewide Importance is classified one lower than Prime Farmland if Irrigated, Committee of the Whole City Council Chambers, *Minutes of July 28, 2008 Council Meeting*, at 2 (2008), available at <ftp://ftp.ci.missoula.mt.us/Packets/Council/2008/2008-08-04/080731cow.pdf>.

<sup>429</sup> Mont. DOT & FWSA, *Culbertson EA*, *supra* note 320 at 64. A BMP is an “approach that integrates the control of storm water peak flows and the protection of natural channels to sustain the physical and chemical properties of aquatic habitat,” EPA, *BMP Background*, [http://cfpub.epa.gov/npdes/stormwater/menuofbmps/bmp\\_background.cfm](http://cfpub.epa.gov/npdes/stormwater/menuofbmps/bmp_background.cfm).

<sup>430</sup> Mont. DOT & FWHA, *Culbertson FONSI*, *supra* note 320 at 9; Culbertson East to North Dakota of No Significant Impact, 34 Roundup 8, August 13, 2008, available at <http://esidney.com/81308.pdf>.

FONSIs when conducted on small sections, but when viewed collectively, the impact on water quality could be significant, especially to bodies of water that traverse several counties or states. The impact of the total improved and expanded corridor will likely be tremendous. Thus, there is a strong argument against assessing highway improvements in small segments, and at the very least an analysis should be included of the reasonably foreseeable improvements along the GPITC to preclude threats to 303(d) impaired waters and underappreciated affects to wetlands.

Analysis of the GPITC requires an EIS rather than an unsubstantial cumulative effects analysis found in numerous environmental assessments—either by the Federal Highway Administration or Corps, or both. An EIS “is appropriate only where the proposal itself is regional or systemic in scope, or where the proposal is one of a series of interrelated proposals that will produce cumulative system wide effects that can be meaningfully evaluated together.”<sup>431</sup> Construction of small GPITC segments utilizing multiple environmental assessments with limited cumulative impacts analysis circumvents the intent of both NEPA and the Clean Water Act. In the permit process, the Corps should consider the environmental impacts of the segments together, at the very least in its cumulative impacts analysis or in an EIS.

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<sup>431</sup> *Ga. River Network v. U.S. Army Corps of Eng’rs*, 334 F. Supp. 2d 1329 (D. Ga. 2004), quoting *Izaak Walton Legal of Am. v. Marsh*, 655 F.2d 346, 374 (D.C. Cir. 1981).

## Chapter 8: KC SmartPort and Lazaro Cardenas and the North American Commission for Environmental Cooperation

Kansas City boasts numerous assets that make it an important hub for transport by rail, water, and air. First, it is at the heart of the rail corridor, both coast to coast and on the NAFTA railway between Canada and Mexico, and it is the number-one rail center in the United States (by tonnage).<sup>432</sup> Second, Kansas City's location on the Mississippi and Missouri river systems makes it accessible to the largest inland-navigable waterway.<sup>433</sup> Third, Kansas City International Airport moves more cargo by air than any air center in the six-state region.<sup>434</sup> Fourth, as one of the leading commerce centers in the United States, Kansas City is ideally located at the intersection of highways I-29, I-35, I-70, and soon, I-49.<sup>435</sup> Kansas City's central location offers access to 98 percent of the U.S. market and 60 percent of the U.S. population is with-in a two-day truck drive.<sup>436</sup> Lastly, Kansas City's Foreign-Trade Zone space is over 10,000 acres, more than any other U.S. city.<sup>437</sup> In a five-year period, Greater Kansas City Foreign Trade Zone, Inc. merchandise processing increased from \$363 million to \$850 million.<sup>438</sup>

To capitalize on Kansas City's ideal location, the Greater Kansas City Chamber of Commerce, the Kansas City Area Development Council, and the Mid-America Regional Council created the nonprofit Kansas City SmartPort, Inc. (KC SmartPort) in 2001.<sup>439</sup> Companies have an opportunity to become investors in KC SmartPort at one of three levels: the Board Level, the Pinnacle Level, and the Gold Level.<sup>440</sup> The Board Level is for contributors of \$10,000 or more, and members receive a position on the board of directors and one vote in KC SmartPort's governing body.<sup>441</sup> Board Level investors include Greater Kansas City Foreign Trade Zone, Inc.; the Kansas and Missouri Departments of Transportation; and the Kansas City Area Development Council.<sup>442</sup> Contributions of \$5,000 give members Pinnacle Level status and an invitation to board meetings.<sup>443</sup> Pinnacle Level supporters include Storage Solutions, LS Commercial Real Estate, and Schweiger Construction Company.<sup>444</sup> Gold Level standing is for investors of \$2,500. They receive an invitation to one board meeting per year. Gold Level members include Metro Park Warehouses, Inc., CenterPoint Properties, and Smart Warehousing.<sup>445</sup>

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<sup>432</sup> About SmartPort, [http://kcsmartport.com/sec\\_about/about.htm](http://kcsmartport.com/sec_about/about.htm).

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* There are three airports in the Kansas City area, Kansas City's Trade Corridor Network, [http://kcsmartport.com/sec\\_corridors/corridors.htm](http://kcsmartport.com/sec_corridors/corridors.htm).

<sup>435</sup> *Id.*

<sup>436</sup> KC = Access, Kansas City SmartPort E-News (March 2008), [http://kcsmartport.com/sec\\_news/enews/MarchE-News.htm](http://kcsmartport.com/sec_news/enews/MarchE-News.htm).

<sup>437</sup> *Id.* Foreign-trade zones are treated as outside U.S. Customs Territory for customs-duty purposes. This allows U.S. manufacturers to import components for manufacturing free of federal duties, and often local and state taxes, Ian MacLeod, Trade Information Center, Trade Development, Ask the TIC (June 2000), <http://ia.ita.doc.gov/ftzpage/tic.html>.

<sup>438</sup> Fast Fact, Kansas City SmartPort E-News (Jan. 2007), [http://kcsmartport.com/sec\\_news/enews/archives/JanuaryNews.htm](http://kcsmartport.com/sec_news/enews/archives/JanuaryNews.htm).

<sup>439</sup> KC SmartPort FAQ, [http://kcsmartport.com/sec\\_about/section/Timeline.htm](http://kcsmartport.com/sec_about/section/Timeline.htm).

<sup>440</sup> KC SmartPort Investors, [http://www.kcsmartport.com/sec\\_investors/investors.htm](http://www.kcsmartport.com/sec_investors/investors.htm).

<sup>441</sup> *Id.*

<sup>442</sup> KC SmartPort Investors – Board Level, [http://www.kcsmartport.com/sec\\_investors/investors/investors\\_board.htm](http://www.kcsmartport.com/sec_investors/investors/investors_board.htm).

<sup>443</sup> KC SmartPort Investors, *supra* note 440.

<sup>444</sup> KC SmartPort Investors – Pinnacle Level, [http://www.kcsmartport.com/sec\\_investors/investors/investors\\_pinnacle.htm](http://www.kcsmartport.com/sec_investors/investors/investors_pinnacle.htm).

<sup>445</sup> KC SmartPort Investors – Gold Level, [http://kcsmartport.com/sec\\_investors/investors/investors\\_gold.htm](http://kcsmartport.com/sec_investors/investors/investors_gold.htm).



KC SmartPort claims that it is the global authority on transportation and logistics opportunities in the Kansas City region.<sup>446</sup> However, KC SmartPort is not a port in the traditional physical sense; instead, it markets transportation and trade assets in Kansas and Missouri, covering 18 counties and 50 cities.<sup>447</sup> Its mission is two-fold: (1) to foster growth of Kansas City's transportation industry by attracting companies involved in transportation and logistics, and (2) to decrease expense while increasing efficiency and security for businesses to move goods in the Kansas City area.<sup>448</sup>

## *KC SmartPort Initiatives*

KC SmartPort focuses on three areas to further its objective to become the North American center for transportation and logistics: economic development, trade-exchange data, and business services.<sup>449</sup>

Under the first prong, economic development, KC SmartPort focuses "on attracting investments from companies with significant transportation and logistics elements such as distribution centers, warehouses, third-party logistic providers, and manufacturers."<sup>450</sup> KC SmartPort uses intermodal shipping, which requires freight-transferring hubs surrounded by distribution centers.<sup>451</sup> Distribution centers for KC SmartPort generally range from 400,000 to 1.5 million square feet, much larger than the typical 250,000 square feet found elsewhere,<sup>452</sup> and they offer storage both above and below ground.<sup>453</sup> Planned centers include:<sup>454</sup>

- Logistics Park Kansas City: 1,000 acres
- Midwest Commerce Center: 151 acres
- Center Point-Kansas City Southern Intermodal Center: 1,400 acres<sup>455</sup>
- KCI Intermodal Business Centre: 800 acres

Companies opening a distribution center in the Kansas City area include Coleman Company, Inc.; Home Depot; and Kimberly-Clark.<sup>456</sup> Shipping companies such as UPS, DHL,

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<sup>446</sup> *Id.*

<sup>447</sup> KC SmartPort FAQ, *supra* note 439.

