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Via Email

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Re: Application of the National Environmental Policy Act to the Rehabilitation of Castle Creek Bridge in Aspen, Colorado

On behalf of the nonprofit organization Friends of Marolt Park & Open Space, we submit this letter to facilitate well-informed discussion and decision-making by the City of Aspen (“Aspen”), the Colorado Department of Transportation (“CDOT”), and the Federal Highway Administration (“FHWA”) with respect to consideration of alternatives for rehabilitating Castle Creek Bridge on State Highway 82, and the National Environmental Policy Act (“NEPA”) obligations that flow from the options currently under consideration.

As explained below, a Three-Lane Shifted (“TLS”) bridge replacement option—which would utilize the bridge’s existing right-of-way and maintain two traffic lanes during construction—can be categorically excluded from NEPA review or can be evaluated in an Environmental Assessment (“EA”), rather than a more detailed Environmental Impact Statement (“EIS”). Importantly, bridge replacement through the TLS option can be completed in a stand-alone decision-making process, without reopening the 1998 Record of Decision (“ROD”) that addressed traffic and transit needs that existed nearly three decades ago. The NEPA process for replacement of Castle Creek Bridge would therefore be much faster and more affordable than a reevaluation of the 1998 ROD and a subsequent full-scale EIS that would likely be required.¹

¹ Our firm has decades of collective legal experience successfully litigating and advising nonprofit organizations and other public interest clients on federal environmental law issues, including the application of NEPA to federal highway matters. A representative list of our firm’s cases can be accessed here: <https://www.eubankslegal.com/caselist>.

EXECUTIVE SUMMARY

As explained in more technical detail below, a legal analysis applying NEPA and its implementing regulations to the emerging problem currently facing Aspen and its residents—an aging Castle Creek Bridge—demonstrates that the best solution from every relevant standpoint is the TLS option, which should be evaluated under NEPA as a stand-alone action, separate and apart from the 1998 ROD. We hereby briefly summarize the benefits of the TLS option, which are described in substantially more detail in the analysis that follows this executive summary:

- **Benefits During the NEPA Process**

- *No EIS Needed* – The TLS option very likely qualifies for a “categorical exclusion” that would exempt it from NEPA review altogether; at most, a shorter EA (rather than a more rigorous EIS) would be required
- *More Affordable* – The NEPA review process for the TLS option would be more affordable than complying with NEPA for broader actions, such as reopening the 1998 ROD, and would also ensure the prompt commencement of construction that would achieve additional cost savings
- *Less Delay* – The NEPA review process for the TLS option would take less time because a reevaluation and a subsequent EIS would be unnecessary, in contrast to other options such as reopening the 1998 ROD

- **Short-Term Benefits During Construction**

- *Minimal Traffic Disruption* – The TLS option is the only bridge replacement approach that will maintain two lanes of traffic during all phases of construction

- **Long-Term Benefits After Construction**

- *More Transit Versatility* – The TLS option is preferable to two-lane bridge replacement options because it provides more transit lane flexibility (for buses or light rail) decades into the future
- *More Traffic Control Flexibility* – The TLS option also provides future versatility by creating the possibility of reversible lanes to help with general traffic flow
- *Increases Bridge Capacity* – The TLS option increases the bridge’s capacity by 50%, thereby improving transit and/or general traffic flow and enhancing emergency response and resident safety
- *Preserves the 1998 ROD* – The TLS option retains Aspen’s future ability to implement unconstructed aspects of the 1998 ROD, assuming funding, public support, and NEPA compliance then exist; thus, nothing is lost if Aspen focuses on the immediate need to replace the aging bridge in its current alignment

BACKGROUND

Before turning to discussion of NEPA’s application to the current decision-making process, we provide a brief background to frame the relevant context of this letter.

A. NEPA and Its Implementing Regulations

I. NEPA Overview

Congress enacted NEPA in 1969 to “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. NEPA is intended “to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process” and it “establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 40 C.F.R. § 1500.1(a).

