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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 is required by 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 Secretary of Transportation to streamline the environmental review process for highway projects. While the Department of Transportation has taken numerous administrative actions in response to this requirement, regulations to put streamlining into practice have not been finalized. The Clinton Administration had issued a streamlining regulatory proposal in May 2000. However, the Bush Administration has withdrawn it due to criticisms by many stakeholders who argued that it would further complicate the review process and result in longer project delays. In the interim, President Bush has issued an executive order which directs federal agencies to expedite environmental reviews for high-priority transportation projects. In oversight hearings, some Members of Congress have expressed concerns over the lack of streamlining regulations, and have argued that further legislative action is necessary to address the issue of project delivery. As introduced, H.R. 5455 would provide the Department of Transportation with greater authority over the environmental review process in order to prevent project delays. 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 Secretary of Transportation to streamline the environmental review process for highway projects. The Department of Transportation has taken numerous administrative actions to address this requirement, but has not issued final regulations on the matter. While the law did not specify a deadline by which implementation must occur, some Members of Congress have expressed concerns over the continuing need for streamlining in order to speed project delivery and meet public demands for transportation infrastructure.

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 and legislation in the 107th Congress.

What types of environmental documents must be prepared?

Under NEPA, the Federal Highway Administration (FHWA) must issue 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 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 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, about 3% 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

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

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.

The FHWA has conducted a study to determine the extent to which EISs have delayed highway projects.² This information 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 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. In the 1970's, the preparation of an EIS for highway projects took 2.2 years on average. The average time increased to 4.4 years in the 1980's, and rose to an average of 5.0 years in the 1990's. This increase is primarily due to the rise in the number of environmental laws, 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 Administration reports that its streamlining efforts have reduced this time to 5 years and 2 months in 2001.³

What are the streamlining requirements under TEA21?

Section 1309 of TEA21 requires the Secretary of Transportation to streamline the environmental review process for highway projects. The law outlines a process that encourages early coordination among the agencies involved to help minimize potential conflicts, which can result in construction delays and higher costs. However, the law does not permit the Secretary of Transportation 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 review under federal law, which ensures whenever practicable that environmental reviews are conducted concurrently, rather than sequentially, and that they are completed within a cooperatively determined time period. The Department of Transportation is required to enter a memorandum of understanding with relevant federal

² Federal Highway Administration. *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance*. May 8, 2001. The full text 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.

agencies to outline the coordinated environmental review process for each project. Under Section 1309(b), this process 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 comply with a mutually agreed upon time frame, 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?

The Department of Transportation has taken several administrative actions in response to the streamlining requirements of TEA21. However, final regulations to put streamlining into practice have not been issued. The Clinton Administration submitted a streamlining regulatory proposal on May 25, 2000.⁵ However, it was widely criticized by Congress, the states, highway interest groups, and environmental organizations. The

⁵ 65 *Federal Register* 33980. While Section 1309 of TEA21 required streamlining only for highway projects, the Clinton Administration included transit projects in its regulatory proposal to address similar concerns over project delays.

principal criticisms were that it did not fully address the streamlining requirements of TEA21, and that it would have added new elements to the planning and development process that may have resulted in further project delays. Due to these concerns, the Bush Administration withdrew the proposal on September 20, 2002, and indicated that a new proposal would not be issued until TEA21 is reauthorized.⁶ In the interim, President Bush has issued an executive order which directs federal agencies to expedite environmental reviews for high-priority transportation projects. This action and other major administrative initiatives are discussed below.⁷

Executive Order on Environmental Streamlining. President Bush issued an executive order on September 18, 2002, which directs federal agencies to expedite environmental reviews for high-priority transportation infrastructure projects. The Secretary of Transportation will be responsible for selecting projects that would benefit from an expedited review. An interagency “Transportation Infrastructure Streamlining Task Force” will oversee the expedited process and recommend ways to streamline project reviews, while taking existing environmental requirements into consideration. In conjunction with streamlining, the executive order directs federal agencies to cooperate with project sponsors to promote environmental stewardship in the “planning, development, operation, and maintenance of transportation facilities and services.”