<sup>448</sup> About SmartPort, *supra* note 432.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> Rob Roberts, *On Track: Large Intermodal Centers with Distribution Facilities Will Create New Industry for Kansas City Region*, Kan. City Bus. J., Nov. 14, 2008, available at <http://www.bizjournals.com/kansascity/stories/2008/11/17/focus21.html>. Intermodal shipping is when cargo containers house freight that moves among trucks, trains, ships, and plains.

<sup>452</sup> *Id.*

<sup>453</sup> Underground Warehouse Space, Kansas City SmartPort E-News (Oct. 2007), [http://kcsmartport.com/sec\\_news/enews/OctoberE-News.htm](http://kcsmartport.com/sec_news/enews/OctoberE-News.htm).

<sup>454</sup> *Id.* See also KC's Industrial Development Projects, Kansas City SmartPort E-News (Aug. 2006), [http://kcsmartport.com/sec\\_news/enews/AugustE-News.htm](http://kcsmartport.com/sec_news/enews/AugustE-News.htm) (listing additional logistics parks).

<sup>455</sup> CenterPoint Completes Purchase of Richards-Gebaur, Kansas City SmartPort E-News (July 2007), [http://kcsmartport.com/sec\\_news/enews/July2007E-News.htm](http://kcsmartport.com/sec_news/enews/July2007E-News.htm).

<sup>456</sup> Coleman Company, Inc. Announces 1.1M-SF KC Distribution Center, Kansas City SmartPort E-News (January 2009), [http://kcsmartport.com/sec\\_news/enews/January2009.htm](http://kcsmartport.com/sec_news/enews/January2009.htm); The Home Depot and Diapers.com Expand into KC Region, Kansas City SmartPort E-News (Apr. 2009) [http://kcsmartport.com/sec\\_news/enews/April2009E-News.htm](http://kcsmartport.com/sec_news/enews/April2009E-News.htm).

FedEx, and BAX Global already have facilities there.<sup>457</sup> Many companies are consolidating their warehousing because of the economic downturn. Kansas City is especially attractive to these businesses that wish to have a fewer, but larger, intermodal facilities.<sup>458</sup>

The trade-exchange data prong aims to improve supply chain visibility and cargo security while at the same time increasing supply-chain efficiency.<sup>459</sup> KC SmartPort, in conjunction with its partners, launched the first test shipments utilizing Intelligent Transportation Systems (ITSs) in 2006, years ahead of competitors.<sup>460</sup> The companies installed high-tech monitoring on truck and rail shipments designed to alert authorities of attacks by thieves and terrorists.<sup>461</sup> KC SmartPort received nearly \$6 million in funding from the Department of Transportation's ITS Program.<sup>462</sup>

KC SmartPort also paired with Electronic Data Systems, Corp. to create a data clearinghouse for shippers, carriers, customers, and the government.<sup>463</sup> The fusion center facilitates the gathering and sharing of data for viewing freight and pinpointing its exact location.<sup>464</sup> Companies can identify products that need classification or lack certificate of origin information.<sup>465</sup> In 2008, KC SmartPort began discussions with the European Commission to synergize with their systems.<sup>466</sup>

KC SmartPort offers services to aid businesses transporting products both domestically and internationally. This assistance includes marketing research and assistance programs, a supply-chain education initiative, and a Mexican custom's office in Kansas City.<sup>467</sup> Mexican customs officials can inspect goods while in Kansas City to expedite border crossing. More than \$18 billion worth of goods passed through Kansas City on the way to Mexico in 2007, one-sixth of the U.S. total.<sup>468</sup> KC SmartPort hopes to provide additional foreign customs' offices in the future.<sup>469</sup>

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<sup>457</sup> KC = Access, *supra* note 436.

<sup>458</sup> Roberts, *supra* note 451.

<sup>459</sup> About SmartPort, *supra* note 432. Visibility refers to knowing where the freight is at all times, KC SmartPort's Trade Data Exchange, Kansas City SmartPort E-News (June 2007).

<sup>460</sup> KC SmartPort Launches First Test Shipment Using ITS Technology, Kansas City SmartPort E-News (Jan. 2006), [http://kcsmartport.com/sec\\_news/enews/archives/0106\\_enews.htm](http://kcsmartport.com/sec_news/enews/archives/0106_enews.htm); Alm, *infra* note 461.

<sup>461</sup> Rick Alm, *Technology Guards Cargo*, Kan. City Star, Dec. 16, 2005, at C1, available at [http://kcsmartport.com/sec\\_news/media/articles/Technologyguardscargo.htm](http://kcsmartport.com/sec_news/media/articles/Technologyguardscargo.htm). EDS is formerly known as BV Solutions Group, Testing Continues on ITS, Kansas City SmartPort E-News (Feb. 2006), [http://kcsmartport.com/sec\\_news/enews/archives/0206\\_enews.htm](http://kcsmartport.com/sec_news/enews/archives/0206_enews.htm). See Press release, KC SmartPort, Inc., KC Leads the Nation in Supply Chain Security: KC SmartPort Applies Tracking Technology to Rail Shipments [hereinafter KC SmartPort, Inc., KC Leads the Nation], available at [http://www.kcsmartport.com/sec\\_press/releases/PressRelease.htm](http://www.kcsmartport.com/sec_press/releases/PressRelease.htm).

<sup>462</sup> KC SmartPort, Inc., KC Leads the Nation, *supra* note 461.

<sup>463</sup> EDS Selected for ITS Testing, Kansas City SmartPort E-News (Sept. 2006), [http://kcsmartport.com/sec\\_news/enews/SeptemberE-News.htm](http://kcsmartport.com/sec_news/enews/SeptemberE-News.htm). EDS applies and tracks monitoring technology.