The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies.” *Id.* § 1500.3(a). The regulations are “intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies.” *Id.* § 1500.1(b). NEPA requires agencies to prepare a “detailed statement”—i.e., an EIS—for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). An EIS must describe (1) “the environmental impact of the proposed action,” (2) “the adverse environmental effects which cannot be avoided,” and (3) “alternatives to the proposed action.” 42 U.S.C. § 4332(C)(i)-(iii). The purpose of the EIS “is to ensure agencies consider the environmental impacts of their actions in decision making”; “[i]t shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

An EIS must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives.” 40 C.F.R. § 1502.13. The alternatives analysis, described by CEQ as the “heart of the NEPA process,” CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,028 (Mar. 23, 1981), must then “present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16).” 40 C.F.R. § 1502.14. Each alternative should be “considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.” *Id.*

Agencies are directed to consider a broad range of environmental effects, defined as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable,” 40 C.F.R. § 1508.1(g), including “ecological (such as the effects on natural

resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health” impacts and must address them in the EIS “whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.1(g)(4). Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.1(g)(1), (2). Cumulative impacts are those that result from the “incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable future actions,” regardless of whether undertaken by other federal agencies or private third parties. *Id.* § 1508.1(g)(3). “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

When an agency is uncertain as to whether an EIS is required, it may prepare an EA, which must “provide sufficient evidence for determining whether to prepare” an EIS, “[a]id an agency’s compliance with the Act when no [EIS] is necessary,” and “[f]acilitate preparation of an EIS when one is necessary.” 40 C.F.R. § 1508.9. NEPA allows agencies to conduct a less rigorous examination of alternatives in an EA than in an EIS. *Compare* 40 C.F.R. § 1508.9 (requiring “brief discussion [in the EA] of alternatives as required by section 102(2)(E)”), *with* 40 C.F.R. § 1502.14(a), (b) (requiring EISs to “[r]igorously explore . . . all reasonable alternatives” and “[d]evote substantial treatment to each alternative”). If, based on the EA, an agency concludes that its proposal does not entail any significant impacts, it must prepare and publish a Finding of No Significant Impact. *Id.* §§ 1508.9, 1501.3.

In addition to EISs and EAs, CEQ’s regulations authorize a third level of NEPA review called categorical exclusions (“CEs”). These are “categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an [EA] or [EIS],” unless “extraordinary circumstances” exist for a proposed action, such that it threatens significant environmental effects. 40 C.F.R. § 1501.4. An agency must publish a list of CEs through formal rulemaking, in informal agency guidance, and/or on the agency’s website.

To streamline agency reviews, Congress recently amended NEPA to clarify that EISs (excluding citations and appendices) “shall not exceed 150 pages” absent “extraordinary complexity.” 42 U.S.C. § 4336a(e)(1)(A). Even a project of extraordinary complexity shall not result in an EIS that “exceed[s] 300 pages.” *Id.* § 4336a(e)(1)(B). In either case, EIS processes should not exceed two years. *See id.* § 4336a(g)(1)(A). For projects requiring an EA, Congress mandated that EAs (excluding citations and appendices) “shall not exceed 75 pages,” *id.* § 4336a(e)(2), and EA processes should not exceed one year. *Id.* § 4336a(g)(1)(B).

Where an agency has previously prepared and issued an EIS or an EA, NEPA’s regulations require an agency to supplement its prior NEPA review when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(i), (ii).

2. *CEQ's Recent Regulatory Amendments*

CEQ recently finalized a substantial overhaul to aspects of its regulations that implement NEPA. *See* CEQ, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 Fed. Reg. 35,442 (May 1, 2024). Because these regulations go into effect on July 1, 2024, *see id.*, we mention them here because they will likely govern any NEPA process to consider the best approach for rehabilitating Castle Creek Bridge.

Relevant here, CEQ's recent amendments affirm that agencies "[s]hall prepare supplements to either draft or final [EISs] if a major Federal action is incomplete or ongoing, and: (i) The agency makes *substantial changes* to the proposed action that are relevant to environmental concerns; or (ii) There are *substantial new circumstances* or information about the significance of adverse effects that bear on the analysis." 40 C.F.R. § 1502.9(d) (2024) (emphases added).² Agencies may, as a threshold matter, "reevaluate an [EIS] to determine that the agency does need to prepare a" supplemental EIS or EA. *Id.* § 1502.9(e).

With respect to reevaluations, where more than five years has passed since the issuance of the prior EIS or EA, the agency may nonetheless rely upon the prior EIS or EA "so long as the agency reevaluates the analysis in the [prior] environmental document and any underlying assumption to ensure reliance on the analysis remains valid." *Id.* § 1501.11(c) (2024). In its reevaluation document, "[t]he agency shall briefly document its reevaluation and explain why the analysis [in the prior EIS or EA] remains valid considering any new and substantial information or circumstances." *Id.* § 1501.11(c)(2) (2024).

