

# CRS Report for Congress

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## Environmental Streamlining Provisions in the Transportation Equity Act for the 21<sup>st</sup> Century: Status of Implementation

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### Summary

Before construction on a federally funded surface transportation project can proceed, the Department of Transportation's (DOT's) Federal Highway Administration must comply with all state and federal legal requirements regarding the environment, including the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.). In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178), which reauthorized the federal surface transportation programs. At the time, various stakeholders reported to Congress that the numerous federal environmental approvals and permits needed to build a highway were inefficient and overly time-consuming. Congress attempted to address these concerns by including "Environmental Streamlining" provisions in TEA-21 that required DOT to develop and implement a "coordinated environmental review process" for projects that do or may have a significant impact on the environment (approximately 10% of all highway projects). This review process is intended to encourage full and early participation by all relevant federal and state agencies required to participate in a highway project. Numerous administrative activities have been undertaken to facilitate streamlining. However, regulations to implement the streamlining provisions of TEA-21 have not been finalized. Some Members of Congress have expressed concern over the lack of regulations, and have argued that further legislative action is necessary to achieve faster project delivery. The Administration's legislative proposal for surface transportation reauthorization was introduced in the House (H.R. 2088) and Senate (S. 1072) on May 14 and 15, 2003, respectively. Included in the bill are provisions intended to further streamline the NEPA process. This report will be updated.

### Introduction

The National Environmental Policy Act of 1969 (NEPA, P.L. 91-190) requires all federal agencies to consider the environmental impact of their proposed actions. To ensure that environmental impacts are considered before final decisions are made, NEPA requires federal agencies to provide a detailed statement of environmental impacts for every proposed federal action *significantly* affecting the quality of the environment. The "detailed statement" was subsequently referred to as an environmental impact statement

(EIS). Projects with less than significant impacts also require documentation. Such projects either require an Environmental Assessment (EA) or are categorically excluded from requirements to prepare an EA or EIS. According to the Federal Highway Administration (FHWA), in 2001 approximately 3% of all highway projects required an EIS, 7% required an EA, and 90% were classified as categorical exclusions. Projects requiring an EIS accounted for 9% of the funds allocated by FHWA. While the number of projects requiring an EIS represents a small portion of the total projects and funds allocated, they are often complex and affect sizable populations.

In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178), which reauthorized the federal surface transportation programs for highways, highway safety, and transit for the fiscal years 1998-2003. During the reauthorization process, states reported to Congress that the numerous federal environmental approvals and permits needed to build a highway were inefficient and overly time-consuming. To address these concerns, Congress included in TEA-21 Section 1309, “Environmental Streamlining,” which was intended to better coordinate federal agency involvement in the NEPA process.

This report describes how the NEPA process is used to demonstrate compliance with environmental requirements and also discusses environmental documents required for highway projects, the time involved in completing them, environmental streamlining provisions under TEA-21, administrative actions taken to implement these requirements, and legislative activity in the 108<sup>th</sup> Congress.

## **The “NEPA Umbrella”**

In addition to complying with NEPA, any given transportation project may require compliance with a wide variety of legislative and regulatory requirements, enforceable by multiple agencies. Under FHWA regulations, compliance with all applicable environmental laws, executive orders, and other related requirements must be documented within the appropriate NEPA documentation.<sup>1</sup> It is FHWA policy that compliance with *all* applicable environmental requirements be coordinated under the “NEPA umbrella.” This means that, for any given transportation project, any study, review, or consultation required by law that is related to the environment should be conducted within the framework of the NEPA process. Legal requirements that frequently apply to transportation projects include the Endangered Species Act of 1973 (16 U.S.C. 1536), the National Historic Preservation Act (16 U.S.C. 470), or the Clean Water Act (33 U.S.C. 1344).

## **Environmental Documents Required Under NEPA**

Under NEPA, FHWA must prepare an EIS for federally funded highway projects if it is known that the action will have a significant effect on the environment. The EIS must include a description of the project’s purpose and need, an analysis of all reasonable project alternatives, a description of the affected environment, and the environmental

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<sup>1</sup> 23 CFR 771.133

consequences of impacts to the affected environment of each alternative.<sup>2</sup> The EIS must also demonstrate that appropriate comments were solicited from relevant federal, state and local agencies and from the public. Relevant agencies obligated to provide comments are those with jurisdiction by law or special expertise with regard to the environmental impacts of the project. For example, if a project alternative impacts a historical site, the Advisory Council on Historic Preservation may be required to participate in the NEPA process. If impacts to wetlands are identified, the U.S. Army Corps of Engineers may need to provide comments or issue a permit before a project may proceed.