<sup>464</sup> *Id.*

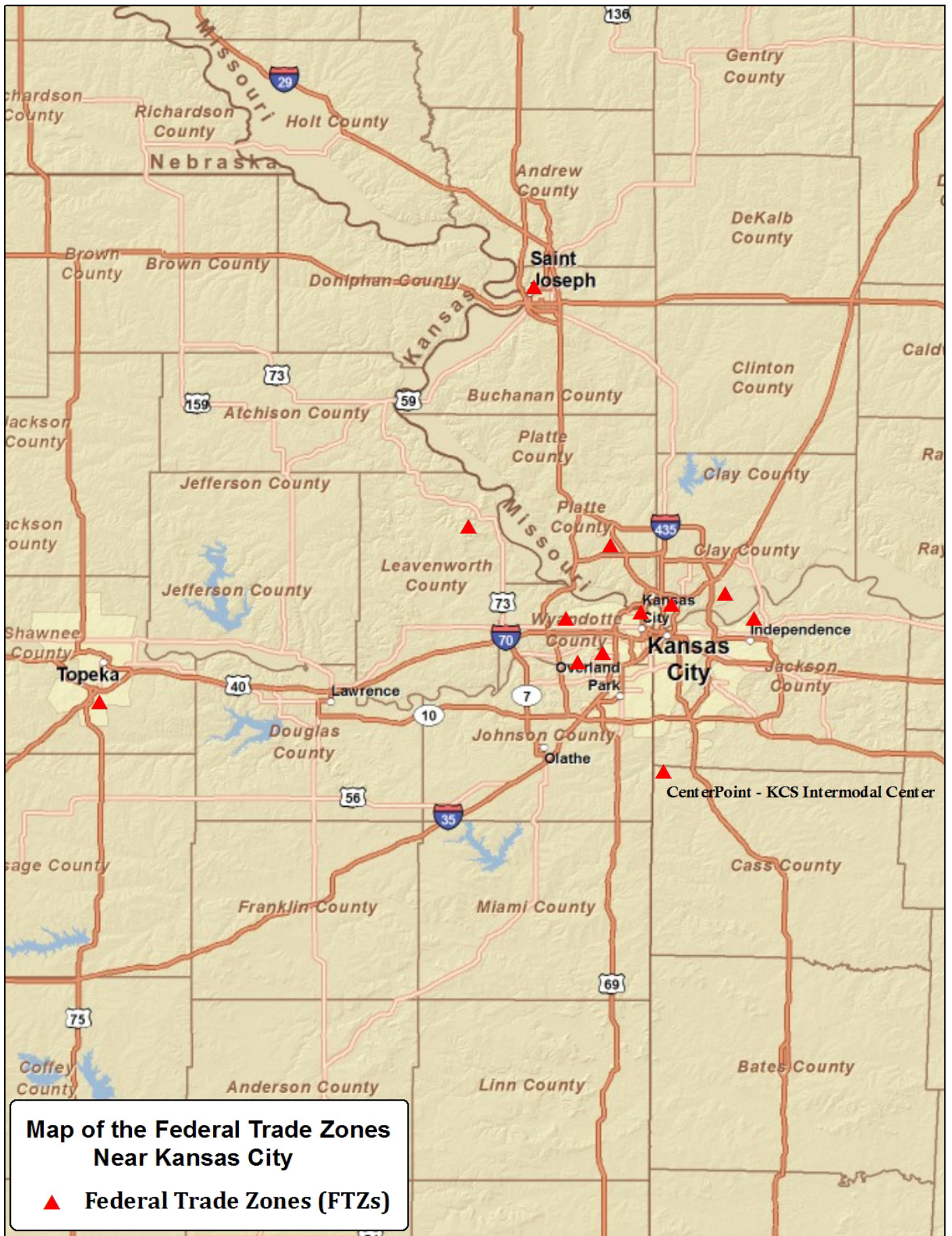
<sup>465</sup> SmartPort completes TDE Phase I design, development and test shipments, Kansas City SmartPort E-News (May 2008), [http://kcsmartport.com/sec\\_news/enews/May2008E-News.htm](http://kcsmartport.com/sec_news/enews/May2008E-News.htm).

<sup>466</sup> TDE Update – European Commission States Interest, Kansas City SmartPort E-News (Oct. 2008), [http://kcsmartport.com/sec\\_news/enews/October2008E-News.htm](http://kcsmartport.com/sec_news/enews/October2008E-News.htm).

<sup>467</sup> See KC SmartPort, <http://kcsmartport.com>.

<sup>468</sup> North American Exports to Mexico Increase, Kansas City SmartPort E-News (July 2008), [http://kcsmartport.com/sec\\_news/enews/July2008E-News.htm](http://kcsmartport.com/sec_news/enews/July2008E-News.htm).

<sup>469</sup> About SmartPort, *supra* note 432.



## Lazaro Cardenas

In March 2005, Kansas City and Michoacan officials signed a cooperative agreement to increase cargo volume between the two cities.<sup>470</sup> This agreement came on the heels of a December 2004 agreement that reduced the through bond charge for bringing goods into the United States through Mexico from \$100,000 per container to \$55,000 for an unlimited number of containers per shipper for Asian goods coming into Lazaro Cardenas and destined for Kansas City.<sup>471</sup> Asian cargo destined for Kansas City via Lazaro Cardenas may undergo prescreening in Southeast Asia to expedite border crossing.<sup>472</sup> Cargo will still undergo other screenings at the border, such as x-ray and gamma ray screenings, to check for anomalies.<sup>473</sup> However, containers can remain on the same rail line from Lazaro Cardenas to Kansas City.<sup>474</sup> This route avoids the congestion of Los Angeles and Long Beach, ports that can cause up to 14-day delays at \$300,000 per week.<sup>475</sup> Even though Lazaro Cardenas is farther from Kansas City than Los Angeles or Long Beach, it could be up to 15 percent less expensive.<sup>476</sup>

In April 2005, Kansas City Southern purchased the controlling share of Transportacion Ferroviaria Mexicana, the railway leaving Lazaro Cardenas. This purchase brought the railway under the shared leadership of Kansas City Southern and Texas Mexicana Railway Company, making it a 1,300 mile “NAFTA Railway.”<sup>477</sup> In anticipation of an overload at the Long Beach port, a Hong Kong-based company, Hutchinson Port Holdings, Ltd., is currently expanding the existing channel at Lazaro Cardenas to accommodate the simultaneous docking of four ultra-large container vessels, and it is increasing the size of its shipyard.<sup>478</sup> Additionally, Michoacan recently donated 180 acres of adjacent land to be developed into an industrial park to facilitate future development of the port. KC SmartPort claims that the Lazaro Cardenas-Kansas City partnership will spur greater trade between Mexico and the United States.<sup>479</sup>

## Foreign-trade Zone

Congress passed the Foreign-Trade Zones Act in 1934.<sup>480</sup> Foreign trade zones (FTZs)

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<sup>470</sup> Kansas City SmartPort, Inc., *Two Worlds...One Route*, at 4 [hereinafter KC SmartPort, Inc., *Two Worlds*], available at <http://kcsmartport.com/pdf/SmtPrtOneRoute.pdf>.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* Cargo will undergo monitoring using ITS.

<sup>474</sup> *See id.* The union of three railways creates “The NAFTA Railway,” linking Mexican seaports to the Midwestern United States.

<sup>475</sup> *Seizing the Opportunity . . . Or Not*, (Dec. 15, 2005), <http://www.aims.ca/atlantica.asp?typeID=4&id=1184>.

<sup>476</sup> KC SmartPort, Inc., *Two Worlds*, *supra* note 470. *Cf.* Dorothy Pomerantz and Evan Hessel, *The China-Kansas Express*, *Forbes*, June 16, 1996 (asserting a cost of 30 percent of California dock operations), available at <http://www.forbes.com/global/2006/0619/034.html>.

<sup>477</sup> KC SmartPort, Inc., *Two Worlds*, *supra* note 470.

<sup>478</sup> *Id.* at 3. Lazaro Cardenas is the only port in Mexico that can dock ultra large container vessels of up to 12,500 TEUs (20 feet equivalent units), Market Research on Infrastructure Projects in the Transportation Sector: The Port of Lazaro, <http://www.buyusa.gov/mexico/en/transportation.html>.

<sup>479</sup> KC SmartPort, Inc., *Two Worlds*, *supra* note 470.

<sup>480</sup> Foreign-Trade Zone Resource Center, *A Brief History of the Foreign-Trade Zones Program*, <http://www.foreign-trade-zone.com/history.htm>.

“provide special customs procedures to U.S. plants engaged in international trade-related activities”<sup>481</sup> by exempting goods brought into the zone from customs laws, provided there is “no manipulation or manufacture effecting a change in tariff classification . . . .”<sup>482</sup> U.S. manufacturers operating within FTZs can import materials for a finished product without paying a duty on them if the company exports the finished product to a foreign country.<sup>483</sup> As of 2009, there are 266 FTZs and more than 450 subzones,<sup>484</sup> spanning all 50 states and Puerto Rico.<sup>485</sup>

Any corporation or municipality can apply for FTZ designation. The Foreign-Trade Zones Act authorizes the Secretary of Commerce, though the Foreign Trade Zone Board, to approve applications for designation. Zone and subzone applications require a discussion of environmental impacts;<sup>486</sup> however, there is no evidence to date that the Foreign Trade Zone Board or Department of Commerce has ever conducted formal NEPA analysis in contemplation of any designation. It is likely that FTZ designation triggers NEPA analysis, as the decision to permit is discretionary, and designation likely allows a land use that has significant impacts. While FTZs, by statute, are not exempt from any federal, state, or local laws,<sup>487</sup> neither the Department of Commerce nor the Foreign Trade Zone Board have issued policy or guidelines regarding NEPA compliance. If NEPA is in fact triggered, then so, too—potentially—are the Endangered Species Act and National Historic Preservation Act. A harmed party could seek enforcement of these acts through litigation against the appropriate government agency.

