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Background on NEPA Implementation for Highway Projects: Streamlining the Process

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Summary

Before a federally funded surface transportation project can proceed, the Department of Transportation's (DOT) Federal Highway Administration (FHWA) must ensure compliance with all local, state, and federal legal requirements regarding the environment, including the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.). NEPA requires all federal agencies to provide an Environmental Impact Statement (EIS) for every proposed major federal action *significantly* affecting the quality of the environment. Projects with uncertain or insignificant impacts also require documentation. Such projects either require an Environmental Assessment (EA) or are categorically excluded from requirements to prepare an EA or EIS.

In addition to NEPA, any given transportation project may require compliance with a wide variety of legal requirements, enforceable by multiple agencies. For example, impacts of a highway project may trigger requirements under the National Historic Preservation Act (16 U.S.C. 470) or the Clean Water Act (33 U.S.C. 1251). FHWA regulations require that compliance with all applicable environmental laws, executive orders, and other legal requirements be documented within the appropriate NEPA documentation (a concept referred to as the "NEPA umbrella").

There has been a long-standing perception that high-profile highway construction projects have been delayed by implementation of NEPA's requirements. However, until recently, there was only anecdotal information directly linking the "NEPA process" to widespread highway project delays. Several studies conducted by the General Accounting Office and the FHWA have attempted to determine a distinct connection between NEPA compliance and highway project delays.

In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178) that reauthorized the federal surface transportation programs for highways, highway safety, and transit for fiscal years 1998-2003. To address concerns regarding highway project delays, Congress included Section 1309 in TEA-21, "Environmental Streamlining," that required DOT to develop and implement a "coordinated environmental review process" for projects having a significant impact on the environment. That process was intended to encourage full and early participation by all agencies required to participate in a highway project.

Since TEA-21 was enacted, numerous administrative activities have been undertaken to facilitate streamlining. However, corresponding regulations have not been finalized. Continued efforts to streamline the NEPA process are expected in legislation to reauthorize surface transportation programs for fiscal years 2004-2009. This report provides background on the NEPA process and discusses streamlining activities to date. It does not cover current debate on streamlining efforts related to the reauthorization legislation (see CRS Report RL32032, *Streamlining Environmental Reviews of Highway and Transit Projects: Analysis of SAFETEA and Recent Legislative Activities*). This report will be updated when changes to the NEPA process are in place.

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Highway projects are generally initiated by state departments of transportation. Before final design, property acquisition, or construction on a highway project can proceed (if the project will receive federal funds) the U.S. Department of Transportation's (DOT) Federal Highway Administration (FHWA) must ensure compliance with all applicable state and federal laws regarding protection of the environment, including the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.). Numerous federal and state agencies have jurisdiction over these laws and must interact with DOT and local transportation sponsors to determine the impacts to the environment for particular projects.

There are a multitude of factors that impact the timing of transportation project delivery. Factors that may cause delay include the state's project planning and design process, changes in the state's funding priorities, construction complexities, local controversy, or the environmental review process to name a few. In 1998, to address delays resulting specifically from the completion of environmental reviews, Congress included "Environmental Streamlining" requirements in Section 1309 of the Transportation Equity Act of the 21st Century (TEA-21, P.L. 105-178). 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 Section 1309 in TEA-21. It was intended to better coordinate federal agency involvement in the NEPA process.

FHWA defines environmental streamlining as the timely delivery of federally-funded transportation projects, while protecting and enhancing the environment. Because major transportation projects may be affected by dozens of federal, state, and local environmental requirements, administered by multiple agencies, improved interagency cooperation was identified by Congress as a critical element to the success of environmental streamlining.

This report discusses the steps required to complete the environmental review process for transportation projects. In particular, it provides an overview of NEPA requirements, including elements that are unique to transportation projects and that have been controversial or of concern to stakeholders with regard to streamlining the process. This report also discusses transportation project delays and their relationship to the NEPA process, streamlining provisions of TEA-21 and efforts undertaken by the Administration to implement those provisions, and challenges to further streamlining efforts.

Overview of the National Environmental Policy Act

In the 1960s, the public was becoming increasingly aware of and concerned about human impacts on the environment. In response, Congress attempted to address the impact of federal actions on the environment by enacting the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.). NEPA requires all federal agencies to consider the environmental impacts of major proposed federal actions. It also requires agencies to inform the public that it has indeed considered environmental concerns in its decision-making process.

To ensure that environmental impacts were considered, before final decisions were made, NEPA requires federal agencies to provide a detailed statement of environmental impacts for every proposed major federal action that significantly affects the quality of the human environment. The "human environment" is defined as the natural and physical environment and the relationship of people with that environment.[1] The "detailed statement" was subsequently referred to as an environmental impact statement (EIS) in regulations to implement NEPA.

Projects with less than significant impacts may require a certain level of documentation. An Environmental Assessment (EA) is required if it is not clear whether a project will have significant impacts. Projects that do not individually or cumulatively have a significant social, economic, or environmental effect, and which FHWA has determined from past experience have no significant impact, are processed as Categorical Exclusions (CEs). According to the Federal Highway Administration (FHWA), in 2001 approximately 3% of all highway projects required an EIS, almost 7% required an EA, and just over 90% were classified as CEs. Projects requiring an EIS accounted for 9% of the funds allocated by FHWA. While such projects represent a small portion of the total projects and funds allocated, they are often high-profile, complex projects that affect sizeable populations.

When conducting an environmental review under NEPA, agencies are not required to elevate environmental concerns over other considerations. Rather, NEPA requires only that the agency take a "hard look" at a project's environmental consequences before taking action.[2] If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other benefits outweigh the environmental costs.

NEPA also established the Council of Environmental Quality (CEQ) in the Executive Office of the President. CEQ formally promulgated regulations to implement NEPA's environmental review requirements in 1978.[3] CEQ further directed federal agencies to develop their own policies and procedures to implement

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[1] 40 CFR 1508.14

[2] The "hard look" requirement was specified by the U.S. Supreme Court in *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976).