In the event that a reevaluation concludes that supplemental NEPA review is warranted, CEQ's recent amendments also flesh out the concept of "tiering" where an agency previously prepared an EIS or EA. *See id.* § 1501.11 (2024). Specifically, the new regulations state that "[t]iering is appropriate" from "an [EIS] or [EA] on a specific action at an early stage (such as need and site selection) to a subsequent [EIS or EA] at a later stage (such as environmental mitigation)." *Id.* § 1501.11(b)(2)(ii) (2024). Accordingly, tiering "allows subsequent tiered environmental analysis to avoid duplication and focus on issues, effects, or alternatives not fully addressed in a [prior EIS or EA] prepared at an earlier phase or stage," by "eliminat[ing] repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided." *Id.* § 1501.11(b) (2024).

3. *FHWA's NEPA Regulations*

In addition to CEQ's binding regulations, FHWA has adopted its own regulations that supplement its NEPA duties (and the NEPA duties of state agencies standing in place of FHWA for a particular project). *See* 23 C.F.R. Part 771; *see also* 23 C.F.R. § 771.01 (explaining that FHWA's regulations "supplement[]" CEQ's regulations).

² When referring to CEQ's regulatory amendments that take effect on July 1, 2024, we include a parenthetical of "(2024)" to identify any such provision of CEQ's regulations.

FHWA's regulations describe "three classes of actions" under NEPA and provide representative examples of actions that ordinarily warrant an EIS, an EA, or a CE. *See id.* § 771.15. Examples of actions that "normally require an EIS" include: (1) "[a] highway project of four or more lanes on a new location," (2) construction or extension of "a fixed transit facility" that "will not be located primarily within an existing transportation right-of-way," or (3) "[n]ew construction or extension of a separate roadway for buses not located primarily within an existing transportation right-of-way." *Id.* § 771.15(a)(2)-(4). Hence, EISs are ordinarily required—whether in the first instance or when supplemental NEPA review is required—only for major new roadway or facility construction that will occur mostly outside of existing transportation rights-of-way.

In addition, FHWA has determined that certain actions are ordinarily excluded, as a categorical matter, from NEPA review, including projects "that would take place entirely within the existing operational right-of-way." 23 C.F.R. § 771.117(c)(22). Also ordinarily excluded from NEPA review is "[b]ridge rehabilitation, reconstruction, or replacement," *id.* § 771.117(c)(28), if such projects: require only a "minor" acquisition of right-of-way; will not "result in any residential or non-residential displacements"; will not need permits from the U.S. Coast Guard or the U.S. Army Corps of Engineers (unless it is covered by a nationwide or general Corps permit); will not result in an "adverse effect" to historic properties under the National Historic Preservation Act or use a protected resource under section 4(f) of the Federal Highway Act; "would not result in major traffic disruptions"; and will not encroach on a floodplain. *Id.* § 771.117(e).

With respect to EAs, rather than identifying specific examples of actions that ordinarily require preparation of an EA, FHWA's regulations instead contain a "catch-all" provision, stating that "[a]ll actions that are not EISs or CEs are EAs." 23 C.F.R. § 771.115(c).

FHWA's regulations also address reevaluations under NEPA. In such instances, FHWA must "determine, prior to granting any new approval related to an action or amending any previously approved aspect of an action, . . . whether an approved environmental document remains valid." 23 C.F.R. § 771.129. The purpose of a reevaluation is to determine whether supplemental NEPA review is required. "An EIS must be supplemented whenever . . . [c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the [prior] EIS"; or "[n]ew information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." *Id.* 771.130(a). The regulations explain, however, that "a supplemental EIS will not be necessary where . . . [t]he changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS"; or FHWA "decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative." *Id.* 771.130(b).

B. Brief Factual Background

In the 1990s, CDOT conducted a comprehensive NEPA process to analyze alternatives for addressing Aspen's then-existing traffic and transit needs, including the primary community

goal of limiting the number of vehicles in the year 2015 to levels at or below those in 1994. In 1998, after preparing a draft EIS, a supplemental draft EIS, and a final EIS, CDOT issued its ROD. In the ROD, CDOT adopted a Preferred Alternative (“PA”) that included numerous design elements, physical improvements, and transportation management measures such as parking management and enhanced transit service. A central feature adopted in the PA is the construction of a new multi-lane highway that would be built across the Marolt-Thomas property, a new cut-and-cover tunnel at least 400 feet long, and a new bridge across Castle Creek. A prior vote in 1996 approved this configuration subject to a number of conditions.³ Until light rail became a reality, the PA allowed the use of the two-lane light rail right-of-way to be used as bus lanes, subject to an affirmative vote by Aspen residents consistent with the Home Rule Charter.

