July 13, 2026

Secretary Sean P. Duffy
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Comment Opposing NPRM–Regulation for Federal Financial Assistance (Docket No. OMB-2026-0034)

Dear Secretary Duffy:

The Natural Resources Defense Council ("NRDC"), Sierra Club, Southern Environmental Law Center, and Earthjustice submit this comment in opposition to the Office of Management and Budget's ("the Office" or "OMB") proposed rule, Regulation for Federal Financial Assistance (Docket No. OMB-2026-0034), which would amend the Department of Transportation's awards guidance at 2 CFR Parts 1200 and 1201. As a threshold matter, OMB lacks the statutory authority to issue a government-wide grants regulation that binds other agencies such as the Department of Transportation ("DOT"). Further, the Proposed Rule would disrupt reliance interests for entities receiving federal grants, and it impermissibly inserts administration priorities into consideration for grant issuance and termination.

This comment focuses on the impact the proposed rule will have on entities that receive funding through DOT. The undersigned commenters are national and regional nonprofit organizations working to reduce transportation-related pollution, accelerate electric vehicle adoption and increase access to transportation options, and promote an equitable transition to clean transportation. The Proposed Rule unlawfully limits the implementation of existing Congressionally-mandated funding, including funding for electric vehicle charging and alternative vehicle fueling infrastructure and transit capital grants. It would prevent the buildout of safe and accessible transportation infrastructure, including electric vehicle charging and alternative fueling infrastructure that would also reduce harmful air pollution that impacts the undersigned organizations' members.[1]

I. OMB Lacks the Statutory Authority to Require the Secretary of Transportation to Consider the Factors in the Proposed Rule

OMB does not have the authority to issue the Proposed Rule as a binding regulation. An agency "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022). OMB's statutory role is to "[p]rovide overall direction and leadership to the executive

[1] This comment adopts by reference all arguments in the comment of Environmental Defense Fund, Earthjustice, Southern Environmental Law Center, The Sierra Club, Conservation Law Foundation, Natural Resources Defense Council, and National Wildlife Federation.

branch on financial management matters by establishing financial management policies and requirements." 31 U.S.C. § 503(a)(2). It has not identified the statutory authority for the control it now seeks over program requirements and eligibility, grant criteria, or other substantive legal and policy matters of other federal agencies such as DOT. OMB must identify the specific authority that Congress has conferred upon it that allows OMB to issue a substantive grants regulation that binds other federal agencies.

Relatedly, DOT may not delegate control over its own statutory financial assistance program to OMB. DOT cites to its organic statute, 49 U.S.C. § 322, and general housekeeping statute as authority to outsource rulemaking to OMB.[2] But the cited statutes do not permit DOT to cede authority over its own statutory programs to OMB. If Congress had intended such a result, it would have spoken clearly to allow it.

II. The Proposed Rule Impermissibly Inserts Extra-statutory Factors into Consideration for Federal Awards

Federal financial aid programs contain express authorization and funding conditions set by Congress. The Proposed Rule undermines the limits on the executive branch's discretion over federal financial assistance, which must be awarded based on the factors set out in the statute rather than by the preferences of a particular presidential administration. It impermissibly inserts extraneous factors into federal funding decisions, in direct conflict with statutory language and Congressional purpose in DOT programs.

First, the Proposed Rule includes a pre-issuance review process requiring senior political appointees to determine whether the award "demonstrably advance[s] the President's policy priorities."[3] DOT should remove this provision as inconsistent with the statutory merit criteria established by Congress for various grant programs. Congress sets the conditions for federal awards as part of its spending power and the executive branch cannot condition awards on their own extra-statutory policy priorities.[4]