[3] 40 CFR 1500-1508. Note, Executive Order 11991, issued by President Carter in 1977, amended CEQ responsibilities requiring it to issue regulations to federal agencies that clarified the procedural provisions of NEPA.

the CEQ regulations.[4] FHWA promulgated regulations to implement NEPA requirements in 1987.[5] In addition to its regulations, FHWA has issued a variety of guidance documents and technical advisories to assist decisionmakers in completing the NEPA process for transportation projects.[6]

The "NEPA Umbrella" and Transportation Projects

For any given transportation project, compliance with a wide variety of statutory and regulatory requirements, enforceable by multiple agencies, may be required. Depending upon the resources present at a project site, compliance with legal requirements regarding any of the following may be required for a given transportation project:

- Natural Resources
- Physical Resources
- Cultural Resources
- Community Impacts
- Special Status Land Use

Laws and executive orders potentially applicable to highway projects are listed in **Table 1**.[7] In addition to these requirements, there are state and local requirements and myriad court decisions addressing virtually every element of NEPA implementation. Under FHWA regulations, compliance with all applicable environmental laws, executive orders, and other related requirements must be documented within the appropriate NEPA documentation.[8] In effect, FHWA coordinates compliance with *all* applicable environmental requirements 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. It does not mean that NEPA itself requires compliance with these requirements. Hence, the NEPA process is the means by which compliance with such requirements is coordinated, documented, and proven. If, theoretically, the requirement to comply with NEPA were removed, compliance with each applicable law would still be required.

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[4] 40 CFR 1507.3

[5] 23 CFR 771

[6] The FHWA Office of NEPA Facilitation maintains a website, "NEPA: Project Development Process," at [http://www.fhwa.dot.gov/environment/00001.htm], which includes FHWA's environmental policy, FHWA Technical Advisories, and a variety of guidance materials to facilitate compliance with NEPA at all stages of the process.

[7] This list is not necessarily exhaustive and does not include local or state legal requirements potentially applicable to a given highway project. States may also have their own "NEPA" statute that may substitute or overlap with the federal NEPA requirements.

[8] 23 CFR 771.133

Table 1. Laws, Regulations, and Executive Orders Potentially Applicable to the NEPA Process for Transportation Projects

Natural Environment
- Emergency Wetlands Resources Act
- ***Endangered Species Act***
- Executive Order 11990, Protection of Wetlands
- Executive Order 12962, Recreational Fisheries
- Executive Order 13112, Invasive Species
- Fish and Wildlife Coordination Act
- Marine Mammal Protection Act
- Marine Protection Research and Sanctuaries Act
- Migratory Bird Treaty Act
- Water Bank Act
- Wildflowers, Surface Transportation and Uniform Relocation Act, Section 130

Physical Environment
- Clean Air Act, as amended
- ***Clean Water Act, as amended***
- Comprehensive Environmental Response, Compensation, and Liability Act, as amended
- Federal Insecticide, Fungicide, and Rodenticide Act
- Federal Land Policy and Management Act (Paleontological Resources)
- Noise Control Act
- Pollution Prevention Act
- Resource Conservation and Recovery Act (RCRA), as amended
- Safe Drinking Water Act, as amended
- Solid Waste Disposal Act (see RCRA)

Impacts to Communities or Individuals
- American Indian Religious Freedom Act
- Emergency Planning and Community Right to Know Act
- Executive Order 12898, Environmental Justice
- Executive Order 13175, Consultation and Coordination With Indian Tribal Governments
- Farmland Protection Policy Act
- Federal Transit Law, nondiscrimination (49 U.S.C. 5332) and relocation requirements (49 U.S.C. 5324)

Community Impacts (continued)
- National Flood Insurance Act
- Public Hearings, 23 U.S.C. 128
- Title VI of the Civil Rights Act
- Uniform Relocation Assistance and Real Property Acquisition Act

Cultural Resources
- Act for the Preservation of American Antiquities
- Archaeological and Historical Preservation Act
- Archeological Resources Protection Act
- ***Department of Transportation Act, "Section 4(f)"***
- Federal-Aid Highway Act, 23 U.S.C. 109, sections (h) Economic, Social and Environmental Effects, and (i) Noise
- Executive Order 11593, Protection and Enhancement of Cultural Environment (1971)
- Historic Bridges, Surface Transportation and Uniform Relocation Act, Section 123(f)
- Historic Sites and Buildings Act
- ***National Historic Preservation Act, Section 106***
- Native American Graves Protection and Repatriation Act
- Reservoir Salvage Act

Special Status Land Use
- Coastal Zone Management Act, as amended
- Coastal Barrier Resources Act
- Executive Order 11988, Floodplain Management
- Flood Disaster Protection Act
- Land and Water Conservation Fund Act, as amended, Section 6(f)
- National Trails System Act
- Rivers and Harbors Appropriations Act, as amended
- Wild and Scenic Rivers Act
- Wilderness Act

Source: Table prepared by the Congressional Research Service (CRS) based on data from FHWA and the California Department of Transportation.

Note: Statues highlighted in bold italics are those most likely to apply to highway projects and to affect highway project delivery.

Additional Environmental Review Requirements

Congress has included environmental review requirements in statutes in addition to NEPA. In this case, an "environmental review" refers to the need to show evidence of formal consideration, evaluation, or analysis of the impacts of a proposed federal action. Such requirements have been established by Congress to provide additional protection to certain sensitive resources or communities. For example, documentation may be required to show that the project has been evaluated sufficiently to identify potential impacts to minority communities, publicly-owned parkland, endangered species habitat, wetlands, floodplains, or historic sites.

Following is a summary of laws and executive orders that direct federal agencies to conduct environmental reviews. This is not an exhaustive list, however; the requirements listed below are those that have been of particular relevance to transportation projects and that have received significant attention from stakeholders in the streamlining debate.