It is important to note that *every* alternative analyzed by CDOT during the prior NEPA process—including the PA—contemplated the continued utilization of the pre-existing two-lane Castle Creek Bridge (built in 1961). Because this core assumption was built into each alternative that CDOT evaluated, the prior EISs explicitly or implicitly considered the effects of maintaining, repairing, and/or replacing the existing Castle Creek Bridge, rather than decommissioning it. Indeed, Aspen, CDOT, and FHWA entered into a memorandum of understanding on July 27, 1998—which was an appendix to the 1998 ROD—stating that CDOT would convey the pre-existing Castle Creek Bridge to Aspen after construction of the PA’s new highway and light rail transit corridor. For 25 years after such conveyance, CDOT agreed to maintain and make corrective repairs to the existing bridge; once 25 years of post-conveyance time passed, Aspen agreed to maintain the existing bridge and conform to all safety, structural, and maintenance standards so that the bridge remains in full and unrestricted use.

Nearly three decades after CDOT issued the ROD, many aspects of the PA have been fully implemented. Due in part to the aspects of the PA that have been successfully implemented, many of the key traffic and transit concerns that drove the prior NEPA process have now been satisfactorily addressed. For example, traffic levels are currently below those documented in 1994, which was a central objective of the prior EISs and ROD. However, the new highway (including a new cut-and-cover tunnel and a new bridge across Castle Creek) has not yet been constructed, nor has a light rail system been implemented. In the meantime, the existing Castle Creek Bridge—the most critical traffic artery into and out of Aspen—has fallen into serious disrepair and is in need of prompt rehabilitation.⁴

Earlier this year, Jacobs Engineering Group published a feasibility study (“Jacobs Report”), which evaluates options for repairing or replacing Castle Creek Bridge. During field

³ In November 1996, City of Aspen voters passed a public referendum authorizing the City’s transfer of a right-of-way over its Holden Marolt Open Space for: “a two lane parkway and corridor for light rail . . . Only If: [f]inances and design are completed and approved by voters; [c]ut and cover tunnel of at least 400’; [s]ection of 82 between Cemetery Lane and Maroon Creek goes to open space; [o]ther open space acquired to make up net loss”; and “[a]n alignment sensitive to historical and natural resources is defined.”

⁴ As Aspen’s City Manager and other staff have explained at recent City Council work sessions, light rail is no longer considered feasible due to construction and operating costs.

inspections, Jacobs Engineering Group found serious structural defects in various components of Castle Creek Bridge requiring “immediate attention,” including with respect to the bridge’s concrete deck, steel girders, girder stiffeners, tack welds, steel coatings, bearings, and abutments. The Jacobs Report identifies various options for repairing the bridge to extend its lifespan, as well as two-lane and three-lane replacement options that would modernize the bridge and provide a longer-term solution compared to merely repairing the bridge.

Notably, the TLS option—one of the three-lane replacement options evaluated in the Jacobs Report—is the only bridge replacement option that would maintain two lanes of traffic on the bridge during all construction phases, which the Jacobs Report concluded would have a minimal adverse impact on the bridge’s current traffic condition. In addition to minimizing traffic disruptions during construction, the Jacobs Report estimates that the TLS option is more affordable than other three-lane replacement options (by 5-18% in 2028 dollars) and is equivalent in cost to a smaller, two-lane bridge replacement options. The three-lane replacement options—including the TLS option—are preferable to two-lane replacement options because three lanes would provide Aspen with significantly more transit lane (i.e., bus or light rail) flexibility now and into the future as conditions change, as well as the possibility of reversible lanes to help with traffic flow in the future. A three-lane option would also increase bridge capacity by 50%, thereby providing additional transit and/or general traffic throughput and enhancing safety evacuation.

