



May 9, 2024

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building Ground Floor
Room W12-140
Washington, DC 20590.

Submitted via www.regulations.gov (Docket Number FHWA-2024-0019)

Re: Notice of Proposed MOU

Dear FHWA and ADOT:

The Coalition for Sonoran Desert Protection, Center for Biological Diversity, Friends of Ironwood Forest, and Tucson Audubon Society submit the following comments regarding the proposed 2024 MOU between FHWA and ADOT. In particular, we believe that the MOU, which would transfer federal environmental review responsibilities for highway projects to the state of Arizona, is an action subject to the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”). In addition, given that FHWA oversaw the Tier 1 review for the I-11 project, and will oversee the “I-11, I-10 to US 93 Tier 2 EIS in Maricopa County,” we believe it is arbitrary, and contrary to the regulations, for ADOT to oversee the other Tier 2 aspects of the I-11 Project and therefore ask that the entirety of the I-11 Project remain with FHWA.

A. NEPA Review

The intent of NEPA is to ensure that federal agencies consider the environmental impacts of their actions in the decision-making process and to provide for informed decision-making and “foster excellent action.”¹ “Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.”² NEPA applies to all “major federal action,”³ which includes authorizations and adoption of formal plans or programs.

¹ 40 C.F.R. § 1500.1

² 40 C.F.R. § 1501.2

³ See 42 U.S.C. § 4336e(10)

Here, because the proposed MOU is discretionary⁴ and “major federal action,” NEPA review is required before the MOU can be finalized. The MOU may significantly impact the quality of the environment because it authorizes Arizona to act in the shoes of FHWA for purposes of highway project environmental review. The State’s ability to review and engage in oversight of highway project compliance with federal environmental law may be weaker, or at least not the same as, federal oversight. For example, this is evident from the three audits⁵ showing “noncompliance observations” with respect to the State’s actions under the 2019 MOU.

B. ESA Review

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation[,]” and “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”⁶ Section 7(a)(2) of the ESA mandates that all federal agencies, through consultation with either the Fish and Wildlife Service or the National Marine Fisheries Service, “insure 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 destruction or adverse modification of [critical] habitat of such species.”⁷

Under the ESA’s implementing regulations, an “action agency”—here, the FHWA—is required to “review its [contemplated] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.”⁸ The proposed 2024 MOU, under which Arizona would assume FHWA’s role with respect to highway project review, is agency action under the ESA.⁹ FHWA is therefore required to engage in ESA consultation with respect to the 2024 MOU, and that is especially true in light of the fact that ongoing highway projects in Arizona, such as the I-11 Project, are already known to affect many ESA-listed species. Because the 2024 MOU “may affect” ESA-listed species or critical habitat, FHWA must consult with the FWS pursuant to section 7 of the ESA to ensure that the action “is not likely to jeopardize the continued existence of any endangered or threatened species.”¹⁰

C. The I-11 Project Oversight

Thus far, oversight of the I-11 Project has been conducted by FHWA.¹¹ That makes sense because “[p]rojects adjacent to or that cross international boundaries” are “ineligible for

⁴ See, e.g., 23 U.S.C. § 327 (“the Secretary may assign, and the State may assume, the responsibilities of the Secretary with respect to one or more highway projects within the State”; “The Secretary may approve the application of a State under this section”)

⁵ See attachments 7, 8, 9 to the “Arizona Department of Transportation - Arizona 327 Memorandum of Understanding Renewal No. 1.”

⁶ *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978)

⁷ 16 U.S.C. § 1536(a)(2)

⁸ 50 C.F.R. § 402.14(a)

⁹ See, e.g., *Ctr. for Biological Diversity v. Regan*, Civil Action No. 21-119 (RDM), 2024 U.S. Dist. LEXIS 26823, at *8 (D.D.C. Feb. 15, 2024) (“The agency action under review would be the EPA’s approval of Florida’s assumption application”)

¹⁰ See *id.* (“FWS would issue a ‘programmatic’ BiOp”)

¹¹ See also 2019 MOU (stating that the MOU “does not include” the “Interstate 11 (I-11) Corridor Tier 1 EIS, Nogales to Wickenburg”)

assignment and State assumption.”¹² Yet now the proposed 2024 MOU states that “FHWA will be the lead federal agency for the I-11, I-10 to US 93 Tier 2 EIS in Maricopa County,” but other aspects of Tier 2 would fall to Arizona oversight. No explanation is provided in any of the documents accompanying the proposed 2024 MOU as to why such split oversight will occur or how such a split complies with the regulations. We believe that the regulations, as well as the fact that FHWA conducted the Tier 1 oversight (and intends to conduct part of the Tier 2 oversight), means that FHWA must oversee the entirety of the Tier 2 analysis.

Thank you for addressing these comments and please keep us on the list of interested public for all notices associated with this action.

Sincerely,

Justin Augustine
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On behalf of Coalition for Sonoran Desert Protection, Center for Biological Diversity, Friends of Ironwood Forest, and Tucson Audubon Society.

¹² 23 C.F.R. § 773.105