If it is not clear whether a project would have significant impacts, an Environmental Assessment (EA) must be prepared. An EIS is required if significant impacts are identified at any time during preparation of the EA. Otherwise, a Finding of No Significant Impact (FONSI) will be issued. Projects that do not individually or cumulatively have a significant social, economic, or environmental impact are excluded from the requirement to prepare an EA or EIS. Such projects are processed as Categorical Exclusions (CEs). State agencies are required to provide FHWA with documentation to prove the action qualifies as a CE. The type of documentation required will depend upon the project. Final design activities, property acquisition, or project construction cannot proceed until one of the following occurs: an action is classified as a CE; a FONSI is approved for an EA; or an EIS is approved.<sup>3</sup>

## **Time to Prepare NEPA Documentation**

In 2001, FHWA undertook an analysis of the direct effect that compliance with the requirements of NEPA has on the ultimate schedule and cost of a completed transportation project.<sup>4</sup> The report was intended to establish a baseline for completion of NEPA documentation, against which progress on its streamlining initiatives could be gauged. On average, the time to complete an EIS in the 1990s was 5.0 years. In 1999, the average time was 5 years and 10 months. FHWA reported that its streamlining efforts reduced that time to 5 years and 2 months in 2001. The study also found a correlation between average environmental review time and factors such as the FHWA region in which the EIS was processed and the number and type of regulations that applied to a given project. FHWA estimated that the average time to complete and approve an EA was 18 months, and the average time to complete a CE determination was 6 months.

## **Streamlining Requirements Under TEA-21**

TEA-21 authorized federal surface transportation programs for highways, highway safety, and transit for the 6-year period FY1998-FY2003. To address concerns about construction delays, Section 1309 on Environmental Streamlining was included. FHWA

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<sup>2</sup> FHWA regulations implementing the NEPA process are specified at 23 CFR 771; further guidance is available on the “NEPA: Project Development Process” web page at [<http://www.fhwa.dot.gov/environment/00001.htm>].

<sup>3</sup> 23 CFR 771.113.

<sup>4</sup> See FHWA’s *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance*, May 8, 2001, available at [<http://www.fhwa.dot.gov/environment/strmlng/baseline>].

defines “environmental streamlining” as cooperatively establishing realistic project development time frames among the transportation and environmental agencies, and then working together to adhere to those time frames.<sup>5</sup> Key elements of Section 1309 are:

- Directs the Secretary of Transportation to establish and implement a “coordinated environmental review process” that encourages full and early participation by all relevant agencies required to review a highway construction project or issue a permit, license, analysis, opinion or approval relating to the project. The process may be documented in a memorandum of understanding between DOT and affected agencies.
- Requires the coordinated environmental review process to encourage agencies to conduct reviews concurrently, rather than sequentially, according to cooperatively determined time periods.
- Creates a dispute resolution process that directs the Secretary to close the record on an activity if it is not completed by an agency within the agreed upon time frame. If an unresolved matter involves an activity required by law, the Secretary and the affected agency are directed to resolve the matter within 30 days.
- Allows state DOTs to require all state agencies with jurisdiction over environmental issues to be subject to the coordinated environmental review process.
- Provides states with the authority to request funds to reimburse affected agencies for expenses associated with meeting time limits for environmental review, if those time limits are less than usual.

The streamlining requirements in TEA-21 do not permit the Secretary to override the authority of another agency. TEA-21 also clarifies that nothing in the streamlining requirements will affect the reviewability of any final federal agency action in a U.S. district court or state court, affect the applicability of NEPA or any other environmental statute, or affect the responsibility of any federal officer to comply with such statutes.

## **Administrative Actions to Implement Streamlining Goals**

DOT has undertaken a variety of actions to meet the goals of TEA-21's streamlining requirements. However, no final regulations have been implemented. In May 2000, under the Clinton Administration, FHWA submitted a proposed rule on “NEPA and Related Procedures for Transportation Decisionmaking.”<sup>6</sup> Some commenters indicated that the proposed rule failed to streamline the review process. Elements of the rule presented an increased burden of paperwork and procedural requirements, they said, and increased the potential for litigation. There was also a concern that the proposed rule lacked specific provisions addressing timeframes, comment deadlines, dispute resolution, and “closing the record” on decisionmaking at an appropriate stage. Due to these concerns, the proposed rule was withdrawn by FHWA in September 2002.<sup>7</sup> Since withdrawal of the proposed rule came within a year of the legislative reauthorization of

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<sup>5</sup> See [<http://www.fhwa.dot.gov/environment/strmlng/overview.htm>]

<sup>6</sup> 65 *Federal Register* 33960.

<sup>7</sup> 67 *Federal Register* 59225.

surface transportation programs, the agency stated that it would wait for the outcome of the legislative process to see what further regulatory changes were needed. In lieu of final regulations, DOT has implemented a variety of administrative actions in response to TEA-21's streamlining requirements. Selected actions are described below.

