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

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Summary

Numerous stakeholders have expressed long-standing concerns about delays and increased costs for major highway construction projects, which are often attributed to the environmental review process required by the National Environmental Policy Act (NEPA, P.L. 91-190). To address these concerns, the Transportation Equity Act for the 21st Century (TEA21, P.L. 105-178) requires the Secretary of Transportation to streamline the environmental review process for highway projects. The Department of Transportation has taken numerous administrative actions in response to the TEA21 streamlining requirements, but regulations to put streamlining into practice have not been finalized. In May 2000, the Clinton Administration proposed streamlining regulations. However, the Bush Administration withdrew them after many stakeholders argued that it would further complicate the review process and possibly result in further delays. In the interim, President Bush issued an executive order directing federal agencies to expedite environmental reviews for high-priority transportation projects. Members of Congress have expressed concern over the lack of regulations to implement the streamlining requirements, and have argued that further legislative action is necessary to achieve faster project delivery. Two highway streamlining bills were introduced late in the 107th Congress, but not enacted. Similar proposals may be considered during the 108th Congress. As passed by the Senate, H.J.Res. 2 includes an omnibus appropriations bill for FY2003 that would provide \$6 million for FHWA streamlining activities. This report will be updated as relevant developments occur.

Introduction

The National Environmental Policy Act of 1969 (NEPA, P.L. 91-190) requires federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions that significantly affect the environment. The substantial amount of time and funding often needed to prepare such documentation for highway projects has been an ongoing issue at the state and local level for many years. However, some environmental organizations argue that thorough reviews are essential to ensure compliance with

environmental laws, and that the time and cost required is warranted due to the extent of potential environmental impacts. To address concerns about construction delays and the incremental costs of project reviews, Section 1309 of 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. 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 concern over the continuing need for streamlining regulations to speed project delivery and meet public demand for transportation infrastructure.

This report describes the environmental documents required for highway projects, discusses the average amount of time to complete this documentation, summarizes the environmental streamlining provisions under TEA21, examines administrative actions taken to implement these requirements, and discusses legislative actions and congressional oversight.

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. The EIS must describe the project's purpose and need, 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 eliminating the requirement for an EIS. However, if it is not clear whether significant impacts would occur, an Environmental Assessment (EA) must be prepared. An EIS will be required if significant impacts are identified through the EA. Otherwise, a Finding of No Significant Impact can be issued. 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 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 complex 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 time needed to prepare an EIS, such as the degree to which there coordination and early participation among the agencies involved, the adequacy of the data to prepare necessary

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

reviews, the technical complexity of the project, and the volume of public comments which must be addressed.

The FHWA has studied the extent to which EISs have delayed highway projects in order to determine the level of progress made by streamlining efforts.² The study was based on a sample of 100 projects from the 1970s to the 1990s. 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. The preparation of EISs for highway projects took 2.2 years on average in the 1970s, 4.4 years in the 1980s, and 5.0 years in the 1990s. This increase was 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 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.

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 frame. The Department of Transportation is required to enter a memorandum of understanding with relevant federal agencies to outline the coordinated environmental review process for each project.

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 established time periods 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.

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.

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 less than the customary time necessary for such review.

What Administrative Actions Have Occurred?

The Department of Transportation has not issued final rules on streamlining. The Clinton Administration submitted a regulatory proposal on May 25, 2000.⁴ However, the proposed rules were widely criticized for not fully addressing the streamlining requirements of TEA21 and for further complicating the review process, potentially resulting in increased delays. Due to these concerns, the proposed rules were withdrawn by the Bush Administration on September 20, 2002. The Bush Administration indicated that a new regulatory proposal would not be issued until TEA21 is reauthorized.⁵ In the interim, President Bush issued an executive order directing federal agencies to expedite environmental reviews for high-priority transportation projects. In lieu of final regulations, the Department of Transportation has taken several administrative actions in response to the streamlining requirements of TEA21. The executive order and selected administrative actions are discussed below.⁶

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 projects selected by the Secretary of Transportation. 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. The executive order also 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 (MOU) on streamlining in July 1999.⁷ It expresses the commitment of each signatory agency to streamline the environmental review process for highway projects in accordance with TEA21. The MOU 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. The FHWA has issued an action plan to carry out the streamlining goals established in the memorandum.

⁴ 65 *Federal Register* 33980. The Clinton Administration included transit projects in its regulatory proposal to address similar concerns about construction delays.

⁵ 67 *Federal Register* 59219 and 59225.

⁶ 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>].