The Kansas City area has both zones and subzones. A FTZ must be “in or adjacent to ports of entry under the jurisdiction of the United States.”<sup>488</sup> A general-purpose zone is adjacent if it is within 60 miles or 90 minutes driving time.<sup>489</sup> A subzone is a “special-purpose zone established as an adjunct to a zone project for a limited purpose”<sup>490</sup> and does not have an adjacency requirement.<sup>491</sup> Kansas City may have a minimum of two FTZs because it borders Kansas and Missouri.<sup>492</sup> The Greater Kansas City Foreign Trade Zone, Inc. (GKCFTZ) operates FTZs 15 and 17.<sup>493</sup> When the GKCFTZ received approval for the Missouri FTZ 15 in March 1973,<sup>494</sup> the GKCFTZ

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<sup>481</sup> MacLeod, *supra* note 453.

<sup>482</sup> 19 U.S.C. § 81c(a). Foreign-trade zones have restrictions on permitted activities.

<sup>483</sup> MacLeod, *supra* note 437.

<sup>484</sup> U.S. Foreign-Trade Zones Board, Growth Zone Projects: 1936-2009, <http://ia.ita.doc.gov/ftzpage/history/zoneprojects.jpg>; U.S. Foreign Trade Zones Board FAQ, How Many Zones Exist Now?, <http://ia.ita.doc.gov/ftzpage/info/zonestats.html>.

<sup>485</sup> U.S. Trade Zones, List of FTZs by State, <http://ia.ita.doc.gov/ftzpage/letters/ftzlist.html>. See Trade and Industry Development: U.S. Foreign-Trade Zones, for a map of current foreign-trade zones, <http://www.tradeandindustrydev.com/ftzones.aspx>.

<sup>486</sup> Application for Zone 15 C.F.R. § 400.24(d)(4)(v); Application for Subzone 15 C.F.R. § 400.25(a)(5). Foreign-trade zones are also referred to as zones, 19 U.S.C. § 81a(i).

<sup>487</sup> Foreign-Trade Zone Resource Center, *The Application Process*, [http://www.foreign-trade-zone.com/pg\\_appprocess.htm](http://www.foreign-trade-zone.com/pg_appprocess.htm).

<sup>488</sup> 19 U.S.C. § 81b(a).

<sup>489</sup> Number and Location of zZones and Subzones, 15 C.F.R. § 400.21(b)(2)(i).

<sup>490</sup> Definitions 15 C.F.R. § 400.2 (1991).

<sup>491</sup> U.S. Foreign-Trade Zones Board, Guidelines for Adjacency Requirement, <http://ia.ita.doc.gov/ftzpage/ftznew/adjacency.html>.

<sup>492</sup> See 19 U.S.C. § 81b(b).

<sup>493</sup> U.S. Foreign-Trade Zones, List of FTZs by State, *supra* note 485.

<sup>494</sup> Foreign-Trade Zone 15— Kansas City, Missouri Area; Application for Reorganization/Expansion, 74 Fed. Reg. 17634, 17634 (Apr. 16, 2009) [hereinafter Foreign-Trade Zone 15], available at <http://regulations.justia.com/view/141040/>.

became the first not-for-profit administrator.<sup>495</sup> A second approval followed in December for FTZ 17.<sup>496</sup> Subsequent expansions have pushed Kansas City-area FTZs to more than 17.6 million square feet,<sup>497</sup> amounting to only 2 percent of the FTZ space designated.<sup>498</sup> Between the two FTZs, Kansas City has 21 sites and seven subzones, totaling 16,749 acres.<sup>499</sup>

## *The Environmental Effects of KC SmartPort*

As of October 2007, KC SmartPort had 20 million square feet of underground warehouse space, nearly 10 percent of the world market.<sup>500</sup> There are 31 industrial parks and six logistics sites.<sup>501</sup> The logistics sites cover 8,000 acres and have easy access to three airports and five railways.<sup>502</sup> KC SmartPort expects that between 2004 and 2015, export truckloads from Mexico to the KC SmartPort hinterland will more than double, going from 169,000 to 357,000 per year.<sup>503</sup> Additional FTZ construction and the expected increase in traffic volume will impact the environment of the Kansas City area in various ways, including a decrease in air and water quality.

### Ozone and Air Quality

In the past, Kansas City has violated ground-level ozone levels and one-hour ozone standards.<sup>504</sup> The 2009 Ozone Report for the Kansas City area found monitor readings exceeding the EPA ozone standard and saw even more when readings were also compared against the

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<sup>495</sup> KC SmartPort Foreign Trade Zones, [http://www.kcsmartport.com/sec\\_providers/section/Providers/ForeignTradeZones/FTZ.htm](http://www.kcsmartport.com/sec_providers/section/Providers/ForeignTradeZones/FTZ.htm).

<sup>496</sup> Foreign-Trade Zone 17— Kansas City, Kansas Area Application for Expansion, 61 Fed. Reg. 40396, 40396 (Aug. 2, 1996) [hereinafter Foreign-Trade Zone 17], available at <http://ia.ita.doc.gov/ftzpage/ft/96/D61-96.html>, approved Oct. 14, 1997. *Contra* U.S. Foreign Trade Zones Board, Foreign-Trade Zones Board Order Cross Reference, <http://ia.ita.doc.gov/ftzpage/1-50.html> (stating establishment of FTZ 17 in May of 1974).

<sup>497</sup> International Trade Council of Greater Kansas City, Kansas City Resources, <http://www.itkc.org/displaycommon.cfm?an=1&subarticlenbr=84>.

<sup>498</sup> Greater Kansas City Trade Zone, Inc., Primer 1, <http://ded.mo.gov/bcs/upload/kcftz.pdf>.

<sup>499</sup> See Foreign-Trade Zone 15, *supra* note 485 (stating FTZ 15 has fourteen zones). See KC SmartPort, Foreign Trade Subzones, [http://www.kcsmartport.com/sec\\_providers/section/Providers/ForeignTradeZones/FTZ\\_subs.htm](http://www.kcsmartport.com/sec_providers/section/Providers/ForeignTradeZones/FTZ_subs.htm), (showing six FTZ 15 subzones and one FTZ 17 subzones). See Foreign-Trade Zone 17, *supra* text accompanying note 496 (showing FTZ 17 has seven zones). See also KC SmartPort, Greater Kansas City Map, [http://www.kcsmartport.com/sec\\_corridors/flash\\_KC/KC\\_maps.htm](http://www.kcsmartport.com/sec_corridors/flash_KC/KC_maps.htm) (map of Kansas City FTZs).

<sup>500</sup> Underground Warehouse Space, Kansas City SmartPort E-News (Oct. 2007), [http://kcsmartport.com/sec\\_news/enews/OctoberE-News.htm](http://kcsmartport.com/sec_news/enews/OctoberE-News.htm).

<sup>501</sup> KC SmartPort Logistics Sites, [http://www.kcsmartport.com/sec\\_providers/list\\_providers.html?var=logistics\\_sites](http://www.kcsmartport.com/sec_providers/list_providers.html?var=logistics_sites).

<sup>502</sup> Kansas City's Trade Corridor Network, *supra* note 450.

<sup>503</sup> TransSystems Corporation, *US – Mexico Freight Flow Analysis*, at 2 (Jan. 2006), available at [http://kcsmartport.com/pdf/US\\_Mexico\\_FreightFlow2006.pdf](http://kcsmartport.com/pdf/US_Mexico_FreightFlow2006.pdf). The hinterland includes North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, and Indiana. *Id.* at 4.

<sup>504</sup> Mid-America Regional Council, *A Clean Air Action Plan For the Kansas City Region*, at 10 (May 2005) [hereinafter MARC, *Clean Air Action Plan*], available at [http://www.marc.org/Environment/airQ/pdf/clean\\_air\\_action\\_plan.pdf](http://www.marc.org/Environment/airQ/pdf/clean_air_action_plan.pdf). The Mid-America Regional Council (“MARC”) predicts that the Kansas City region will approach the EPA standard by 2010 without a reduction in emissions. *Id.* at 9. The model predicts a peak eight-hour reading of 93 ppb in 2010 in an area without an ozone monitor. *Id.* at 34.