**Executive Order Implementation.** In September 2002, President Bush issued an executive order directing federal agencies to expedite environmental reviews for transportation projects deemed “high-priority” by DOT.<sup>8</sup> Among the criteria for project selection are whether they are of national or regional significance and whether they may experience delays from lack of federal interagency coordination. As required by the order, an Interagency Transportation Infrastructure Streamlining Task Force, chaired by the Secretary of Transportation, is to monitor work on expedited projects, review the list of suggested projects, and identify and promote policies that aid in streamlining. The Task Force also includes members from federal agencies likely involved in environmental project reviews. To date, ten highway projects have been chosen for expedited review.

**2002 Report to Congress.** In April 2003, FHWA submitted its Report to Congress on FHWA environmental streamlining activities during 2002.<sup>9</sup> The report provided an update on the status of such activities as the implementation of the executive order regarding streamlining, the creation of guidance materials to facilitate streamlining, efforts to re-engineer the environmental review process, and state efforts at streamlining.

**National Memorandum of Understanding.** In July 1999, FHWA and six other federal agencies signed a National Memorandum of Understanding (MOU) on streamlining.<sup>10</sup> It expresses the commitment of each agency to streamline the environmental review process in accordance with TEA-21.

**Dispute Resolution Procedures.** FHWA developed the National Dispute Resolution System, one element of which was the development of guidance to be used to manage conflict and resolve disputes between state and federal agencies during the transportation project development and environmental review process.<sup>11</sup> Workshops in the application and use of alternative dispute resolution are currently being scheduled and will use the guidance as the principal reference document.

**Support of State Streamlining Initiatives.** In April 1999, the FHWA, Environmental Protection Agency, and the American Association of State Highway and Transportation Officials (AASHTO) established a pilot program to gain practical experience in streamlining. The program focuses on various aspects of the review process, such as early coordination and establishing time frames for environmental reviews. In 2002, AASHTO launched the “Center for Environmental Excellence” to assist its members in promoting “innovative streamlining” of the project delivery process.

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<sup>8</sup> Executive Order 13274 is available at [<http://www.fhwa.dot.gov/stewardshipeo/index.htm>]

<sup>9</sup> The report is available at [<http://www.fhwa.dot.gov/environment/strmlng/final02rpt.htm>].

<sup>10</sup> Full text of the MOU is available at [<http://www.fhwa.dot.gov/environment/nmou4.htm>].

<sup>11</sup> The guidance, issued December 2002, “Collaborative Problem Solving: Better and Streamlined Outcomes for All,” is available at [<http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/>].

FHWA is also supporting individual states in implementing streamlining initiatives by providing program funding or technical support.

## Legislative Actions to Facilitate Streamlining

During the 107<sup>th</sup> Congress, oversight hearings were held to evaluate the Administration's progress in implementing TEA-21's requirements, such as the development of a consistent process to put streamlining into practice on a national scale. Some Members expressed disappointment that regulations to implement TEA-21's streamlining requirements have not been issued. Two bills were introduced late in the 107<sup>th</sup> Congress. In September 2002, Representative Young introduced the Expediting Project Delivery to Improve Transportation and the Environment Act (H.R. 5455). In October 2002, Senator Baucus introduced the Maximum Economic Growth for America Through Environmental Streamlining Act (S. 3031). Neither bill was enacted, and neither has been reintroduced in the 108<sup>th</sup> Congress. However, due to ongoing concerns over highway project delays, elements of these or similar bills may be included as part of the transportation program reauthorization process.

On May 13, 2003, DOT formally submitted its legislative proposal to reauthorize surface transportation programs. The Administration's proposal was introduced in the House (H.R. 2088) and Senate (S. 1072) on May 14 and 15, 2003, respectively. The proposal, the Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2003 or SAFETEA, includes three sections that deal with NEPA-related issues. They are:

- *Section 1602. Efficient Environmental Reviews for Project Decisionmaking.* Would repeal Section 1309 and replace it with similar provisions, including the addition of provisions to: allow for the coordinated environmental review process and establishment of time frames to be initiated by project sponsors; allow the coordinated review process to be implemented for transit projects; codify the right of states to prepare environmental documents; allow the dispute resolution process to be initiated by state governors; and impose a 180-day limit on judicial review of a final permit, license or other approval related to the project.
- *Section 1603. Assumption of Responsibility for Categorical Exclusions.* Would allow states to assume authority to designate and approve CEs.
- *Section 1604. "Section 4(f)" Policy on Lands, Wildlife and Waterfowl Refuges, and Historic Sites.* Would revise current statutory requirements prohibiting the use of public parks and recreation lands, wildlife and waterfowl refuges, and historic sites unless there is no prudent and feasible alternative to do otherwise, and the project includes all possible planning to minimize harm to land. The proposal clarifies conditions under which such resources could be used for transportation projects.

These provisions are likely to generate controversy. For example, the establishment of time frames for environmental reviews has been an issue of ongoing concern with environmental groups. Also, clarifying situations in which "Section 4(f)" lands could be used may be interpreted as weakening current requirements. It is expected that a variety of additional issues may arise in response to the Administration's proposal. Also, subsequent bills introduced in the 108<sup>th</sup> Congress may differ from this proposal.