National Memorandum of Understanding. The FHWA and six other federal agencies signed a National Memorandum of Understanding on streamlining in July 1999. It expresses the commitment of each signatory agency to streamline the environmental review process for highway projects in accordance with TEA21. The memorandum establishes several goals to reduce project delays while continuing to protect and enhance environmental quality. These goals reflect the overall intent of TEA21, as well as some of the specific requirements in the law, such as the early identification of information needed to prepare environmental documentation, the performance of concurrent reviews whenever possible, and the development of procedures to resolve disputes between agencies over time frames for review. The FHWA has issued an action plan to carry out the streamlining goals established in the memorandum.

Dispute Resolution Procedures. As discussed earlier, TEA21 required the Secretary of Transportation to develop procedures for resolving disputes when federal agencies do not complete their reviews within mutually agreed upon time frames. The FHWA has been working with the U.S. Institute for Environmental Conflict Resolution to develop dispute resolution procedures, and has issued a discussion draft. The procedures will outline the steps for the FHWA to take in order to reach consensus with other federal agencies on the amount of time that is necessary to complete environmental documentation required under federal law. The Administration expects to finalize these procedures by the end of 2002.

Interagency Funding Guidelines. One of the potential obstacles in expediting project reviews is the lack of agency funding and personnel. To address this issue, TEA21 allows the use of federal highway funds to provide the necessary resources for

⁶ 67 *Federal Register* 59219 and 59225.

⁷ For additional information on these actions, refer to the Federal Highway Administration’s environmental streamlining web site at [<http://www.fhwa.dot.gov/environment/strmlng>].

agencies to meet mutually agreed upon time frames for project reviews, if such time limits are shorter than those for customary reviews. In response to this requirement, the FHWA issued guidance in February 2002, which outlines the mechanisms and procedures for the use of federal highway funds to reimburse agencies for the increased costs of expediting the preparation of environmental documentation. The FHWA jointly developed this guidance with other federal agencies and state transportation agencies.

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 gain practical experience in streamlining. The program includes ten transportation projects in seven states.⁸ 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 environmental reviews. The National Cooperative Highway Research Program, administered by the Transportation Research Board of the National Academy of Sciences, is tracking the program's progress and will analyze the results.⁹

Oversight and Legislation in the 107th Congress

During the 107th Congress, several oversight hearings have been held to examine the actions that the Department of Transportation has taken to implement the environmental streamlining requirements under TEA21. Some Members have expressed their disappointment that these actions have primarily been administrative in nature, and that four years after the enactment of the law, final regulations to put the principles of streamlining into practice have not been issued. In the conference report on TEA21, Congress stated its expectation that the Secretary of Transportation would implement the streamlining requirements through the regulatory process.¹⁰ The lack of regulations has prompted some Members to indicate that further legislative action is necessary to address the issue of project delivery.

On September 25, 2002, Representative Young introduced the Expediting Project Delivery to Improve Transportation and the Environment Act (H.R. 5455). The bill would repeal most of the requirements under Section 1309 of TEA21 and take firmer measures to streamline the environmental review process. Specifically, the Department of Transportation would receive greater authority to define the purpose and need of a project, select the alternatives that will be evaluated, and determine the level of analysis that will be required. The bill also would establish statutory time limits for agency comments, create a process to resolve disputes if a project is delayed, and limit the time allowed for litigation to challenge a project decision. The Department of Transportation also would be required to establish a comprehensive program to identify measures that would improve project delivery, measure progress, and analyze the causes of delay.

⁸ The seven states in which pilot projects were selected include California, Florida, Georgia, New Jersey, Oregon, Texas, and Wisconsin.

⁹ For specific project data, refer to the National Cooperative Highway Research Program's web site at [<http://www.itre.ncsu.edu/nchrp>].

¹⁰ 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. 452.