The downsides of the TLS option noted in the Jacobs Report relate to right-of-way acquisition and the potential need for an EIS under NEPA. As to the right-of-way, the Jacobs Report explains that the TLS option would exceed the existing Castle Creek Bridge right-of-way by 4.5 feet; this, however, assumes both: (1) that the TLS option must include a pedestrian sidewalk; and (2) that the sidewalk must be at least 10 feet wide. The Jacobs Report estimates the right-of-way acquisition cost for the TLS option at \$5.4 million (i.e., the highest of any option), but again the overall cost of the TLS option is comparable to less flexible two-lane replacement options and more affordable than other three-lane options, despite their lower right-of-way acquisition costs. At an April 15, 2024 work session, Aspen’s City Council agreed to commission a new report by Jacobs Engineering Group to explore building a new three-lane bridge entirely within the existing right-of-way; this report is due in August 2024.

As to NEPA review, the Jacobs Report assumes for all bridge replacement options—including the TLS option—that a new EIS and ROD would be required. The Jacobs Report estimates that the NEPA process would cost more for a three-lane bridge replacement (\$3 million) than for a two-lane bridge replacement (\$2 million).

Recently, Jacobs Engineering Group prepared a technical memorandum regarding the options available under NEPA for replacing Castle Creek Bridge. In short, the options identified include: (1) implementing the remaining unbuilt aspects of the PA from the 1998 ROD, such as construction of a new highway, cut-and-cover tunnel, and bridge; (2) implementing the remaining aspects of the PA with modifications; or (3) considering a different alternative from the PA adopted in the 1998 ROD. The memorandum notes that, even if the first option is selected to implement the PA from the 1998 ROD, a reevaluation will be required and a new EIS may be warranted due to the amount of time that has passed since the 1998 ROD (and since the

2007 reevaluation). That is especially true here, because the memorandum notes that the community goals from the outdated EISs and ROD may no longer reflect the desires and priorities of Aspen’s residents. The memorandum asserts that changing the original PA decision could increase the risk of litigation. It also estimates that the NEPA process will range between 1-3 years and cost \$1 million to \$4 million, depending on the level of NEPA review required.⁵

DISCUSSION

As explained below, the TLS bridge replacement option is cost-effective, provides flexibility for Aspen’s long-term traffic and transit needs, and entails only minimally disruptive construction effects. Moreover, the NEPA requirements to analyze and adopt this option are neither time-consuming nor expensive compared to the NEPA requirements underlying alternative strategies, including implementation of unbuilt aspects of the PA. In short, the following discussion demonstrates that expanding the existing Castle Creek Bridge is the most prudent course of action for Aspen.

A. The TLS Option Very Likely Qualifies for a CE under NEPA

At the outset, it is important to stress that there is *no obligation* under NEPA to reopen the 1998 ROD merely to replace the aging Castle Creek Bridge. The 1998 ROD adopted a comprehensive PA involving numerous design components, physical improvements, and traffic management measures, many of which have been implemented to successfully resolve the (now outdated) concerns addressed in the prior EISs and ROD. The 1998 ROD *could* be reopened to consider modifications to the PA adopted therein. However, given the substantially smaller scope and narrower purpose of promptly replacing the failing Castle Creek Bridge—a new problem that did not exist at the time of the 1998 ROD—the more sensible step would be to consider rehabilitation of the existing bridge as a stand-alone proposed action under NEPA.

Importantly, this narrower approach would provide Aspen with maximum versatility. By timely replacing Castle Creek Bridge before further safety issues emerge, Aspen leaves the 1998 ROD and PA intact, including the potential future implementation of the PA’s plan for a new highway, cut-and-cover tunnel, bridge, and light rail transit. Assessing the replacement of Castle Creek Bridge as a stand-alone action would not require, as a first step under NEPA, a time-intensive reevaluation (with the costs and time delay to be borne by Aspen); by definition, reevaluations are required only when an agency opts to revisit a prior EIS and ROD. Moreover, because evaluating the replacement of Castle Creek Bridge as a stand-alone action under NEPA would not reopen the 1998 ROD or modify aspects of the PA, this approach would also eliminate any potential litigation risk to which Jacobs Engineering Group alluded if the 1998 ROD is revisited and the PA modified as a result. Accordingly, both to preserve Aspen’s flexibility with respect to future implementation of the PA and to expedite approval and reduce the cost of replacing Castle Creek Bridge, the prudent solution is to evaluate the TLS option as a new action under NEPA, separate and apart from the 1998 ROD and PA.