Second, the Proposed Rule would require agencies to deprive federal funding to awardees who the administration believes would advance disfavored policies on the basis of factors not relevant to transportation projects. This includes "eliminat[ing] the use of disparate-impact liability in all contexts relevant to Federal awards," and a prohibition on the use of award funds for "disparate-impact studies, disparate-impact litigation, or other related activities."[5] The Proposed Rule would also prohibit the use of any federal award to "fund, promote, encourage, subsidize, or facilitate" Diversity, Equity, or Inclusion, or Diversity, Equity, Inclusion, or Accessibility "policies,

[2] 91 Fed. Reg. at 32,274
[3] 91 Fed. Reg. at 32,249
[4] *Cf. City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018)
[5] 91 Fed. Reg. at 32,252

principles, or practices,"[6] "gender ideology," defined to include any position that does not affirm "the biological reality of sex or the sex binary," or the "so-called 'transition' of a child."[7] It also allows for an agency to terminate an award at any point if it "determines that a termination is in the interest of the Federal agency…, including if a Federal award does not effectuate . . . the national interest."[8]

No provision of law authorizes the executive branch to condition award funds in this way. Agency action is arbitrary and capricious if, among other items, "the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Proposed Rule requires agencies to consider factors that Congress did not intend them to consider, thus *mandating* arbitrary and capricious agency action. The examples below illustrate how these provisions of the Proposed Rule are contrary to law as applied to such statutes.

A. Charging and Fueling Infrastructure ("CFI") Program

In the 2021 Infrastructure Investment and Jobs Act ("IIJA") Congress created a grant program for the buildout of an interconnected network of electric vehicle charging and alternative fueling stations throughout the country: the Charging and Fueling Infrastructure ("CFI") Program.[9] The Proposed Rule, if finalized, would unlawfully constrain that program by requiring DOT to make awards based on the extra-statutory factors in OMB's regulation.

The CFI Program was designed to fund the buildout of electric vehicle charging and other alternative fueling projects along major transportation corridors and in communities nationwide. Congress established it under "Subtitle D-Climate Change," of IIJA and appropriated funds to "support changes in the transportation sector that help achieve a reduction in greenhouse gas emissions and improve [] mobility" by "strategically deploy[ing] publicly accessible electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, and natural gas fueling infrastructure."[10]

Congress specified what DOT should consider when awarding CFI Grants. The Proposed Rule would impermissibly insert additional factors into this analysis: whether the award advances administration priorities (which may or may not match the policy that the award program is advancing) or advances disfavored policies and ideas.

Under one part of the CFI Program, potential CFI awardees must submit "an assessment of the estimated emissions that will be reduced" by the grant.[11] When making awards, DOT shall

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[6] 91 Fed. Reg. 32,253
[7] 91 Fed. Reg. 32,253
[8] 91 Fed. Reg. 32,258
[9] Pub. L. No. 117–58, Section 11401; 23 U.S.C. § 151(f) (as codified)
[10] Pub. L. No. 117–58, Section 11401
[11] 23 U.S.C. § 151(f)(4)(B)

consider whether the award would "improve alternative fueling corridor networks" or "meet current or anticipated market demands for charging or fueling infrastructure."[12] Similarly, for a subset of grants comprising half of the CFI program, grants may only be provided for projects that are "expected to reduce greenhouse gas emissions."[13] None of this relates to the factors in OMB's Proposed Rule, which would become binding on DOT. Considering whether the award risks advancing disfavored policies and ideas, such as "gender ideology" and "DEI," has nothing to do with the Congressional *purpose* in creating the CFI Program: to "support changes in the transportation sector that help achieve a reduction in greenhouse gas emissions and improve the mobility of passenger and commercial vehicles that employ electric, hydrogen fuel cell, propane, and natural gas fueling technologies across the United States."[14]

Thus, the Proposed Rule would require the Secretary to consider executive branch priorities such as those listed in the Proposed Rule rather than the statutorily allowable factors set forth in IIJA.[15] The refusal to enter into agreements or obligations pursuant to grant awards or to notice availability of appropriated funds for grant applications due to factors that Congress did not intend for DOT to consider are the hallmarks of arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A); *see also FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (agency action must be "reasonable and reasonably explained").