Evaluation of Certain Cultural Resources. "Section 4(f)" of the Department of Transportation Act of 1966 applies to the use of publicly owned parks and recreation areas, and wildlife and waterfowl refuges.[9] It also applies to public or privately owned historic sites of national, state, or local significance. When a project uses such resources, a separate "Section 4(f) evaluation" must be prepared and included with the appropriate NEPA documentation.

Unlike NEPA, the "significance" of impacts to the resource is not necessarily relevant. Under the law, any use of such a resource for a transportation project is prohibited unless:

- There is no prudent and feasible alternative to using such land, and
- The project includes all possible planning to minimize harm to land.

To demonstrate that there is no feasible and prudent alternative, the Section 4(f) evaluation must analyze alternatives and design shifts that avoid the protected resource. If Section 4(f) land is chosen for use in a project, the evaluation must demonstrate that the use of identified alternatives would have resulted in unique problems. "Unique problems" are present when there are truly unusual factors or when the costs or community disruption reach extraordinary magnitude.[10]

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[9] This provision was set forth at section 4(f) of the DOT Act, and printed in the United States Code (U.S.C.) at 49 U.S.C. 1653(f). A similar provision is found at 23 U.S.C. 138. In 1983, as part of a general codification of the DOT Act, 49 U.S.C., 1653(f), was formally repealed and recodified with slightly different language in 49 U.S.C. 303. Given that over the years, the whole body of provisions, policies, case law, etc., has been collectively referenced as "section 4(f)" matters, DOT has continued this reference for this regulation.

[10] This test of prudent and feasible alternatives was introduced in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and subsequently referred to as "Overton Park Criteria."

Historic Preservation. The National Historic Preservation Act (NHPA, 16 U.S.C. 470), declares a national policy of historic preservation to protect, rehabilitate, restore, and reuse districts, sites, buildings, structures, and objects significant in American architecture, history, archaeology, and culture. Section 106 of NHPA mandates that federal agencies take into account a project's effect on a property on, or eligible for inclusion in, the National Register of Historic Places. NHPA does not mandate preservation of such resources, but requires all federal agencies to consider the impact of their actions on such properties and seek ways to avoid, minimize or mitigate adverse impacts.

Section 106 also requires the agency to seek comments on the project from the Advisory Council on Historic Preservation (ACHP). Under authority granted by Congress, the ACHP has issued regulations that set forth procedures that explain how agencies must take into account the effects of their actions on historic properties and how the ACHP will comment on those actions.[11]

Section 106 is an integral part of Section 4(f) compliance whenever historic properties are involved. Section 4(f) requires that the historic site be granted protection if it is determined to be of local, state, or national significance. The Section 106 process is the method by which that significance is determined.

While there are similarities between Section 4(f) and Section 106, there are also important differences between the statutes. Section 106 of NHPA is primarily a procedural statute that directs all federal agencies, as opposed to just DOT, to *consider* project impacts on certain resources. Section 4(f) of the DOT Act specifically prohibits the use of certain resources, except under extreme conditions, and only if the project includes all possible planning to minimize harm to the site resulting from its use.

Dredge and Fill Permit Evaluation. Section 404 of the Clean Water Act (33 U.S.C. 1344) requires projects that involve the discharge of dredged or fill material into waters of the United States to obtain a permit from the U.S. Army Corps of Engineers. As part of the 404 permit evaluation process, the NEPA documentation must demonstrate that an evaluation of the need for a permit has been made. Other federal agencies may be involved in the 404 permit evaluation process, such as the Department of the Interior's U.S. Fish and Wildlife Service (FWS), the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) Fisheries (previously named the National Marine Fisheries Service), or the U.S. Environmental Protection Agency (EPA). EPA is the only agency with the authority to veto a Corps 404 permit.

If the evaluation process determines that a "Section 404 permit" is needed, obtaining the permit may take longer than completion of the NEPA process. (This discussion addresses only the requirement to perform an environmental review to determine if a Section 404 permit is required, not the subsequent compliance

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[11] 36 C.F.R. 800

requirements with a 404 permit.[12] Also, it does not address requirements to comply with other requirements under the Clean Water Act.)

Assessment of Threatened and Endangered Species. Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) requires federal agencies to insure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat for these species. Such efforts must be undertaken in consultation with the Secretary of the Interior or the Secretary of Commerce, as appropriate. The FWS and NOAA Fisheries share responsibilities for administering the Act.[13]

As part of the Section 7 consultation, a biological assessment is required when the presence of threatened or endangered animals or plants are suspected to occur in the vicinity of a project. The assessment must include an inventory of species in the project area and report the potential for adverse impacts to the FWS or NOAA Fisheries.

Consideration of Social, Economic, and Environmental Impacts. The Federal-Aid Highway Act (23 U.S.C. 109(h)), requires that potential adverse economic, social, and environmental effects of proposed Federal-aid highway projects are identified and fully considered. The Act also requires that project locations are fully considered and that final decisions on highway projects are made in the best overall public interest. To accomplish these requirements, transportation projects are required to eliminate or minimize the adverse effects of:

- Air, noise, and water pollution;
- Destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;
- Adverse employment effects, and tax and property value losses;
- Injurious displacement of people, businesses and farms; and
- Disruption of desirable community and regional growth.

Compliance with these requirements should be demonstrated in the appropriate NEPA documentation.

Consideration of Executive Order Requirements. Requirements of three executive orders may apply to highway projects, with regard to environmental review. First, Executive Order 12898, issued in 1994, directed every federal agency to make environmental justice part of its mission by identifying and addressing the effects of all programs, policies, and activities on "minority populations and low-income populations." Two executive orders issued in 1977 directed federal agencies to avoid, to the extent possible, long and short term adverse impacts to floodplains

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[12] As specified under 40 CFR 230-233.

[13] Regulations governing interagency cooperation under Section 7 are found at 50 CFR 402.

and wetlands.[14] Construction on, or modification to, such resources is to be avoided wherever there is a practical alternative.

Compliance with each of the requirements listed above is required under separate statutory or Executive authority, apart from NEPA. However, *evidence* of compliance with each of these requirements is required by FHWA to be contained in the appropriate NEPA documentation.