⁵ These estimates pre-dated CEQ’s recent promulgation of new regulations implementing NEPA. The memorandum from Jacobs Engineering Group does not address regulatory changes that will become effective July 1, 2024, which will streamline NEPA review processes.

Correctly understood as a stand-alone action, replacing the Castle Creek Bridge clearly entails the least burdensome, expensive, and time-consuming NEPA process available. Indeed, it is very likely that bridge replacement—through the TLS option that provides the best short-term outcome for traffic flow during construction and the most long-term flexibility for Aspen’s future traffic and transit needs—would qualify for a CE and thus avoid altogether the need for an EA or an EIS. There are two CEs for which the TLS option could possibly qualify to avoid more detailed NEPA review and obtain expedited construction approval at a lower cost than other NEPA approaches.

First, as explained above, FHWA has determined in its NEPA regulations that, absent extraordinary circumstances, a CE can be applied to projects “that would take place entirely within the existing operational right-of-way.” 23 C.F.R. § 771.117(c)(22). While the Jacobs Report noted that the TLS option would exceed the existing right-of-way by a mere 4.5 feet, the report assumed both that the TLS option must contain a pedestrian sidewalk and that the sidewalk must be at least 10 feet wide. If Aspen were to consider eliminating the sidewalk from the TLS option given the limited use that a sidewalk will receive in this location—or reducing the width of or relocating the sidewalk to a more user-friendly location—it is readily apparent that the TLS option could be constructed “entirely within the existing right-of-way.” *Id.* Indeed, the Jacobs Report notes that several other two-lane and three-lane bridge replacement options—which are only nominally narrower than the TLS option—can be built entirely within the existing right-of-way. Thus, it is only logical to assume that with very minor adjustments to the design of the TLS option, it could be modified to fit entirely within the existing right-of-way and therefore satisfy the eligibility criteria for the CE set forth by FHWA at 23 C.F.R. § 771.117(c)(22). Accordingly, it would be prudent for Aspen to expeditiously work with its engineering consultants to ascertain whether the existing right-of-way can accommodate a modified version of the TLS so that Aspen may avail itself of this CE for NEPA compliance.

Second, in the unlikely event there is no feasible way to modify the TLS option to fit within the existing right-of-way, the TLS option might still qualify for a separate CE set forth in FHWA’s regulations. Pursuant to 23 C.F.R. § 771.117(c)(28), “[b]ridge rehabilitation, reconstruction, or replacement” is ordinarily excluded from NEPA review, so long as certain criteria, set forth in 23 C.F.R. § 771.117(e), are satisfied. Although CDOT and/or FHWA would have to make the ultimate determination as to the satisfaction of those criteria, it appears that the TLS option would qualify for this CE for the reasons that follow:

- Even without design modification, the TLS option would require, at most, acquisition of a “minor” amount of right-of-way comprising only 5% of the total right-of-way needed (i.e., 4.5 feet out of a 90-foot right-of-way for the TLS option). *Id.* § 771.117(e)(1).
- The TLS option should not result in any residential or non-residential displacement. *See id.* § 771.117(e)(1).
- The TLS option should not require any U.S. Coast Guard or U.S. Army Corps of Engineers permits. *See id.* § 771.117(e)(2).

- The TLS option should not adversely affect any historic properties or endangered or threatened species. *See id.* § 771.117(e)(3).
- The TLS option—which maximizes traffic flow during all phases of construction—will not result in any major traffic disruptions or closures. *See id.* § 771.117(e)(4).
- The TLS option will not result in changes in access control. *See id.* § 771.117(e)(5).
- The TLS option—which will actually *remove* one existing pier in Castle Creek and thus restore, enhance, and reduce impacts to the floodplain—will not encroach on a floodplain in a manner more adverse than the existing structure, nor will it affect a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers. *See id.* § 771.117(e)(6).

Thus, based on an objective application of these regulatory criteria to the TLS option, it is likely the TLS option would qualify for a CE, even if it cannot be feasibly modified to fit within the existing right-of-way. Accordingly, if the TLS option is analyzed under NEPA as a stand-alone action intended to resolve the new, emerging problem of a structurally defective Castle Creek Bridge, there are two CEs for which the TLS option is very likely eligible, in order to avoid a more time-intensive and costly EA or EIS process.

