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Environmental Streamlining Provisions in the Transportation Equity Act for the 21st Century: Status of Implementation

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Summary

At the state and local level, many observers have expressed long-standing concerns over delays, duplication of effort, and additional costs frequently associated with the environmental review process for highway projects that must be completed under the National Environmental Policy Act of 1969 (NEPA, P.L. 91-190). To address these concerns, the Transportation Equity Act for the 21st Century (TEA21, P.L. 105-178), enacted in 1998, requires the Federal Highway Administration (FHWA) to streamline the environmental review process for highway projects. However, final streamlining regulations have not been issued to date, and some Members of Congress have expressed concerns over the pace of implementation. Thus far, the FHWA has proposed regulations for a coordinated environmental review process that address some of the provisions of TEA21, signed a National Memorandum of Understanding on streamlining with six other federal agencies, and established a pilot program to gain practical experiences in streamlining before applying it on a national scale. In addition to the FHWA's activities, numerous states have undertaken efforts to streamline the review process. Oversight hearings have been held in the 107th Congress to examine these actions, and congressional oversight of this matter will likely continue as the FHWA proceeds with its streamlining initiatives, and as Congress considers the reauthorization of TEA21. This report will be updated as relevant developments occur.

Introduction

The National Environmental Policy Act of 1969 (NEPA, P.L. 91-190) requires all federal agencies to prepare Environmental Impact Statements (EISs) for major activities that significantly affect the environment. The often substantial amount of time and funding that is needed to prepare such documentation for highway projects has been an ongoing issue at the state and local level for many years. To reduce the approval time for such projects and speed the delivery of federal highway funds to states and local areas, Congress included provisions in Section 1309 of the Transportation Equity Act for the 21st

Century (TEA21, P.L. 105-178), enacted in 1998, which require the Federal Highway Administration (FHWA) to streamline the environmental review process. The FHWA has taken numerous actions to address these requirements. However, final regulations to implement them have not been issued to date. While the law did not specify a deadline by which implementation must occur, some Members of Congress have expressed concerns over the pace at which implementation has proceeded.

This report describes the types of environmental documentation that must be prepared prior to the approval of a highway project, indicates the average amount of time required to complete this documentation, summarizes the environmental streamlining provisions under TEA21, examines what has been done to implement these requirements, and discusses oversight issues for the 107th Congress.

What types of environmental documents must be prepared?

Under NEPA, the FHWA must prepare an EIS for federally funded highway projects that have a significant impact on the environment. This statement must describe the project, characterize the surrounding environment, analyze the environmental effects of all reasonable construction alternatives, and indicate plans for complying with applicable environmental laws and mitigating environmental damage. Other federal agencies, such as the Environmental Protection Agency, Army Corps of Engineers, and U.S. Fish and Wildlife Service, often cooperate in the preparation of EISs for highway projects due to their responsibilities under federal laws, such as the Clean Air Act, Clean Water Act, and Endangered Species Act, to issue permits, licenses, approvals, and other opinions on proposed actions. If it is clearly known that a highway project will not individually or cumulatively have significant environmental impacts, a Categorical Exclusion may be issued which eliminates the requirement for an EIS. However, if it is not clear whether significant impacts would occur, an Environmental Assessment must be prepared. If significant impacts are identified, an EIS will be required. Otherwise, a Finding of No Significant Impact can be issued as a result of the assessment. When all necessary environmental documentation is complete, a Record of Decision may be prepared to approve federal funding and allow final design and construction to proceed.¹

How long does the preparation of an EIS take?

According to the FHWA, less than 5% of all highway projects have a significant enough impact on the environment to require the preparation of an EIS. While this amount represents a small portion of the total projects that receive federal funding each year, such projects are usually large and affect sizeable populations. Consequently, construction delays are often controversial. The preparation of an EIS requires substantial amounts of time and money, which can result in delaying construction for several years, especially if plans for complying with environmental requirements are challenged as inadequate. Numerous factors can contribute to the amount of time that is needed to prepare an EIS, such as the degree to which there is adequate coordination and early participation among the agencies involved, the adequacy of the data to prepare necessary reviews, the technical complexity of the project, and the volume of public comments which must be addressed.

¹ The environmental review process for highway projects is specified at 23 CFR 771.

To provide information on the extent to which the environmental review process has delayed highway projects, the FHWA released a study on May 8, 2001, which examines the time needed to complete EISs.² This study will be used as a baseline to determine the level of progress made by streamlining efforts. The study is based on a sample of 100 highway projects which were approved for federal funding from the 1970's to the 1990's. During this 30 year period, the average time required for total project development was 13.1 years, and 3.6 years, or 28% of this time, was necessary for the preparation of EISs. Examined by decade, the average time to prepare an EIS increased over the years. In the early days of NEPA in the 1970's, the preparation of an EIS for highway projects took 2.2 years on average. The average preparation time increased to 4.4 years in the 1980's, and rose to an average of 5.0 years in the 1990's. The increase in the average time required for the preparation of EISs can primarily be attributed to the rise in the number of environmental laws during this period and the resulting increase in the stringency of environmental requirements. The average review time increased to 5 years and 10 months in 1999, and the FHWA reports that its streamlining efforts have reduced this time by 8 months, to 5 years and 2 months in 2001.³

What are the streamlining requirements under TEA21?