Of the legal requirements listed above, FHWA identifies the Endangered Species Act, the Clean Water Act, Section 4(f) of the DOT Act, and the National Historic Preservation Act as the statutes most likely to apply to all highway projects and most likely to affect highway project delivery. Unlike NEPA, which is essentially a procedural requirement, the "big four" statutes prohibit or limit activity, depending upon the resource impacted.

Appropriate NEPA Documentation

FHWA regulations identify the following three classes of actions that will dictate the NEPA documentation required for a highway project:[15]

- Actions with a *significant* environmental impact - such projects require the preparation of an Environmental Impact Statement (EIS). When an EIS is approved, a Record of Decision (ROD) is issued.
- Actions that have *no significant* individual or cumulative environmental impacts - such actions are categorically excluded from the requirement to prepare an EIS; whether and what types of documentation will be required depends upon the complexity of the project and resources impacted.
- Actions for which environmental impacts are initially *uncertain* - such projects require the preparation of an Environmental Assessment (EA) to determine if an EIS is necessary. If no EIS is required, a Finding of No Significant Impact (FONSI) is issued.

As illustrated by the classes of actions listed above, to determine the type of NEPA documentation that is appropriate for any given project, it must first be determined if the project's impacts are "significant." Almost every federal action has *some* impact on the environment. CEQ regulations require federal agencies to determine the significance of those actions by considering the project's context and intensity.[16]

Determining the context of a project involves analyzing impacts to society as a whole, the affected region, or the locality. The degree of significance must be considered on a project-by-project basis and will depend upon factors such as the location and scope of the project. For example, a highway project that impacts one

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[14] Executive Order 11988: Floodplain Management and Executive Order 11990: Protection of Wetlands.

[15] 23 CFR 771.115

[16] 40 CFR 1508.27

acre of a 2,000-acre wetland may be insignificant, compared to a project that impacts one acre of a two-acre wetland. The value and function of the impacted wetlands would also be relevant.

The intensity of an impact refers to its severity. Factors used to assess intensity will differ from project to project. Factors to consider may include unique characteristics of the geographical area, the degree to which the action adversely impacts endangered species or historic sites, or the degree to which the proposed action affects public health or safety. To adequately determine an impact's intensity, more than one agency may need to be involved. For example, the Department of Agriculture may need to determine the intensity of impacts from a project that would cut through prime farmland.

Since degrees of impact, with regard to both context and intensity, must be evaluated to determine project significance, such an evaluation may be highly subjective.[17] While court decisions have been rendered regarding most elements of NEPA implementation, few federal courts have attempted to specifically define "significance." Most often, a court will determine whether the evidence for a given project involved potentially significant environmental effects and then decide whether the agency's decision *not* to prepare an EIS was reasonable under circumstances specific to that project.[18]

Documentation Required When Impacts Are Significant. If it is determined that the impacts of a proposed project will likely be significant, an EIS must be prepared. An EIS is a full disclosure document that provides a description of the proposed project, and the existing environment, as well as analysis of the anticipated beneficial and adverse environmental effects of all reasonable alternatives. Preparation is done in two stages, resulting in a draft and final EIS.

As soon as practicable after its decision to prepare an EIS, the agency preparing the EIS (in the case of highway projects the agency would be FHWA) is required to publish a notice of intent (NOI) in the Federal Register.[19] The NOI acts as the formal announcement of the project to the public and to interested federal, state and local agencies. For FHWA projects, this process generally begins in conjunction with the preliminary design stage of a highway project.

As soon as possible after, or in conjunction with, the determination that an EIS is needed, the FHWA is required to determine the scope of the project.[20] The role of other agencies and other environmental review and consultation requirements should

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[17] In determining a project's significance, the cost of the project is not an element of consideration.

[18] Dinah Bear, "NEPA at 19: A Primer on an 'Old' Law with Solutions to New Problems," *Environmental Law Review*, 19 ELR 10060 (Feb. 1989). This article is posted on the CEQ website under "CEQ Reference."

[19] 40 CFR 1508.22

[20] 40 CFR 1501.7

be established during the scoping process.[21] It is during the scoping process that the agency should determine which statutory requirements or executive orders will apply (i.e., the applicant will review all laws and executive orders listed in **Table 1** to determine which, if any, will apply to the project). For example, it should be determined early in the project whether property of historical significance is impacted or if the project will raise environmental justice issues.

Once the initial scoping is complete, EIS preparation can begin. Significant elements of an EIS include:

- Project Purpose and Need
- Project Alternatives
- Affected Environment
- Environmental Consequences
- Agency Comments and Coordination
- Public Comments

Each of these elements is discussed below.

Delineation of Project Purpose and Need. CEQ requires one section of the EIS to be devoted to clarifying the purpose and need for the project. By virtue of the fact that an EIS is being prepared, a transportation project is anticipated to have significant environmental, social, or economic impacts. Such a project can be expected to require the expenditure of a significant amount of funds. The public and decisionmakers will require a clear, well-supported explanation for why such a project should be built. When adverse environmental impacts are significant, it is also important to justify why such impacts are acceptable in light of the transportation needs being met by the project.

The Purpose and Need section is the foundation upon which subsequent sections of the EIS are built. FHWA requires the discussion to be clear, specific, and support the need for the project. A well defined and well justified purpose and need evaluation will facilitate the development of reasonable project alternatives. For example, if a project's purpose involves addressing a traffic capacity problem, potential means of solving that problem will be considered in the proposed alternatives. Some of the common needs presented in FHWA EISs include: safety improvements, increased highway capacity, urban transportation plan consistency, and system linkage.

The clear delineation of project purpose and need is also necessary to meet the requirements under Section 4(f), the Executive Orders on wetlands and floodplains, and the Section 404 permitting requirements.