B. If the TLS Option Does Not Qualify for a CE, an EA (Rather than an EIS) Is Lawfully Sufficient to Comply with NEPA

Although the TLS option very likely qualifies for a CE, in the unlikely event that CDOT and FHWA determine that a CE is not appropriate for the TLS option, an EA should be more than legally sufficient to comply with CDOT’s and FHWA’s NEPA obligations. This is true whether the TLS option is evaluated under NEPA as a stand-alone proposed action (as is most sensible) or as part of a targeted reopening of the 1998 ROD to consider modifying the PA.

Nothing in CEQ’s or FHWA’s regulations suggests that merely replacing a bridge (even with one additional lane) warrants a protracted EIS process. To the contrary, as explained in the prior section, absent extraordinary circumstances FHWA has determined that bridge replacement, as well as projects occurring within existing rights-of-way, are normally *excluded* from NEPA review. And FHWA’s representative list of projects that ordinarily require an EIS—e.g., construction of new highways of four or more lanes in a new location, construction of a new fixed transit facility, or construction of a new roadway for buses not located in an existing right-of-way, *see* 23 C.F.R. § 771.15(a)(2)-(4)—only underscores that an EIS is an especially improper vehicle for assessing the modest action of replacing an aging bridge that will be located entirely or almost entirely within an existing right-of-way, rather than new construction of a major highway or facility outside of an existing transportation right-of-way.

Common sense supports this approach. Given the substantial overlap in location and design, the effects of the TLS option are comparable to the longstanding impacts of the existing bridge. This is true regardless of whether the streamlined, stand-alone approach or a reopened

1998 ROD approach is adopted. Indeed, every alternative analyzed in the prior EISs and the 1998 ROD explicitly retained (rather than decommissioned) Castle Creek Bridge, meaning that the impacts of the bridge have already been considered and analyzed as part of the baseline underlying the PA and other alternatives in the 1990s. There is no evidence in the Jacobs Report or elsewhere that the TLS option would threaten new, significant resource impacts that the existing bridge does not already pose to those same resources. In fact, in some respects the TLS option would *lessen* the impacts caused by the existing bridge (e.g., removing a pier in Castle Creek that will restore and enhance the creek’s flow). Thus, this is precisely the type of action for which FHWA’s regulations contemplate that no EIS is required—i.e., there are no “[c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the [prior] EIS,” or “[t]he changes to the proposed action . . . result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS.” 23 C.F.R. § 771.130(a), (b).⁶

In the event the decision is made to reopen the 1998 ROD, the propriety of an EA (rather than an EIS) to assess the TLS option is also supported by CEQ’s regulations on tiering under NEPA. Here, there is a prior EIS and ROD that already considered the effects of a much broader action and ultimately adopted the comprehensive PA. The only—very narrow—question presented today if the 1998 ROD is reopened is whether to modestly alter the PA to address an issue that was not ripe for decision in 1998, when the 1961 bridge was only halfway through its 75-year expected lifespan. Clearly, CDOT and FHWA need not reopen the entire 1998 ROD and PA to address the limited question of rehabilitating a bridge nearing the end of its useful life. Rather, the agencies may “tier” to those prior analyses and “focus [the current analysis only] on the actual issues ripe for decision, and exclude from consideration issues already decided” in the prior ROD. 40 C.F.R. § 1501.11(b) (2024). Thus, rather than reopening the entire PA and scrutinizing the validity of the outdated need and intent, CDOT and FHWA could instead prepare an EA (tiered to the prior EISs and ROD) focusing exclusively on the narrow, emerging question of promptly replacing the existing Castle Creek Bridge. Such a straightforward analysis, which does not revisit or consider “issues already decided” in the 1998 ROD, *id.*, would most certainly not require preparation of an EIS.

For all of these reasons, and regardless of the NEPA approach adopted with respect to reopening (or not) the 1998 ROD, *at most* the agencies’ consideration of the TLS option should require an EA to ensure full NEPA compliance. Given that EAs (excluding appendices) should not exceed 75 pages and the NEPA process for an EA shall not exceed one year, *see* 42 U.S.C. § 4336a(e)(2), (g)(1)(B); 40 C.F.R. § 1501.5(g) (2024), even an EA process (instead of a CE) should be minimally burdensome as to the delay and costs incurred by Aspen.