⁷ Full text of the MOU is available at [<http://www.fhwa.dot.gov/environment/nmou4.htm>].

Dispute Resolution Procedures. One of the commitments of the MOU is to develop national procedures for dispute resolution. To meet this commitment, FHWA developed the National Dispute Resolution System. One element of this system was the development of guidance, issued December 31, 2002, to be used to manage conflict and resolve disputes between state and federal agencies during the transportation project development and environmental review process. Workshops in the application and use of alternative dispute resolution are anticipated to begin in late Spring 2003 and will use the guidance as the principal reference document.

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 agencies to meet project review deadlines, if mutually agreed upon time limits are shorter than usual. In response to this requirement, the FHWA issued guidance in February 2002 outlining mechanisms and procedures for the use of federal highway funds to reimburse agencies for the increased costs of expediting environmental documentation.

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 California, Florida, Georgia, New Jersey, Oregon, Texas, and Wisconsin. These projects focus on various aspects of the review process such as early coordination and establishing specific time frames for environmental reviews.

What Legislative Actions Have Occurred?

During the 107th Congress, several oversight hearings were held to examine actions, including those discussed above, taken by the Department of Transportation to implement the environmental streamlining requirements in TEA21. Some Members expressed disappointment that these actions have 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 implement the streamlining requirements through the regulatory process.⁸ The lack of regulations prompted some Members to indicate that further legislative action is necessary to address the issue of project delivery to meet state and local needs for surface transportation infrastructure.

Two bills were introduced late in the 107th Congress to address the streamlining issue, but neither was enacted. Representative Young introduced the Expediting Project Delivery to Improve Transportation and the Environment Act (H.R. 5455) on September 25, 2002. Senator Baucus introduced the Maximum Economic Growth for America Through Environmental Streamlining Act (S. 3031) on October 2, 2002. Due to ongoing concerns over highway project delays, similar proposals may be considered during the 108th Congress as part of the reauthorization of TEA21, or as stand-alone legislation.

Both H.R. 5455 and S. 3031 would have established a statutory process to streamline environmental reviews for surface transportation projects. Under this process, the

⁸ 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.

Department of Transportation would have been designated as the lead agency, and would have been granted the authority to determine the alternatives that would be considered for a project and the extent of the analysis that would be necessary to examine the impacts of such alternatives. The Department of Transportation also would have had the authority to develop a schedule for the completion of the review process, to which participating agencies would have been subject. Both bills would have created procedures to resolve disputes if an agency were not able to adhere to this schedule, and would have required the Secretary of Transportation to notify Congress at specified points after a deadline was not met. Each bill also would have allowed qualified states to assume federal responsibilities for various aspects of the review process.

While both bills shared the above similarities, there were significant differences between the two proposals. For example, S. 3031 would have allowed review schedules to be set on a project-by-project basis, whereas H.R. 5455 would have imposed a 30-day statutory deadline for agency comments on proposed actions, which could have been extended to 60 days. Unlike the Senate bill, H.R. 5455 also proposed statutory revisions to the regulations for implementing Section 4(f) of the Department of Transportation Act of 1966, which requires special effort to preserve public parks, wildlife and waterfowl refuges, and historic sites.⁹ The proposed revisions would have substantially rewritten the regulations, which some stakeholders felt would have resulted in weaker protections. H.R. 5455 also would have limited judicial review of final project decisions to 90 days, and would have removed the “no build” alternative from consideration of proposed actions. Existing regulations for the preparation of EISs require the consideration of this alternative to determine whether the environmental, social, and economic impacts of the proposed action would be so adverse that they would outweigh the expected benefits.

While many stakeholders have indicated interest in a more efficient review process, some concerns were raised about both bills. One of the main issues was whether the Department of Transportation would have sufficient expertise and resources to determine the level of analysis needed for participating agencies to examine the impacts of proposed actions. Another issue was whether the statutory deadlines in H.R. 5455 would have allowed enough time for agencies to fulfill their responsibilities under other environmental laws to comment on the impacts of proposed actions. Some stakeholders also expressed concern that taking statutory action to alter the review process would have resulted in the lack of opportunity for public comment, whereas regulatory action requires public input under federal rulemaking procedures.

As passed by the Senate, H.J.Res. 2 includes an omnibus appropriations bill for FY2003, which would provide \$6 million for FHWA streamlining activities. The House did not include an omnibus appropriations bill in passing its version of the resolution. Final appropriations for FY2003 will be determined in conference.

⁹ 49 USC 303.