Section 1309 of TEA21 requires the FHWA to streamline the environmental review process for highway projects. This section of the law outlines a process that encourages early coordination among the agencies involved to help minimize potential conflicts which often result in construction delays and higher costs. However, the law's requirement to streamline the review process does not exempt highway projects from meeting environmental requirements under other federal laws, such as the Clean Air Act, Clean Water Act, or Endangered Species Act, nor does TEA21 permit the FHWA to override the authority of another agency to conduct environmental reviews in order to prevent construction delays. In the conference report on TEA21, Congress stated that the goals of Section 1309 are:

.... to establish an integrated review and permitting process that identifies key decision points and potential conflicts as early as possible; integrates the NEPA process as early as possible; encourages full and early participation by all relevant agencies that must review a highway construction project or issue a permit, license, approval or opinion relating to the project; and establishes coordinated time schedules for agencies to act on a project.⁴

To accomplish these goals, Section 1309(a) requires the Secretary of Transportation to develop and implement a "coordinated" environmental review process for each highway project subject to such review under federal law, which ensures whenever

² Federal Highway Administration. *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance*. The full text of the report is available at [<http://www.fhwa.dot.gov/environment/strmlng/baseline>].

³ Department of Transportation. *Highway and Transit Environmental Streamlining Progress Summary: 2002 Report to Congress*. February 2002. p. 2.

⁴ U.S. House of Representatives. 105th Congress. Conference Report to Accompany H.R. 2400, the Transportation Equity Act for the 21st Century. H.Rept. 105-550. May 22, 1998. p. 450.

practicable that environmental reviews are conducted concurrently, rather than sequentially, and that they are completed within a cooperatively determined time period. This process is to be specified in a memorandum of understanding between the Department of Transportation and other federal agencies involved in the environmental review of a highway project. Under Section 1309(b), the coordinated environmental review process outlined in the memorandum for each affected project should:

- ! at the earliest possible time, identify all federal agencies that are required to prepare environmental documentation under NEPA, or are required to determine whether to issue a permit, license, approval, or other opinion;
- ! jointly establish time periods for concurrent reviews with all involved federal agencies, unless concurrent review would result in significant adverse impact to the environment, substantively conflict with requirements under other federal laws, or not be possible without information developed as part of the environmental review process; and
- ! be modified if the Secretary of Transportation and another federal agency mutually agree upon an extension due to the necessity for further analysis and review arising from new information being discovered that could not have been anticipated when the original time period was established.

If a federal agency does not complete its environmental review for a project within the established time period, or within a mutually agreed upon time extension, Section 1309(c) authorizes the Secretary of Transportation to close the record on the matter after notice and consultation with the federal agency concerned, and enter dispute resolution to mutually rectify the matter within 30 days. However, the closing of a record by the Secretary due to a missed deadline is limited only to the matter pending before the Secretary, and such action does not remove a federal agency from requirements under NEPA to complete an environmental review or from requirements under other federal laws to determine whether to issue a permit, license or approval for the project. Section 1309(f) includes a judicial review and savings clause which clarifies that the lack of compliance with time periods established in a memorandum of understanding will not affect the applicability of NEPA to a highway project or the reviewability of any final federal agency action regarding a project in a U.S. district or state court.

Section 1309(d) allows state agencies to participate in the coordination of the review process if such agencies have jurisdiction over environmental issues related to the project. Section 1309(e) permits the use of federal highway funds to provide federal agencies with the resources to meet time limits for review that are specified in a memorandum of understanding. However, this funding is limited to assisting federal agencies in meeting time limits that are shorter than those for customary reviews.

What has been done to implement these requirements?

Final regulations to implement the environmental streamlining requirements under TEA21 have not been issued to date. While the law did not specify a deadline, some Members of Congress have expressed concerns over the pace at which implementation has proceeded. The President's budget proposal includes \$6 million to support the Department of Transportation's streamlining initiatives in FY2003, about \$3 million more

than in FY2002. As reported, the Department of Transportation and Related Agencies Appropriations Act for FY2003 (S. 2808, S.Rept. 107-224) does not indicate how much funding would be provided for streamlining projects, nor does report language include commentary on the pace at which the FHWA has implemented the streamlining provisions in TEA21. The status of major streamlining activities is discussed below.⁵