Development and Analysis of Alternatives. Once the purpose and need for a project have been clearly delineated, the potential alternatives to meet that

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[21] CEQ has issued a variety non-regulatory guidance which is used by FHWA in preparing and processing environmental documents during the scoping process (see the CEQ NEPA Guidance web page at [http://ceq.eh.doe.gov/nepa/regs/guidance.html])

purpose and need can be evaluated and determined. CEQ regulations refer to the Alternatives section of the EIS as the "heart" of the document.[22] CEQ regulations require agencies to discuss a range of alternatives that will include all "reasonable alternatives" under consideration as well as any other alternatives that were considered but subsequently eliminated from consideration (i.e., a mass transit alternative may not be reasonable for a given project, but may still need to be acknowledged). Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the agency or a potentially affected stakeholder.[23]

FHWA regulations require that alternatives considered ensure that the project: connects logical termini; have independent utility; and not restrict consideration of future transportation alternatives.[24] The Alternatives section should begin with a concise discussion of how and why the reasonable alternatives were selected for detailed study and explain why other alternatives were eliminated. FHWA specifically requires the following range of alternatives to be considered when determining reasonable alternatives:

- "No-action" alternative: may include activities such as short-term minor restoration activities (e.g., safety and maintenance improvements) that maintain continuing operation of the existing roadway.
- Transportation System Management (TSM) alternative(s): activities which maximize the efficiency of the present system. Possible subject areas to include in this alternative are options such as ride-sharing, the addition or designation of high-occupancy vehicle (HOV) lanes on existing roadways, and/or traffic signal timing optimization.
- Mass Transit alternative(s): reasonable and feasible transit options (e.g., bus systems, rail) even though they may not be within FHWA funding authority (when such an alternative is considered, FHWA coordination with the Urban Mass Transportation Administration is necessary).
- Build alternatives: construction activities such as the improvement of existing highway(s) or alternatives in a new location.[25]

A discussion of the "no-build" alternatives (no-action, TSM, or mass transit alternative) can serve as a baseline against which "build" alternatives are compared. It provides an agency with an opportunity to explore and discuss options such as the designation of HOV lanes, changes in mass transit, or the creation of ride-sharing

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[22] 40 CFR 1502

[23] From response to question regarding the "Alternatives Outside the Capability of Applicant or Jurisdiction of Agency" in *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, published in the Federal Register at 46 FR 18026, March 16,1981.

[24] 23 CFR 771.111(f)

[25] These choices are specified in FHWA Technical Advisory T6640.8A, October 30, 1987, entitled "Guidance for Preparing and Processing Environmental and Section 4(f) Documents," available online [http://www.fhwa.dot.gov/environment/nepa/ta6640.htm].

programs. Also, in instances where impacts are particularly adverse, the no-build alternative may prove to be a viable alternative if the need is relatively minor.

With regard to the "build alternatives," large, complex projects may have the potential for a large number of reasonable alternatives. Where this is the case, CEQ suggests that only a representative number of the most reasonable examples, covering the full range of alternatives, should be presented.[26] The determination of the number of reasonable alternatives in the draft EIS, therefore, depends on the particular project and the facts and circumstances in each case.

Identification of the Affected Environment. CEQ regulations require that one section of the EIS be devoted to describing the environment of the area affected by each alternative under consideration.[27] FHWA guidance suggests that this section includes a description of the existing social, economic, and environmental setting of the area potentially affected by all alternatives presented in the EIS.[28] Data to include in this section may include demographics of the general population served by the proposed project, as well as an identification of socially, economically, and environmentally sensitive locations or features in the proposed project area. For example, the EIS should identify the presence of impacted minority or ethnic groups, parks, hazardous material sites, historic resources, or wetlands.

Identification of Environmental Consequences. One section of the EIS must identify the specific "environmental consequences" (i.e., impacts or effects) of each alternative. It is within this section that methods of compliance with applicable legal requirements may be discussed and demonstrated.[29] An explanation of environmental consequences involves a discussion of the probable beneficial and adverse social, economic, and environmental effects of each alternative. Also included would be a description of the measures proposed to mitigate adverse impacts.

CEQ regulations specify minimum criteria for evaluating environmental consequences.[30] For example, this section must include, where applicable, a discussion of both the direct and indirect effects of each alternative and the significance of those effects.

FHWA also has identified 25 environmental consequences potentially applicable to highway projects (see **Table 2**). For example, one potential environmental consequence regards "Historic and Archeologic Preservation." If a project alternative results in such an environmental consequence, the draft EIS may require a discussion

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[26] From responses to questions regarding the "range of alternatives" in *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*.

[27] 40 CFR 1502.15

[28] See FHWA Technical Advisory T6640.8A, October 30, 1987, Section V.F.

[29] The environmental consequences potentially relevant to a given transportation project would be regulated under the statutes and executive orders listed **Table 1**.

[30] 40 CFR 1502.16

demonstrating that such resources have been identified and evaluated in accordance with all legal requirements under Section 4(f) or Section 106 of NHPA.

FHWA recommends that the environmental consequences section be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action relative to each alternative. The FHWA may need input from other federal, state, or local agencies with expertise on the environmental consequences under review. For example, FHWA may need assistance in determining environmental consequences to threatened or endangered species, coastal zones, floodplains, or air quality.

Table 2. Potential Types of Environmental Consequences to be Considered for Transportation Projects

• Land Use Impacts • Farmland Impacts • Social Impacts • Relocation Impacts • Economic Impacts • Joint Development • Considerations Relating to Pedestrians & Bicyclists • Air Quality Impacts • Noise Impacts • Water Quality Impacts • Permits • Wetland Impacts • Water Body Modification & Wildlife Impacts	• Floodplain Impacts • Wild & Scenic Rivers • Coastal Barriers • Coastal Zone Impacts • Threatened/Endangered Species • Historic & Archeological Preservation • Hazardous Waste Sites • Visual Impacts • Energy • Construction Impacts • Relationship of Local Short-term Uses vs. Long-term Productivity • Irreversible & Irretrievable Commitment of Resources

Source: Table prepared by the Congressional Research Service (CRS) based on data from the FHWA Technical Advisory T6640.8A

Agency Comments and Coordination. NEPA projects involve the participation of a "lead agency" and "cooperating agencies." The lead agency is defined as the federal agency that has taken responsibility for preparing the NEPA documentation.[31] For federally funded highway projects, the lead agency will usually be FHWA. State or local agencies, such as state DOTs, will likely act as joint lead agencies. The project applicant will initially develop substantive portions of the environmental document, while FHWA will be responsible for its scope and content.[32] FHWA requires that the draft and final EIS demonstrate that appropriate comments and coordination were solicited from relevant federal, state and local cooperating agencies.