B. Additional DOT Programs

DOT administers several other discretionary grant programs, with their own statutorily mandated funding factors, including the Better Utilizing Investments to Leverage Development (BUILD) Grant Program; Safe Streets and Roads for All (SS4A) Grant Program; Promoting Resilient Operations for Transformative, Efficient, and Cost-saving Transportation Program (PROTECT); Reconnecting Communities Pilot (RCP) Grant Program; Active Transportation Infrastructure Investment Program (ATIIP); Thriving Communities Program; Capital Investment Grants Program; and the Reduction of Truck Emissions at Port Facilities Competitive Grants Program, among others. These grant programs were each established by Congress for specific purposes—such as providing funding to ensure surface transportation resilience to natural hazards, in the case of PROTECT—and contain detailed statutory requirements. As a whole, these programs (and others) provide critical funding for a cleaner, safer, and more accessible transportation system, and, as with CFI, DOT's faithful administration of those programs in line with Congressional purpose and statutory requirements would be harmed by the Proposed Rule's requirements. A few illustrative examples demonstrate the harms:

<u>Better Utilizing Investments to Leverage Development (BUILD) Grant Program</u>: The BUILD program "provides grants for surface transportation infrastructure projects with significant

[12] *Id.* § 151(f)(5)
[13] *Id.* § 151(f)(8)(D)
[14] *Id.* § 151(a)
[15] 91 Fed. Reg. 32,249

local or regional impact."[16] The statute authorizing BUILD specifically delineates "[p]rimary selection criteria" that DOT "shall evaluate," including the extent to which a project "improves safety; improves environmental sustainability; [and] improves the quality of life of rural areas or urbanized areas," among others.[17] The statute also lays out four "[a]dditional selection criteria," including project readiness, cost, and use of innovative technology,[18] and specifies how much funding can go to rural versus urbanized areas.[19] And these are just a handful of the very particular criteria DOT must consider when making grants under BUILD.[20] In sum, the BUILD program is governed by a specific set of detailed statutory requirements, which is incompatible with the Proposed Rule's overlay of extra-statutory criteria, none of which are related to the program's purpose. It would be arbitrary and capricious for the Secretary to consider executive branch priorities in the Proposed Rule rather than the statutorily mandated factors prescribed by Congress.

Promoting Resilient Operations for Transformative, Efficient, and Cost-saving Transportation (PROTECT) Program**:** Congress established "competitive planning grants" under the PROTECT program "to enable communities to assess vulnerabilities to current and future weather events and natural disasters" and "competitive resilience improvement grants" to protect, among other things, "surface transportation assets by making the assets more resilient to current and future weather events and natural disasters."[21] Congress established a detailed statutory regime to govern grant awards under the PROTECT program, including listing eligible entities;[22] explaining in great detail the allowable purposes of planning grants,[23] and the eligible activities for resilience grants;[24] and delineating grant requirements.[25] The statute lays out numerous other highly specific and detailed eligibility criteria, requirements, and priorities for program grants.[26] In short, the BUILD program is governed by detailed statutory requirements, which are incompatible with the Proposed Rule's overlay of extra-statutory criteria, none of which are related to the program's purpose.

III. The "Termination for Convenience" Provision Impermissibly Disrupts Reliance Interests

[16] DOT, Better Utilizing Investments to Leverage Development (BUILD) Grant Program, https://www.transportation.gov/BUILDgrants
[17] 49 U.S.C. § 6702(d)(3)
[18] *Id.* § 6702(d)(4)
[19] *Id.* § 6702(f)(1)
[20] *See, e.g.*, *id.* §§ 6702(a)(2)-(3) (defining eligible entity and project), 6702(c) (specifying monetary size of grants); 6702(d)(1)-(2) (setting forth application process)
[21] 23 U.S.C. § 176(b)(2)(B)&(C).
[22] *Id.* § 176(d)(2)
[23] *Id.* § 176(d)(3)
[24] *Id.* § 176(d)(4)(A)(ii) (listing over 15 specific categories of eligible activities)
[25] *Id.* § 176(d)(5)
[26] *See generally, id.* § 176