2011 standard.<sup>505</sup> If the three-year average for any monitor in the Kansas City region violates the standard, the entire region faces nonattainment status.<sup>506</sup> The Mid-America Regional Council (MARC) is a nonprofit association that “promotes regional cooperation and develops innovative solutions.”<sup>507</sup> MARC encourages the public and businesses to voluntarily decrease ozone-forming emissions through the Clean Air Action Plan (CAAP), but also promotes incentives for those needing additional motivation.<sup>508</sup> CAAP emissions data show that onroad mobile sources were responsible for 37 percent of volatile organic compounds (VOCs) and 24 percent of NO<sub>x</sub> emissions. CAAP predicts a decrease in overall emissions through incorporating emissions-reduction procedures.<sup>509</sup> Measures such as retrofitting diesel engines and replacing defective gas caps would reduce VOCs and NO<sub>x</sub> emissions of onroad mobile sources to 23 percent and 18 percent, respectively.<sup>510</sup> Unfortunately, such retrofitting is voluntary, and with the influx of enormous multi-modal distribution facilities, mobile sources will continue to contribute significantly to air pollution in the Kansas City area.

Kansas City also has a voluntary Climate Protection Plan, with the goal to reduce greenhouse gas emission to 20 to 30 percent of emission levels in 2020 and 80 percent by 2050.<sup>511</sup> However, adopting this plan remains voluntary and it is not legally mandated or binding. Increased trucking to and from Mexico, as well as the increased trucking expected within the United States in and around KC SmartPort, will result in increased emissions. All current local emissions reductions strategies are in fact wholly voluntary, and Kansas City itself continues to exceed the state NAAQS. Notably, the Supreme Court has held that U.S. federal agencies do not have the authority to analyze or mitigate Mexican truck travel in the United States.<sup>512</sup>

## Water Quality and Aquatic Life

The two largest river basins in the Kansas City metropolitan area are Turkey Creek Basin and Blue River Basin. Pollutants in the Missouri portion of Turkey Creek include lead, zinc, cadmium, and bacteria.<sup>513</sup> In 2006, the Blue River Basin—covering half of the Kansas City metropolitan area south of the Missouri River—had serious water-quality issues stemming from

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<sup>505</sup> Mid-America Regional Council, *2009 Ozone Season Report for the Kansas City Region*, at 2 (2009), available at <http://www.marc.org/environment/airQ/pdf/ozonereports/2009O3summaryApr1-July%2026.pdf>. There are six monitors in the Kansas City region and two just outside of it, Mid-America Regional Council, *AirQ FAQ*, at 2 (2009) [hereinafter MARC, *AirQ FAQ*], available at <http://www.marc.org/environment/airQ/pdf/FAQfourpage.pdf>.

<sup>506</sup> MARC, *AirQ FAQ*, *supra* note 505. The Kansas City area had nonattainment status from 1978 through 1992, MARC, *Clean Air Action Plan*, *supra* note 504.

<sup>507</sup> About MARC, <http://www.marc.org/aboutmarc.htm>.

<sup>508</sup> Mid-America Regional Council Environmental Programs: Air Quality, <http://www.marc.org/Environment/airQ/index.asp>; see also MARC, *Clean Air Action Plan*, *supra* note 504 at 58.

<sup>509</sup> MARC, *Clean Air Action Plan*, *supra* note at 504 at 24, 26.

<sup>510</sup> *Id.* at 26, 48, 50.

<sup>511</sup> *Id.* at 7-8. United Nations Development Programme, *Human Development Report 2007/2008: Fighting climate change: Human solidarity in a divided world*, at 17 (2007), available at [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf) (cutting greenhouse gas emissions in developed nations under the Kyoto Protocol).

<sup>512</sup> *Dep't of Transport. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

<sup>513</sup> EPA Region 7, *Public Notice of the Proposed Decision on the Missouri 2004/2006 303(D) List – Summary of Public Comments and EPA Responses*, at 65 (2009) [hereinafter EPA, *Missouri 303(D) List*], available at [http://www.epa.gov/region07/news\\_events/legal/MO\\_303d\\_final\\_decision\\_letter011609.pdf](http://www.epa.gov/region07/news_events/legal/MO_303d_final_decision_letter011609.pdf). See EPA, *EPA's Decision Document on Kansas' 2006/2008 Impaired Waters List*, at 118-122 (2008) [hereinafter EPA, *Kansas Impaired Waters List*], available at [http://www.epa.gov/region07/news\\_events/legal/KS\\_303d\\_decision\\_document\\_121808.pdf](http://www.epa.gov/region07/news_events/legal/KS_303d_decision_document_121808.pdf).

the presence of household chemicals, pesticides, prescription drugs, and bacteria.<sup>514</sup>

Water bodies listed as 303(d) impaired waters in Kansas or Missouri include rivers, creeks, lakes, and wetlands.<sup>515</sup> The EPA also determined that the 303(d) list that Missouri presented omitted 135 water bodies that required inclusion.<sup>516</sup> Exacerbating the problem is the combined storm water and sewer system (CSS).<sup>517</sup> Water in the CSS travels to a wastewater treatment plant for treatment and discharge; however, if water in the CSS exceeds the CSS pipe volume or treatment capacity, a combined sewer overflow results and the system diverts excess untreated water to nearby streams.<sup>518</sup> There are about 220 diversion sites in Kansas City, Missouri that drain to approximately 100 stream outfall points; three-fourths of the diversion sites and stream outfall points are in the Blue River basin.<sup>519</sup>

One study found that the integrity of the aquatic community is inversely proportional to urbanization.<sup>520</sup> The median organic waste compound concentration at CSS sites was twice that of sites with no apparent wastewater sources.<sup>521</sup> During increased streamflow, pesticides and polycyclic aromatic hydrocarbons (PAHs) have higher concentrations. Incomplete combustion of organic substances, such as gasoline or coal, produces PAHs.<sup>522</sup> PAHs from industry or wastewater treatment plants may enter the water supply through effluent.<sup>523</sup> Vehicle exhaust also contains PAHs, which may attach themselves to dust particles and become airborne or adhere to surfaces like asphalt.<sup>524</sup> Precipitation can dislodge PAHs from these surfaces and carry them to the ground, where they eventually reach surface or groundwater.<sup>525</sup> Therefore, it is likely that increased freight transportation in the Kansas City area will contribute to the decline of water quality.

Poor water quality is also having an effect on endangered species. In 1990, the U.S. Fish and Wildlife Service placed the pallid sturgeon on the endangered species list. It is one of the largest and rarest fish species in the Missouri and Mississippi river systems.<sup>526</sup> Contaminants

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<sup>514</sup> U.S. Geological Survey Newsroom, Crossing the Line: Water Quality Shared by Missouri and Kansas, (Sept. 7, 2006), <http://www.usgs.gov/newsroom/article.asp?ID=1549>.

<sup>515</sup> See generally EPA, *Missouri 303(D) List*, *supra* note 513. See generally *Kansas Impaired Waters List*, *supra* note 513.

<sup>516</sup> EPA, EPA Seeks Public Comment on Proposed Changes to List of Impaired Waters for Missouri, (2008) [http://yosemite.epa.gov/opa/advpress.nsf/names/r07\\_2008-9-24\\_epa\\_seeks\\_comments\\_MO\\_impaired\\_waters](http://yosemite.epa.gov/opa/advpress.nsf/names/r07_2008-9-24_epa_seeks_comments_MO_impaired_waters).

<sup>517</sup> D.H. Wilkison et al., *Water Quality in the Blue River Basin, Kansas City Metropolitan Area, Missouri and Kansas, July 1998 to October 2004*, at 2 (2006), available at <http://pubs.usgs.gov/sir/2006/5147/pdf/sir2006-5147.pdf>.

<sup>518</sup> *Id.* During dry weather, sewage travels to a wastewater treatment facility; during wet weather, the treatment facility receives storm-water runoff.

<sup>519</sup> *Id.*

<sup>520</sup> Wilkison et al., *supra* note 517 at 68.

<sup>521</sup> *Id.* at 20.

<sup>522</sup> Agency for Toxic Substances and Disease Registry, Department of Health and Human Services, *Polycyclic Aromatic Hydrocarbons (PAHs)*, at 1 (1996) [hereinafter DHS, *ToxFAQs PAHs*], available at <http://www.atsdr.cdc.gov/tfacts69.pdf>.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*; Wilkison et al., *supra* note 517 at 47.