Cooperating agencies required to provide input on an EIS are those that are obligated to provide comments within their agency's jurisdiction, expertise, or authority. This means that the federal agency with jurisdiction over or expertise

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[31] 40 CFR 1508.16

[32] 23 CFR 771.109(c)

regarding any identified environmental consequence is required to provide FHWA with the appropriate input. For example, if historical and archeological preservation consequences are identified, the Advisory Council on Historic Preservation will likely be included as one of the cooperating agencies during the NEPA Process. If farmland impacts are identified, the draft EIS should summarize the results of comments and coordination with the U.S. Department of Agriculture (USDA) and, as appropriate, state and local agriculture agencies.

If a cooperating agency, or any other federal, state or local agency participating in the NEPA Process, comments on a NEPA document, FHWA is required to assess and consider those comments and respond in one of the following ways:[33]

- Modify proposed alternatives.
- Develop and evaluate alternatives not previously considered.
- Supplement, improve, or modify its analyses.
- Make factual corrections to the EIS.
- Explain why the comments do not warrant further agency response from FHWA, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

Under CEQ regulations, lead agencies are required to invite comments, cooperating agencies have a duty to respond to environmental documents, and lead agencies are required to respond to those comments. However, as illustrated in the choices listed above, the lead agency is not precluded from moving forward with a project if it explains why a cooperating agency's comments do not warrant further response.

Public Involvement. One of the primary goals of NEPA is to allow the public a meaningful opportunity to learn about and comment on the proposed actions of the federal government. It is the intent of NEPA that agencies encourage and facilitate public involvement in decisions that affect the quality of the human environment and make a diligent effort to involve the public in preparing and implementing their NEPA procedures. To meet these goals, agencies are required to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform public stakeholders that may be interested in or affected by a proposed project. Any documentation related to the public's participation in the NEPA process (i.e., comments or hearings transcripts) must be included in the final EIS.

Stakeholders who may comment on surface transportation projects will vary according to the impacts of each project. They may include individuals or groups expected to benefit from or be adversely impacted by the project, or special interest groups with concerns about the project's impacts on certain affected environments. For example, consider a highway project that involves upgrading existing roadways, the construction of which would impact adjacent homes or businesses. Such a project may elicit comments from the local business community (e.g. individual

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[33] 40 CFR 1503.4

businesses, the Chamber of Commerce, or local development organizations) or area home owners. A project with impacts to sensitive environmental resources, such as wetlands or endangered species, may generate comments from local or national environmental organizations.

If a stakeholder has concerns about a project's impacts, their comments may be directed at virtually any element of the NEPA process or related documentation. While not an exhaustive list, following are examples of topics on which a stakeholder may comment:

- Purpose and need determination – stakeholders may assert that a project's purpose and need discussion was not sufficiently broad, meaning the scope of the purpose and need was so narrow that only a limited number of alternatives could be chosen.
- Alternatives selection – stakeholders may assert that all "reasonable" alternatives were not considered. They may assert that additional alternatives exist that were not considered. This may be the case particularly for controversial projects that are not welcomed by impacted communities or special interest groups.
- Alternatives analyses – stakeholders may assert that proposed alternatives were not analyzed sufficiently to determine all potential environmental consequences.
- Issues with documentation – a stakeholder may assert that all regulatory requirements were not fulfilled. For example, they may assert that required findings were not documented (e.g., proof of compliance with all applicable laws was not documented) or that required evaluations or reviews were not sufficiently illustrated (e.g., the presence of endangered species or impacts to historic sites was not properly evaluated, or consideration of social and economic impacts was not demonstrated).
- Issues regarding project significance – stakeholders may disagree with the lead agency's determination of the project's significance. For example, they may assert that a project for which an EA was prepared should have required an EIS, or they may feel that a project approved as a categorical exclusion was questionable and required the more in-depth review of an EA.

Any one of the topics listed above could be the subject of legal action, and has been in the past. For example, FHWA personnel have indicated that a recent court decision is now commonly used as the benchmark in developing the appropriate purpose and need statement and resulting scope of project alternatives during the NEPA process.[34] Plaintiffs in this case were affected landowners who brought suit against the U.S. Army Corp of Engineers in response to their issuance of a permit to build a dam. In his decision, the judge stated, "One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence) ... If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role."

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[34] See *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (1997).

To a large degree, the manner in which FHWA implements NEPA is dictated by such judicial decisions. To avoid conflict after a project has reached an advanced stage of development, FHWA recommends that continuous contact with non-agency stakeholders be maintained throughout the decisionmaking process– from the earliest project planning stages, as one or more transportation problems are identified, through defining purpose and need, through the development of a range of potential alternatives, and up to the decision to select a particular alternative.

Record of Decision. Not less than 30 days after publication of the final EIS notice in the Federal Register, a Record of Decision (ROD) is signed. The ROD will present the basis for the Agency's final decision, summarize any mitigation measures that will be incorporated in the project, and document any approval of resources regulated under Section 4(f). Final design activities, property acquisition, purchase of construction materials, or project construction cannot begin until the ROD has been signed.