DOT should remove the "termination for convenience" provision to discretionary awards. If adopted, this provision would allow an agency to terminate an award at any point if it "determines that a termination is in the interest of the Federal agency…, including if a Federal award does not effectuate program goals, Federal agency priorities, or the national interest."[27] This inserts uncertainty into the Federal award process, especially for awards that span multiple years and phases such as the build-out of electrical vehicle charging stations and transit infrastructure in federal transportation programs.

This "termination for convenience" provision ignores the reliance interests of federal grantees, who often make substantial investments of time and money on federally funded projects. *See, e.g., Metro. Transp. Auth. v. Duffy*, 784 F. Supp. 3d 624, 669 (S.D.N.Y. 2025). ("[C]apital projects invariably involve substantial investment of time and resources. To build a highway or building, plans must be made, employees must be hired, supplies must be purchased, and monies must be raised."). Under the Proposed Rule, funds could be terminated at any point during the planning, construction, operation, or maintenance process if the agency determines that the award does not effectuate the "national interest." Termination of grants for projects already underway would have economic costs for project sponsors. If a federal grant is canceled after the start of construction, for example, the local agency would be left with an impossible choice: find a way to quickly raise millions of dollars or shut the project down, losing money, jobs, and the future benefits of the completed project.

Where an agency has changed its policy, as it has here, it must demonstrate that it has considered any "serious reliance interests" prior to changing course. *FCC v. Fox Television Studios*, 556 U.S. 502, 515 (2009). DOT must consider these "serious reliance interests" in any Final Rule.

IV. DOT Must Disclose the Use of Artificial Intelligence

DOT must disclose whether and how it uses artificial intelligence ("AI") in this proceeding. When an agency uses computer models to formulate a proposed action, the agency "must explain the assumptions and methodology used in preparing the model." *Owner-Operator Ind. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (cleaned up). This ensures that the "ultimate responsibility for the policy decision remains with the agency rather than the computer." *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

Here, DOT has posted its AI Use Case Strategic Alignment,[28] which lists the use of a "Enterprise AI Public Comment Processing Analyzer" for the purpose of "enabl[ing] faster, more comprehensive assimilation of every stakeholder's input, [and] reduc[ing] delays in regulatory decision-making" by "processing and evaluat[ing] public comments for regulatory and agency

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[27] 91 Fed. Reg. 32,258

[28] USDOT, *Part I-AI Use Case Strategic Alignment* (last updated Oct. 3, 2025), at 12, *available at* https://www.transportation.gov/sites/dot.gov/files/Part_I_-_AI_Use_Case_Alignment_508.pdf.

actions." Therefore, DOT has indicated its intent to use AI in agency decisionmaking. Given this, if it employs AI, it must describe the AI tools employed and explain how the agency has used them.[29]

V. Conclusion

For the foregoing reasons, we respectfully urge OMB and DOT to withdraw the Proposed Rule. If OMB and DOT proceed with issuing a Final Rule, they should remove or substantially narrow the vague, ambiguous, and overly broad provisions discussed above, and retain any remaining provisions as guidance rather than binding requirements. As drafted, the Proposed Rule would undermine the DOT's administration of federal awards by imposing the consideration of politicized requirements that conflict with congressional purpose and statutory text.

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[29] OMB Memorandum M-25-21 requires agencies to publicly disclose their use of AI and to identify whether that use is "high-impact." If high-impact AI is used, agencies must comply with additional safeguards. And Executive Order 13960, which recognizes that public trust in AI depends on transparency and requires agencies to ensure that AI systems—and their inputs and outputs—are documented and traceable. Thus, disclosure of the use of AI is also necessary to comply with the OMB Memorandum and EO 13960.

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