NEPA Regulatory Proposal. On May 25, 2000, the FHWA and the Federal Transit Administration (FTA) proposed regulations to streamline the environmental review process for highway and transit projects, and public comments were accepted through September 23, 2000.⁶ Some Members of Congress criticized the proposal for not fully addressing the streamlining requirements under TEA21, and for addressing other planning and regulatory issues not required under the law. Some of the principal criticisms were the absence of a requirement for environmental reviews to be conducted concurrently, rather than sequentially, and to be completed within a cooperatively determined time period. Thus far, this requirement has only been addressed outside of the regulatory process in a National Memorandum of Understanding, discussed below. Some Members also criticized the proposal for not fulfilling the law's requirement to develop procedures for resolving disputes when federal agencies do not complete their reviews within mutually agreed upon time frames. To address this requirement, the FHWA has been working with the U.S. Institute for Environmental Conflict Resolution, and has issued a discussion draft for dispute resolution procedures, which the Administration expects to finalize by the end of 2002.⁷ The Department of Transportation reports that its proposal lacked regulatory requirements to establish time frames for review and resolve disputes due to its absence of authority over other federal agencies and a concern that "one-size-fits-all" approaches could limit flexibility.⁸ A decision on whether to proceed with the original regulatory proposal, or to withdraw it and possibly draft a new proposal, has not been announced to date.

National Memorandum of Understanding. The FHWA and six other federal agencies signed a National Memorandum of Understanding on streamlining in July 1999.⁹ It expresses the commitment of each signatory agency to streamline the environmental review process for highway projects in accordance with TEA21. To accomplish this objective, the memorandum establishes several goals that are designed to reduce project delays while continuing to protect and enhance environmental quality. These goals reflect the overall intent of the streamlining provisions in TEA21 and some of the specific requirements in the law, such as the early identification of information needed to prepare

⁵ Refer to the FHWA's web site at [<http://www.fhwa.dot.gov/environment/strmlng>] for additional information on federal streamlining projects.

⁶ 65 *Federal Register* 33980. While TEA21 only required streamlining for highway projects, the Clinton Administration included transit projects to address similar concerns over delays.

⁷ For the full text of the discussion draft on dispute resolution procedures, refer to the FHWA's web site at [<http://www.fhwa.dot.gov/environment/strmlng/npdjan22.htm>].

⁸ Department of Transportation. *Highway and Transit Environmental Streamlining Progress Summary: 2002 Report to Congress*. February 2002. p. 8.

⁹ The six other federal agencies which signed the memorandum are the Department of the Interior, Department of Commerce, Department of Agriculture, Army Corps of Engineers, Environmental Protection Agency, and Advisory Council for Historic Preservation.

environmental documentation, the performance of concurrent reviews whenever possible, and the development of national procedures for dispute resolution when an agency cannot meet an agreed upon deadline. The FHWA has issued an action plan which outlines several strategies and operating principles to carry out the streamlining goals established in the memorandum.

Pilot Projects. In April 1999, the FHWA, Environmental Protection Agency, and the American Association of State Highway and Transportation Officials established a pilot program to examine effective and efficient ways to implement the environmental streamlining requirements under TEA21. Federal and state officials established the program to gain practical experience in streamlining the environmental review process before applying it on a national scale. States were given the opportunity to nominate projects for the pilot program, and in July 2000, ten transportation projects in seven states were selected that would demonstrate innovations in the preparation and processing of environmental reviews.¹⁰ These projects are in the implementation stage and are focusing on various aspects of the review process such as early coordination, integrating environmental concerns into the planning process, and establishing specific time frames for completing environmental documentation. The National Cooperative Highway Research Program, administered by the Transportation Research Board of the National Academy of Sciences, is tracking the progress of the pilot projects and will analyze the results.¹¹ In addition to the pilot projects, a total of 21 states are implementing environmental stewardship demonstration projects, which may assist states in identifying environmental requirements earlier and help to speed the project review process.¹²

What are some of the issues for congressional oversight?

During the 107th Congress, several oversight hearings have been held to examine the pace at which the Department of Transportation has been implementing the environmental streamlining requirements under TEA21. Some Members have expressed concerns over the inadequacies of the proposed streamlining regulations and have indicated their disappointment in the lack of final regulations to put the principles of streamlining into practice on a national scale. Further, how the National Memorandum of Understanding would work in tandem with the streamlining regulations to fulfill the requirements of TEA21 is an issue as well. A potential issue regarding the streamlining pilot projects will be whether the knowledge gained from such experiments will prove to be limited in scope or applicable to many different types of highway projects on a national scale. Oversight of these issues will likely continue as the Department of Transportation proceeds with its efforts to implement the streamlining provisions of TEA21 and as Congress begins to consider the reauthorization of the law, which expires at the end of FY2003.

¹⁰ The seven states in which pilot projects were selected include California, Florida, Georgia, New Jersey, Oregon, Texas, and Wisconsin.

¹¹ For specific project data, refer to [<http://www.itre.ncsu.edu/nchrp>].

¹² For specific project data, refer to [<http://www.itre.ncsu.edu/aashto/stewardship>].