Documentation Required When Impacts are Not Significant. Transportation projects that do not individually or cumulatively have a significant social, economic, or environmental effect, and which FHWA has determined from past experience have no significant impact, are excluded from the requirement to prepare an EIS or Environmental Assessment (discussed below). Such actions are processed as categorical exclusions (CEs) and make up almost 91% of the projects processed by FHWA. Even if a project's impacts are not significant, CEQ and FHWA regulations may require a certain degree of documentation to prove that the highway project is undertaken in compliance with all applicable environmental requirements (see **Table 1**).[35]

Even though categorically excluded projects have insignificant environmental impacts, depending upon the action, some documentation may be required to prove that the CE determination is appropriate and that any required environmental review or analysis has occurred. As discussed previously, statutory requirements to conduct certain environmental reviews may still be required, regardless of whether impacts are deemed significant under NEPA. For example, any impacts to a 4(f) resource must be evaluated. Also, documentation regarding the assessment of impacts to endangered species habit may be required.

FHWA regulations specify two groups of activities that experience has shown would meet the definition of a CE. Whether and what type of documentation will be required, before the project could be approved by FHWA, would depend on within which of the two groups the action falls.[36]

The first group includes projects that call for no or limited construction. Examples include the construction of bicycle and pedestrian lanes, paths, and facilities, landscaping, the acquisition of scenic easements, emergency repairs, and the installation of fencing, signs, pavement markings, small passenger shelters, or traffic signals. Normally such projects do not require any further NEPA approvals

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[35] 23 CFR 771.133

[36] Each group of potential CEs is listed under 23 CFR 771.117(c) and (d).

by FHWA. However, requirements of other laws may still apply. For example, construction of a bicycle path or installation of traffic signals in a historic district may require compliance with Section 106 or Section 4(f). While requirements under NEPA indicate that such a project has no significant impact, documentation of compliance with additional statutory requirements may be required to approve the project's CE status.

The second group of projects consists of actions with a higher potential for impacts than the first group, but which still meet the criteria for a CE because environmental impacts are minor. An example of such a project is the modernization of a highway through resurfacing, reconstruction, adding shoulders, or adding auxiliary lanes. Whether or not such actions will have a significant impact on the environment depends largely on where they are located. Where adverse environmental impacts are likely, FHWA recommends that the level of analysis be sufficient to define the extent of impacts, identify appropriate mitigation measures, and address known and foreseeable public and agency concerns. At a minimum, documentation must include a description of the proposed action and, as appropriate, its immediate surrounding area, a discussion of any specific areas of environmental concern (e.g., historic sites or wetlands), and a list of other federal actions required, if any, for the proposal.[37]

Documentation Required When the Significance of Impacts is Uncertain. An environmental assessment (EA) is prepared when it is uncertain whether a project's impact will be significant. The EA should briefly provide evidence and analysis for determining whether to prepare an EIS (i.e., whether the project's impacts are significant).[38] If at any time during preparation of the EA, it is determined that a project's impacts are significant, EIS preparation should begin.

There is no standard format for EAs required by either CEQ or FHWA regulations. FHWA suggests that the process for developing an EA should be similar to developing an EIS.[39] For example, the applicant should consult interested agencies to scope the project to determine the potential for social, economic or environmental impacts; briefly discuss the project's purpose and need; identify project alternatives and measures to mitigate adverse impacts; and identify any other environmental review requirements applicable to the project (i.e., section 4(f) or 404 permitting requirements).

The EA and other relevant documents (e.g., public comments or hearing transcripts) must be submitted to the FHWA with a request for a Finding of No Significant Impact (FONSI). FHWA requires that the basis for the FONSI request be clearly and adequately documented. Like an EIS, the EA or FONSI is required to clearly document compliance with NEPA and all other applicable environmental laws, executive orders, and related requirements. An approved FONSI serves the same purpose that a ROD serves with an EIS. Similarly, final design activities,

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[37] This guidance is provided in FHWA Technical Advisory T6640.8A

[38] 40 CFR 1508.9

[39] See FHWA Technical Advisory T6640.8A, Section II, "Environmental Assessments."

property acquisition, purchase of construction materials, or project construction cannot begin until the FONSI has been approved.

FHWA estimates that projects requiring an EA, and no subsequent EIS, accounted for almost 7% of highway projects approved in 2001. Coupled with categorically excluded projects discussed above, this means that close to 97% of all projects approved by FHWA are determined to have no significant impact on the environment. **Figures 1 and 2** illustrate the percentage of FHWA projects by the threes classes of action discussed above and by funding amounts for 1998 through 2001. Note that while projects requiring an EIS are often the most complex and costly, on average, such projects still account for less than 10 percent of total FHWA project funding.

Figure 1. FHWA Projects by Class of Action

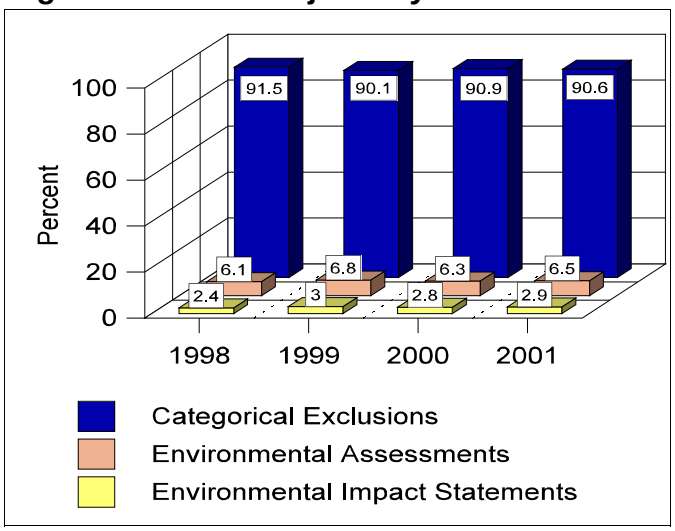
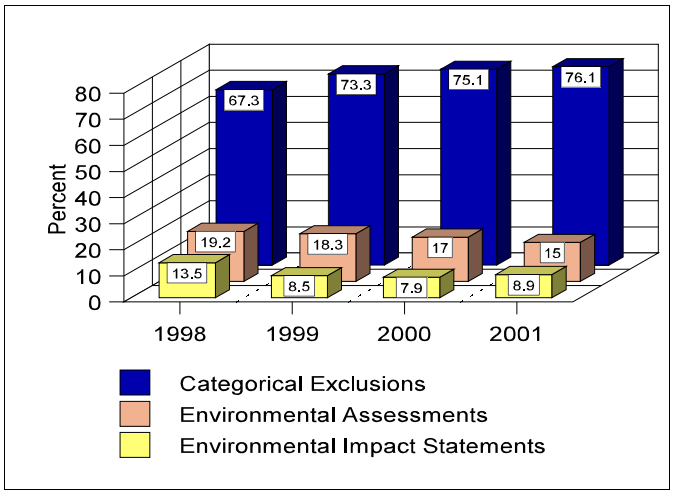