<sup>525</sup> DHS, *ToxFAQs PAHs*, *supra* note 522; Peter C. Van Metre, Barbar J. Mahler, Edward T. Furlong, *Urban Sprawl Leaves Its PAH Signature*. 34 *Env'tl. Sci. & Tech.* 4064, 4069 (2000), available at <http://tx.usgs.gov/coring/pubs/urban.PAH.pdf>.

<sup>526</sup> EPA Office of Pesticide Programs, *Appendix C: Status and Life History of the Pallid Sturgeon (Scaphirhynchus albus)*, at 1 (2007), available at [http://www.epa.gov/espp/litstatus/effects/appendix\\_c\\_life\\_history\\_sturgeon.pdf](http://www.epa.gov/espp/litstatus/effects/appendix_c_life_history_sturgeon.pdf).



found in pallid sturgeons range from mercury and selenium to DDT and PCBs.<sup>527</sup> Limited studies preclude drawing conclusions of the effects of these pollutants on the pallid sturgeon,<sup>528</sup> but in white sturgeons, DDT, PCBs, and mercury cause gonadal abnormalities.<sup>529</sup> As Kansas City attracts more industry and builds more foreign-trade zone space, an increase in paved surfaces will boost the amount of contaminated storm-water runoff.

## *Commission for Environmental Cooperation*

The North American Commission for Environmental Cooperation (CEC) is a joint effort of the United States, Canada, and Mexico to protect and facilitate needs of North America under the North American Agreement on Environmental Cooperation (NAAEC).<sup>530</sup> The CEC complements the environmental provisions of NAAEC by concentrating on the prevention of environmental and trade conflicts, focusing on regional environmental matters, and advancing the enforcement of environmental law.<sup>531</sup> Outside of Europe, the CEC “is the only complaint-based monitoring procedure in international environmental law that allows private parties to seek review of state actions.”<sup>532</sup>

A tripartite structure governs the CEC: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The environmental ministers of Mexico, Canada, and the United States form the Council, the governing body of the CEC.<sup>533</sup> The staff of the Secretariat is from all three countries and is responsible for assisting the Council,<sup>534</sup> processing citizen enforcement submissions, implementing initiatives, and conducting research.<sup>535</sup> Five individuals appointed from each country comprise the JPAC.<sup>536</sup> Members of the JPAC act independently to fulfill their advisory roles to the Council and the Secretariat.<sup>537</sup> The JPAC aims to “ensure active public

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<sup>527</sup> Pallid Sturgeon Recovery Coordinator, U.S. Fish and Wildlife Service, *Pallid Sturgeon (Scaphirhynchus albus): 5 Year Summary and Evaluation*, at 52 (2007), available at [http://ecos.fws.gov/docs/five\\_year\\_review/doc1059.pdf](http://ecos.fws.gov/docs/five_year_review/doc1059.pdf).

<sup>528</sup> *Id.*

<sup>529</sup> Grant W. Feist et al., *Evidence of Detrimental Effects of Environmental Contaminants on Growth and Reproductive Physiology of White Sturgeon in Impounded Areas of the Columbia River*, 113 *Envtl. Health Perspectives* 1675, 1680 (Dec. 2005), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1314904&blobtype=pdf>. Research shows that contaminants may affect the shovelnose sturgeon as well, Brian T. Koch, James E. Garvey, Jing You, and Michael J. Lydy, *Elevated Organochlorines in the Brain-hypothalamic-pituitary Complex of Intersexual Shovelnose Sturgeon*, 25 *Envtl. Toxicology and Chemistry*, 1689 (July 2006).

<sup>530</sup> Commission for Environmental Cooperation, *Who We Are*, [http://www.cec.org/who\\_we\\_are/index.cfm?varlan=english](http://www.cec.org/who_we_are/index.cfm?varlan=english). See generally *North American Agreement on Environmental Cooperation*, [http://www.naaec.gc.ca/eng/index\\_e.htm](http://www.naaec.gc.ca/eng/index_e.htm).

<sup>531</sup> *Id.*

<sup>532</sup> John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *Ecology L.Q.* 1, 45 (2001).

<sup>533</sup> Commission for Environmental Cooperation: About Us: Council, [http://www.cec.org/who\\_we\\_are/council/index.cfm?varlan=english](http://www.cec.org/who_we_are/council/index.cfm?varlan=english).

<sup>534</sup> See Commission for Environmental Cooperation, Professional Staff Directory, [http://www.cec.org/who\\_we\\_are/secretariat/staff/index.cfm?varlan=english](http://www.cec.org/who_we_are/secretariat/staff/index.cfm?varlan=english).

<sup>535</sup> Commission for Environmental Cooperation, About Us: Secretariat, [http://www.cec.org/who\\_we\\_are/secretariat/index.cfm?varlan=english](http://www.cec.org/who_we_are/secretariat/index.cfm?varlan=english).

<sup>536</sup> Commission for Environmental Cooperation, About Us: Joint Public Advisory Committee, [http://www.cec.org/who\\_we\\_are/jpac/index.cfm?varlan=english](http://www.cec.org/who_we_are/jpac/index.cfm?varlan=english).

<sup>537</sup> Commission for Environmental Cooperation, About Us: Joint Public Advisory Committee Vision Statement, [http://www.cec.org/who\\_we\\_are/jpac/vision/index.cfm?varlan=english](http://www.cec.org/who_we_are/jpac/vision/index.cfm?varlan=english).

participation and transparency in the actions of the Commission.”<sup>538</sup>

### **Citizen Submissions on Enforcement Matters**

Under Articles 14 and 15 of the NAAEC, a citizen or a nongovernmental agency in the territory of any Party to the NAAEC may make submissions to the CEC Secretariat “asserting that a Party is failing to effectively enforce its environmental law . . . .”<sup>539</sup> The NAAEC limits submissions to those involving failure of effective enforcement of environmental laws.<sup>540</sup>

The CEC defines environmental law as “any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health . . . .”<sup>541</sup> Examples of CEC-approved submissions include determinations under the Clean Air Act, the Clean Water Act, Endangered Species Act, and NEPA.<sup>542</sup> However, not all legal instruments qualify as environmental law, such as the Great Lakes Water Quality Agreement or the Transboundary Movement of Hazardous Waste.<sup>543</sup> Also, no submissions to date have raised an issue under laws “directly related to worker safety or health” up through 2000.<sup>544</sup>

Allegations usually fall into one of two categories: a situation in which a regulated party is violating environmental requirements or one in which the government is not effectively enforcing the requirements.<sup>545</sup> An accusation of the latter type must be based on ineffective enforcement of the standard, not on the failure to set an effective standard.<sup>546</sup>

There are also two temporal issues to consider. First, the CEC requires the citizen petition as soon as a citizen becomes aware of the government failing to enforce the environmental law.<sup>547</sup> Second, the CEC will not entertain submissions alleging violations that occurred prior to the signing of the NAAEC unless they are ongoing violations.<sup>548</sup>

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<sup>538</sup> *Id.*

<sup>539</sup> North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 14-15, Jan. 1, 1994, 32 I.L.M.1480 [hereinafter NAAEC].

<sup>540</sup> David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 Geo. Int’l Env’tl. L. Rev. 545, 551 (2000). “Party” refers to any of the three countries of the NAAEC.

<sup>541</sup> NAAEC, *supra* note 539 at art. 45(2).

<sup>542</sup> Markell, *supra* note 540 at 552.

<sup>543</sup> *Id.* at 553.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.* See generally NAAEC, *supra* note 543 at art. 45(1) (defining when a Party has not failed to effectively enforce its environmental laws).

<sup>546</sup> Secretariat of the Commission for Environmental Cooperation, *Great Lakes Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, at 5-6 (1998), available at <http://www.cec.org/files/pdf/sem/98-3-DET-e.PDF>; Secretariat for the Commission for Environmental Cooperation, *Great Lakes Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, at 1 (1998) [hereinafter Secretariat, *Great Lakes Article 14(1) and (2) Determination*], available at <http://www.cec.org/files/pdf/sem/ACF1786.pdf>.

<sup>547</sup> Markell, *supra* note 540 at 555.

