



July 24, 2018

Mr. Paul O'Brien
ADOT NEPA Assignment Manager
1611 W. Jackson St.
MD EMO2
Phoenix, AZ, 85007

Dear Mr. O'Brien,

The Phoenix Mountains Preservation Council, Inc. (PMPC) is opposed to the assignment by the Federal Highway Administration (FHWA) for the Arizona Department of Transportation (ADOT) to assume the responsibilities for the National Environmental Policy Act (NEPA) and related laws through participation in the Surface Transportation Project Delivery Program (NEPA Assignment Program). The assignment provides too broad oversight to act on behalf of the FHWA over a multitude of NEPA issues including air quality, wildlife, historic and cultural resources, hazardous materials, parklands, water resources and wetlands, social and economic impacts. The proposed assignment does not provide the necessary checks and balances to ensure the affected U.S. Codes are properly reviewed and applied to ADOT projects.

PMPC is a grassroots organization, who for over 45 years has advocated for the protection and sustainable use of the City of Phoenix Mountain Preserves. In addition, PMPC collaborates with a variety of Arizona groups to ensure our state's open spaces and adjacent development is sensibly planned so that future generations can enjoy, recreate and access a healthy parks and preserves. Our organization has the following concerns with this Memorandum of Understanding (MOU).

Arizona Has Not Had A NEPA-Equivalent State Environmental Review Procedure

In its draft Application dated June 29, 2018, ADOT mentions that the State of Arizona does not have a State Environmental Review Procedure, which is statutorily recognized as a NEPA-equivalent procedure (p.12). Yet later in the application, ADOT claims to have a "long-standing" and "well-developed environmental program and procedures" and states that its staff includes "experienced NEPA practitioners" (p.25). At page 26 of the Application, ADOT refers to a "mature environmental compliance program." ADOT only acquired responsibility for Categorical Exclusions approximately six months ago, in January 2018. Surely these statements do not refer to ADOT's very brief possession of Categorical Exclusion responsibility.

These contradictory statements create uncertainty about exactly how much experience ADOT truly has with the NEPA work over which it hopes to acquire full control. The Application describes ADOT's existing environmental review processes with positive adjectives, but it does not address how technical and managerial expertise may need to be adjusted under full NEPA responsibility acquisition. How will this (seemingly quite large) learning curve be handled both by ADOT and by FHWA? Hopefully it is more robust than a proposed internal self-review process.

Arizona's Public Records Law is NOT Comparable to FOIA

The Application asserts that Arizona's public records law is "comparable" to the requirements of the Freedom of Information Act (FOIA). This claim is untrue, particularly with respect to response timelines. Unlike Arizona's records law, FOIA places strict timelines on submitted requests and provides legal remedies to the requestor if the agency does not respond to their request within certain deadlines. Arizona's public records law at A.R.S. § 39-121.01(E) requires a "prompt" response but never defines what constitutes a prompt response. ADOT's application does not specify whether FOIA or Arizona records law would govern records generated under ADOT's NEPA assumption. This needs to be clarified.

ADOT can bypass certain designated activities within the geographic boundaries of the State

These designated activities can be categorically excluded from preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act. PMPC has been actively involved with providing comments to ADOT for past project Environmental Impact Statements (EIS) and Final Environmental Impact Statements (FEIS). It is through those interactions and ADOT's lack of attention and action to NEPA regulations that worry PMPC, especially in the area of ongoing project mitigation.

ADOT Proposes to Streamline Arizona's Environmental Review Process

The Application (p.3) proposes that the NEPA Assignment Program will streamline Arizona's environmental review process and shorten project delivery timelines. Yet stated elsewhere, ADOT also assures that the assignment program will create minimal changes in environmental review processes and compliance (August 15, 2017 NEPA Assignment PowerPoint presentation). What exactly will these changes and streamlines consist of?

The Arizona Department of Transportation is not free from political influence.

The list of U.S. Codes, The Clean Water Act, Clean Air Act, the National Historic Preservation Act, and the Archeological Resources Protection Act of 1979, are just a few of the laws created to protect a variety of resources for United States citizens. **Under § 773.109(a)(3)(i): Existing organization and procedures** (ADOT. *Arizona Department of Transportation: Draft Application for Assumption of Federal Highway Administration National Environmental Policy Act Responsibilities*. p. 6. June 29, 2018.

<https://azdot.gov/docs/default-source/planning/draft-adot-nepa-assignment-application.pdf?sfvrsn=2>

ADOT is described as an Arizona state agency, "led by the Director, who is appointed by the Governor (see organization chart in Figure 1). The Director leads ADOT in implementing transportation policy mandated by state law." This organization is further described as "[a]n independent seven-member State Transportation Board is the primary policy-making and governing body for ADOT. The State Transportation Board determines project priorities, awards construction contracts, presides over the state highway system, makes local airport grants, and advises the ADOT Director on transportation policy matters. The seven members are appointed by the Governor and represent geographical districts in Arizona."

In the Application, ADOT states that it supports environmental decision making which has "independent of administrative, political, or performance-based pressure" (p. 30). Yet there is little description in the Application of how this is to be accomplished, other than a plan to keep environmental document approval decisions separate from project design decisions. In particular, ADOT proposes to conduct annual self-assessments to determine effectiveness, resolve problems, and gauge overall successes.

How will that self-assessment process be kept free of administrative, political and performance-based pressures? At the very minimum, ADOT's self-assessment should be noticed to and receive input from interested members of the public, Indian tribes, and local NGO's such as PMPC.

Legal Sufficiency Reviews by Outside Counsel

ADOT proposes to conduct legal sufficiency reviews or consultation over final EIS documents using either assigned attorneys from the Arizona Attorney General's Office, or appointed outside counsel (p.28). How does ADOT propose to conduct conflict checks over any outside appointed counsel? Will this be done by the Attorney General's Office?

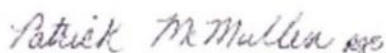
Further, ADOT is applying to assume all FHWA project-level NEPA responsibilities over both state highway system projects, and local public agency projects not part of the state highway system (p. 1). The Application states that local public agency projects will be subject to the same legal consultation and legal sufficiency reviews "when applicable."

Why is this distinction being made? ADOT is applying for NEPA responsibility over both categories of projects, so why wouldn't all of those projects be subject to the same legal consultation and sufficiency reviews? Furthermore, who and what criteria would determine which projects are and are not subject to such reviews? How will affected members of the public be made aware of these determinations and have the ability to challenge these determinations?

It these political appointments by the governor that point to a process that has the potential to be fraught with undue intervention or influence by a Transportation Board who serves at the pleasure of the governor and not in the best interest of Arizona's environment. The conflict between Arizona natural resources and the economy is seen on Governor Ducey's official website (<https://azgovernor.gov/governor/priorities>) which states, "As our economy advances, our government and our laws need to modernize too". Governor Ducey provides no mention on how to balance economic needs with those of existing laws put into place to protect our environment. Based on past lack of engagement in communications between PMPC and Governor Ducey regarding PMPC concerns on ADOT projects, our group does not have faith that the 41 ADOT employees assigned to oversee these complex NEPA assignments will have the necessary autonomy from political influence.

For these reasons PMPC asks that the NEPA Assignment Program not be awarded to ADOT and the process and responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of projects in Arizona stay in place.

Respectfully,



Patrick McMullen, PhD
President
Phoenix Mountains Preservation Council, Inc.