C. Other NEPA Approaches Would Be More Time-Consuming and Expensive for Aspen and its Residents

As explained above, the TLS option almost certainly qualifies for a CE or, at most, an EA under NEPA and its implementing regulations. If, as urged, the TLS option is considered as a

⁶ As a further, practical matter, there appears to be broad public consensus around the need to replace the aging 1961 bridge, thereby reducing the litigation risk of the TLS option.

stand-alone proposed action under NEPA, it would save Aspen substantial time and money by streamlining the NEPA process, as compared to alternative approaches to NEPA compliance.

Once again, it is important to stress that if the TLS option is evaluated under NEPA as a stand-alone action, it would *not* require a threshold reevaluation, which, by definition, only applies to situations in which agencies are revisiting a prior NEPA review. This alone would save Aspen at least one to two years of bureaucratic delay and approximately \$1 million, according to the estimates supplied by Jacobs Engineering Group for any reevaluation that is undertaken in connection with this action.

In addition, evaluating the TLS option as a stand-alone action under NEPA in a CE or an EA would result in significant time and financial savings to Aspen as compared to any other alternative, including the unconstructed aspects of the PA (e.g., a new highway, cut-and-cover tunnel, and bridge). As Jacobs Engineering Group correctly recognized, key community goals from the severely outdated 1990s-era EISs and ROD, as well as important data underlying the 1998 PA such as traffic and congestion levels, seriously call into question the validity of those core assumptions, and the continued relevance and accuracy of the EISs and ROD today. Indeed, a core foundation of the PA—i.e., a light rail component as the mass transit solution—is no longer financially or practically feasible.

As a result, if Aspen chooses to implement the PA through a new highway, tunnel, and bridge as the preferred action to address the failing Castle Creek Bridge (which itself would be a major deviation from the PA that expressly contemplated retaining the existing bridge), it is impossible to see how that could be accomplished without a full-blown EIS subject to a new scoping process that identifies current (rather than 1990s-era) goals and needs, and which incorporates modern traffic data and other critically important new information bearing on the proposed action and its effects. Hence, in contrast to a stand-alone NEPA analysis for the TLS option to replace Castle Creek Bridge, any attempt by Aspen to move forward with the severely outdated PA will be subject to a protracted and expensive EIS process. If such action proceeds without preparing a new EIS, the decision not to prepare an EIS will be extremely vulnerable to litigation given the significant changes that have occurred since the 1998 ROD. *See, e.g., Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729-30 (9th Cir. 1995) (requiring a new EIS where elements of a project's purpose and need had changed, thereby modifying the reasonable range of alternatives that can satisfy the purpose and need).⁷

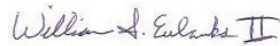
⁷ Friends of Marolt Park & Open Space previously sued in federal court to challenge the 1998 ROD and underlying EISs specifically because of concerns (even at that time) regarding the impacts of a new highway, tunnel, and bridge. If those aspects of the PA proceed in the absence of rigorous NEPA review through a new EIS—failing to recognize the substantial changes over time in the project's need and intent, as well as in the design of the PA itself—the organization would very likely sue again to rectify violations of federal law. In contrast, because the stand-alone consideration of the TLS option in a CE or EA has broad community support to promptly replace the aging Castle Creek Bridge—while maintaining two lanes of traffic during all phases of construction and optimizing versatility with respect to future traffic and transit needs under the PA or otherwise—the risk of litigation is essentially non-existent if that approach is adopted.

In sum, proceeding with the PA adopted in the 1998 ROD will not save time or conserve Aspen's resources. To the contrary, it will require a rigorous EIS process (after a time-intensive reevaluation process) to address the myriad significant changes that have occurred since 1998 that bear on the proposed action and its effects. This would unnecessarily delay replacement of Castle Creek Bridge, cost Aspen millions of additional dollars, and increase the safety risks inherent in allowing an aging bridge to remain in place.

CONCLUSION

Aspen and its residents have a strong interest in ensuring that CDOT and FHWA adopt the most expedited, cost-effective NEPA approach to promptly rehabilitate the deteriorating Castle Creek Bridge. The most sensible choice—as outlined above—is to evaluate the TLS bridge replacement option as a stand-alone NEPA action through a CE (if it qualifies, as it very likely does) or in an EA. This approach not only minimizes cost, delay, and safety risk to Aspen and its residents, but also maximizes versatility by preserving the future possibility of implementing the remaining unbuilt aspects of the PA by not reopening that more comprehensive issue until the immediate needs of Castle Creek Bridge are addressed.

Respectfully submitted,



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