<sup>548</sup> *Id.*

The submission should include relevant regulations or statutes and the documentation of the acts illustrating the enforcement failure.<sup>549</sup> The Secretariat first evaluates the submission to determine consideration according to the criteria in Article 14(1).<sup>550</sup> Should the submission fail to meet these requirements, the Secretariat will notify the submitter, provide an explanation for the determination, and give the submitter 30 days to resubmit.<sup>551</sup> If the submission meets the criteria, then the Secretariat ascertains whether the submission requires a response from the Party based on guidance from the four factors of Article 14(2).<sup>552</sup> First, the Secretariat assesses whether the submission alleges harm to the individual or corporation making the submission.<sup>553</sup> The harm must be one of two types: (1) environmental, which depends on the resource's nature and significance;<sup>554</sup> or (2) geared toward protecting human life or well-being.<sup>555</sup> Second, the Secretariat determines whether further study is necessary based on whether the submission alone, or in conjunction with other submissions, suggests that additional studies would advance the goals of the agreement.<sup>556</sup> Third, the Secretariat ascertains whether the submitter pursued private remedies under Party's laws.<sup>557</sup> This is not a strict exhaustion-of-remedies requirement; rather, it asks whether other remedies were pursued.<sup>558</sup> The purpose of this requirement is to allow the Secretariat to consider whether the petition will interfere with or duplicate past or current litigation,<sup>559</sup> as well as to evaluate the reasonableness of the pursuit of those remedies.<sup>560</sup> Lastly, the Secretariat takes into consideration whether the submission depends entirely on CEC mass media reports.<sup>561</sup> The Secretariat evaluates both these kinds of submissions for the inclusion of relevant information from reasonably available sources.<sup>562</sup> The Secretariat has discretion as to how to weigh each of the four factors.<sup>563</sup>

After considering the second set of criteria, the Secretariat has two choices: dismiss

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<sup>549</sup> Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at 5(2) (2001) [hereinafter CEC, *Revised Submission Guidelines*], available at [http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts_en.pdf). In 2001, the Council adopted *Revised Submission Guidelines* as the revised guidelines for submissions under Articles 14 and 15, Commission for Environmental Cooperation, *Council Resolution 01-06* (2001) [hereinafter *Council Resolution 01-06*], available at [http://www.cec.org/files/PDF/ABOUTUS/Res-06r4\\_EN.pdf](http://www.cec.org/files/PDF/ABOUTUS/Res-06r4_EN.pdf).

<sup>550</sup> NAAEC, *supra* note 539 at art. 14(1). The criteria are that it must (1) be written in a language designated by the Party, (2) identify the Submitter, (3) provide sufficient information to the Secretariat for review, (4) aim at law enforcement, not industry harassment, (5) involve prior communication to Party authorities, and Party's response, if any, and (6) involve the Submitter residing or established in the territory of the Party.

<sup>551</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 6(2).

<sup>552</sup> *Id.* at 15.

<sup>553</sup> NAAEC, *supra* note 539 art. 14(2)(a).

<sup>554</sup> Markell, *supra* note 540 at 5. See generally Commission for Environmental Cooperation – Secretariat, *Recommendation of the Secretariat to the Council for the development of a Factual Record: Cozumel – Notification to Council*, at 5 (1996), available at <http://www.cec.org/files/pdf/sem/96-1-ADV-E.pdf>.

<sup>555</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 7.4(a).

<sup>556</sup> NAAEC, *supra* note 539 at art. 14(2)(b).

<sup>557</sup> *Id.* at art. 14(2)(c).

<sup>558</sup> Knox, *supra* note 532 at 63.

<sup>559</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 7.5(a).

<sup>560</sup> *Id.* at 7.5(b). The Council acknowledges that there may be barriers to the pursuit of these remedies in some situations.

<sup>561</sup> NAAEC, *supra* note 539 at art. 14(2)(d).

<sup>562</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 7.6

<sup>563</sup> Secretariat, *Great Lakes Article 14(1) & (2) Determination*, *supra* note 546 at 9.

the submission and provide reasoning for the dismissal, or inform the Council and send the submission and supporting information to the Party and request a response.<sup>564</sup> The Party normally has 30 days to respond.<sup>565</sup> After receiving the response, the Secretariat may decide that a factual record is not appropriate and dismiss the submission.<sup>566</sup> Otherwise, the Secretariat proceeds under Article 15 and presents the reasoning to the Council, which must approve the preparation of a factual record with a two-thirds vote.<sup>567</sup> Within five days of the Secretariat notifying the Council, the notification and the reasoning require placement in the registry per Article 15 and in the public file per Article 16.<sup>568</sup> The Council must conclude the process within two years of the receipt of the Secretariat's submission.<sup>569</sup> Generally, factual records are publically available by a two-thirds Council vote,<sup>570</sup> but some information may be kept confidential.<sup>571</sup>

The development of a factual report does not directly lead to legal remedies,<sup>572</sup> but it may offer transparency to environmental regulatory policies.<sup>573</sup> The factual record can function as a precursor to the heightened scrutiny of a Part V process.<sup>574</sup>

### **Part V Processes: Consultation and Resolution of Disputes**

The initiation of Consultation and Dispute Resolution is available only to NAAEC Parties. However, it is possible for non-NAAEC Parties—for example, citizens or nongovernmental organizations—to become involved in the process.

Under Part V of the agreement, a Party may consult with a Party regarding its failure to enforce an environmental law.<sup>575</sup> If there is no resolution within 60 days, any consulting Party may request a special session of Council.<sup>576</sup> If the matter is not resolved before the Council within 60 days, the request of any consulting Party and a two-thirds vote of the Council can convene an arbitral council.<sup>577</sup> At this point, a third party that has a substantial interest may join as a complaining party.<sup>578</sup> The third party may attend hearings, make written and oral submissions

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<sup>564</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 8-9.

<sup>565</sup> NAAEC, *supra* note 539 at art. 14(3).

<sup>566</sup> *Id.*

<sup>567</sup> *Id.* See CEC, *Revised Submission Guidelines*, *supra* note 549 at 12.1, for the type of information included in factual records.

<sup>568</sup> *Council Resolution 01-06*, *supra* note 549. The registry is available to nongovernmental organizations or people, who may access summary information of records and follow their status during the submission process, *Revised Submission Guidelines*, *supra* note 5 at 15.1.

<sup>569</sup> *Council Resolution 01-06*, *supra* note 549.

<sup>570</sup> NAAEC, *supra* note 539 at art. 15(7).

<sup>571</sup> CEC, *Revised Submission Guidelines*, *supra* note 549 at 17. See Article 11(8) for determining confidentiality, NAAEC, *supra* note 539 at art. 11(8).

<sup>572</sup> Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. Colo. L. Rev. 443, 478 (2005); Markell, *supra* note 540 at 571.

<sup>573</sup> *Id.* at 456.

<sup>574</sup> *Id.* at 468. Factual records do not draw legal conclusions.

<sup>575</sup> NAAEC, *supra* note 5 at art. 22(1).

<sup>576</sup> *Id.* at art. 23(1).

<sup>577</sup> *Id.* at art. 24(1). See generally *id.* at art. 25, 26, 27 (discussing the determination of panelists); see generally *id.* at art. 28 (discussing panel procedure).

<sup>578</sup> *Id.* at art. 24(2). A third Party need not be a NACEC member. *Id.* at art. 24(2).

to the panel, and receive written submissions from the Parties.<sup>579</sup> The panel presents an initial report within 180 days of selecting the last panelist,<sup>580</sup> and disputing parties may submit written comments within 30 days.<sup>581</sup> The panel presents a final report within 60 days of the presentation of the initial report, unless otherwise agreed to by the disputing Parties,<sup>582</sup> and the publishing of the report shall occur within five days of its transmittal to the Council.<sup>583</sup> If the Party complained against does not fully implant the panel's action plan, the panel may impose a monetary enforcement assessment.<sup>584</sup>

## *KC SmartPort and the CEC*

Given the multitude of impacts the designation and expansion of FTZs in the Kansas City area are having on the environment, it is likely there are one or more potential challenges lurking. If the Department of Commerce has not conducted NEPA analysis in contemplation of designating or expanding FTZs, it is possible it is in violation of NEPA, and possibly other attendant federal laws. Harmed individuals could bring a challenge against the Department of Commerce for failure to comply with NEPA in designating or expanding FTZs in their area. Should a NEPA or other environmental claim fail in U.S. federal court, a potential plaintiff could then petition the CEC to review the matter. It is not essential that the petitioner have lost or won in U.S. federal court, but the CEC favors petitioners that have attempted to exhaust other remedies. The CEC process alone has the potential to bring transparency to an otherwise opaque process. While the CEC cannot enforce U.S. environmental law, it can investigate the government's failure to enforce it and make public the government's violations of U.S. environmental laws.

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<sup>579</sup> *Id.* at art. 29.

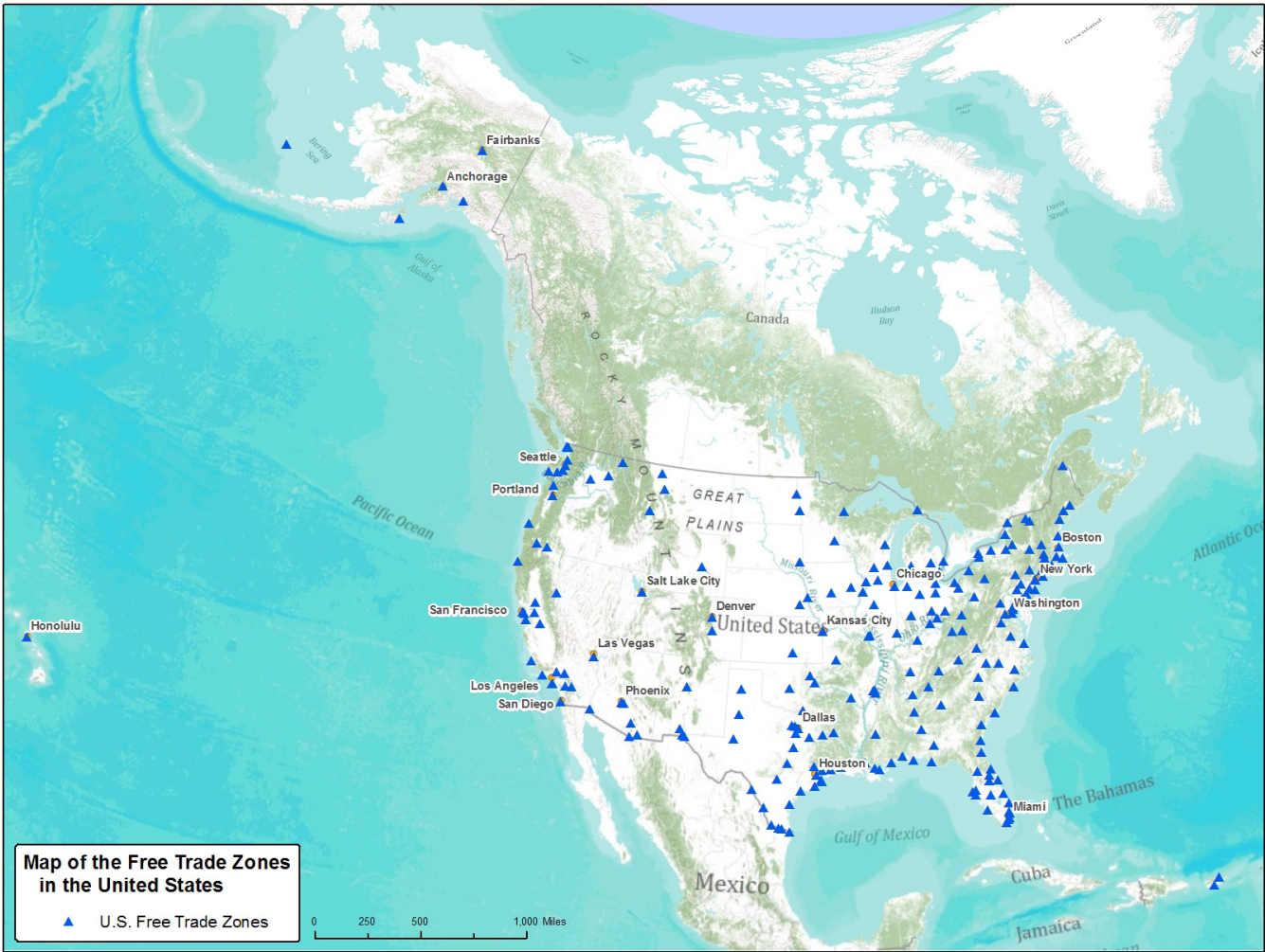
<sup>580</sup> *Id.* at art. 31(2). Panelists may seek external information or technical advice, provided that disputing Parties agree. *Id.* at art. 30.

<sup>581</sup> *Id.* at art. 31(3).

<sup>582</sup> *Id.* at art. 32(1).

<sup>583</sup> *Id.* at art. 32(3).

<sup>584</sup> *Id.* at art. 34(5). See *id.* at Annex 34 for information regarding monetary enforcement assessments.



## Chapter 9: Conclusions and Recommendations

There is a misconception that the Security and Prosperity Partnership has mandated the construction of a single “NAFTA Super-Corridor” across the United States;<sup>585</sup> however, the truth may be far more nefarious. This guide indicates that the SPP, its Transportation Working Group, and its corporate supporters may be in the process of promoting a series of distinct but interrelated highway projects. And if completed, these projects’ results would be the construction of a combined network of new and expanded highways, absent any analysis of their collective and cumulative effects, spanning from Canada through the United States to Mexico.

Aside from the knowledge that the SPP is endorsing increased freight mobility, it is unclear which, if any, specific transportation projects the SPP is promoting. Therefore, the analysis in this guide is limited to a selection of projects that have been, in one form or another, associated with furthering the goals of the SPP or NAFTA.<sup>586</sup>

If fully constructed, these NAFTA/SPP corridors may impact up to 340,000 acres of wetlands and water bodies, vast swaths of threatened and endangered species’ critical habitat, many thousands of acres of nonfederal land, and the already-impaired air quality standards of several localities. Additionally, the approval of FTZ absent any environmental review has already had unmeasured effects on thousands of acres of land.

This guide indicates that the transportation networks have disparate local promoters but common national advocates and financiers. It also shows that because most of these projects go through federal permitting processes, there are opportunities, if not mandates, for more cumulative and inclusive environmental analysis.

This guide identifies and maps the NAFTA corridors, showing the corridors’ impacts to a variety of critical environmental features, including probable impacts to endangered species and designated critical habitat, air attainment and non-attainment areas, waterways and wetlands, farmlands, private and public lands, and national historic sites, public parks, recreation areas, and wildlife and waterfowl refuges.

It analyzes key environmental laws and applies them to the projects, corridors, and the larger SPP transportation framework, and it provides advocates with information about the SPP and its likely impacts to the American landscape, as well as tools to ensure that SPP-related construction does not harm the environment.

Through the production of the guide, it was discovered that there are significant limitations to understanding the NAFTA corridors’ impact on the environment. There are basic information gaps in data availability on existing impacts, and there is no clearinghouse of

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<sup>585</sup> James Langton, Texans Fear U.S. Sovereignty Will Disappear Down Superhighway, Telegraph.co.uk, Mar. 4, 2007, <http://www.telegraph.co.uk/news/uknews/1544550/Texans-fear-US-sovereignty-will-disappear-down-superhighway.html>.

<sup>586</sup> Other “trade corridors” include the Inner-Port at Roanoke, Virginia, the La Entrada al Pacifico Corridor, the Canadian Intelligent Super Corridor, the North American Super Corridor, the Prairie-to-Ports Gateway & Inland Port, the River of Trade Corridor, and the remaining highways from the Corridors of the Future Program.

information on the existing NAFTA corridors.<sup>587</sup> Future studies could look at how other factors associated with the NAFTA corridors affect the environment, including increased oil and gas demands, installation of transmission lines, spills from auto and rail accidents, effects on air travel, intelligent transportation system infrastructure, increased auto manufacturing and disposal, effects of noise pollution, an increase in rock salt and roadside pesticide application, and an increase in hazardous material transportation.

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<sup>587</sup> Sierra Club et al., *NAFTA Transportation Corridors*, at 31-32 (2000), available at [http://www.ccc.org/programs\\_projects/trade\\_enviro\\_n\\_econ/pdfs/sierra.pdf](http://www.ccc.org/programs_projects/trade_enviro_n_econ/pdfs/sierra.pdf).