Figure 2. FHWA Project Funding by Class of Action



Source: FHWA, available at [http://www.fhwa.dot.gov/environment/strmlng/projectgraphs.htm].

Determining NEPA's Role in Transportation Project Delays

The process of both compliance with and *documenting* compliance with all environmental statutes, regulations, executive orders, and court decisions potentially applicable to a highway project is complicated. As has been discussed, even those projects with no or minor environmental impacts must demonstrate that potential impacts to certain types of resources (i.e., public parkland, historic sites, land with threatened or endangered species, or property in minority neighborhoods) have been considered and that compliance with applicable requirements documented.

The perception that NEPA results in extensive delays and additional costs to the successful delivery of transportation projects can be magnified when compliance with multiple environmental laws and regulations is required (as would likely be the case with large, complex highway projects). FHWA has asserted that many delayed projects or failed processes can be traced back to a disintegrated and disconnected approach to meeting NEPA and other requirements. FHWA asserts that their experience in administering NEPA has shown that many practitioners do not fully understand or practice the approach to using the NEPA process as an umbrella for integrating all required studies, reviews, or consultations.[40]

The sometimes extensive reviews required by agencies such as the Army Corps of Engineers, the Fish and Wildlife Service, the Coast Guard, or EPA, as well as various state regulatory and review agencies, add further to the perception that extensive delays are related to the "NEPA process." Such delays may actually be a result of an agency's need to complete a permitting processes or other analyses under separate statutory authority (e.g., the Clean Water Act or Endangered Species Act), over which FHWA has no authority.

A project with significant impacts would likely be a large, high-profile, complex project costing millions of dollars. Delays of such projects are well-known among transportation professionals and have garnered significant public attention in the past. For example, in the Washington, D.C. area, replacement of the Woodrow Wilson Memorial Bridge is a well-known FHWA project. Challenges to the NEPA documentation for that project resulted in delays to the project. However, much of the delay was only indirectly related to the NEPA process, in that the project has highly visible and generated significant public interest. Often, similar high-profile projects have been delayed by public challenges to elements of the NEPA documentation. However, until recently, there was only anecdotal information directly linking the "NEPA process" to widespread highway project delays.

Studies Examining NEPA's Role in Project Delays. Federal and state governments do not routinely maintain information on the time it takes to complete highway projects. Therefore, gathering accurate data specific to the time it takes to prepare NEPA documentation is difficult. For example, document preparation under NEPA is generally done concurrently with preliminary project design. If a project undergoes specification changes, those changes may necessitate changes in NEPA documentation. Consequently, the time to complete the NEPA process may be

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[40] Notice of Proposed Rulemaking, 65 FR 33965, page 33976.

extended. However, determining if such delays can be directly attributed to the NEPA process itself may be difficult. Several studies, conducted by both the General Accounting Office (GAO) and FHWA have attempted to define that connection. The findings of these studies are discussed below.

2002 GAO Report. In the absence of data to determine project development time frames, GAO compiled data based on the professional judgement of FHWA staff, staff of state departments of transportation, and transportation associations.[41] FHWA estimated that it typically takes from 9 to 19 years to plan, gain approval for and construct a new major, federally-funded highway project that has significant environmental impacts (i.e., requires an EIS). Such projects were completed in four phases as outlined in **Table 3**.

Table 3. Estimated Time to Complete Federally Funded Highway Projects

Phase	Time to Complete (years)
Planning	4-5
Preliminary design and environmental review	1-5
Final design and right-of-way acquisition	2-3
Construction	2-6
Total	**9-19**

Source: FHWA, as quoted by GAO.

GAO noted that the wide range in time for each phase is attributed to the inherent variations in project size, complexity, and public interest in the project. In the study, FHWA noted that the "preliminary design and environmental review" phase often overlapped with the "final design and right-of-way acquisition" phase. Federal and state officials reported that larger, more controversial projects were likely to take longer because they generally required compliance with more federal and state requirements and because of the public interest they may generate.

Federal and state transportation officials and transportation engineering organizations contacted by GAO identified the timely resolution of environmental issues as providing the greatest opportunity for reducing the time it takes to complete highway projects. Those officials generally stated that environmental reviews resulted in better project decisions; but reaching those decisions was difficult and time consuming. Factors that could make the process more difficult included: incomplete permit applications, limited resources at environmental agencies, and public opposition to projects.

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[41]General Accounting Office, *Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects*, GAO-02-1067T, September 19, 2002.

FHWA NEPA Baseline. Among the data used in the 2002 GAO report, referenced above, was information from an FHWA study completed in 2001.[42] In that study, FHWA undertook an analysis of the direct effect that compliance with the requirements of NEPA has on the ultimate schedule and cost of delivering a completed transportation project. The report is to be used to establish a baseline against which progress on its streamlining initiatives will be gauged. The study was also intended to provide a better understanding of the impacts of the NEPA process on the total time involved in completing a Federal-aid highway or bridge project, as well as individual factors influencing the time required to complete the NEPA process in order to develop performance measures for future improvement.

In the baseline study, FHWA acknowledged the perception that NEPA is the cause of delays and additional cost to the delivery of transportation projects. FHWA asserted that what was missing from the discussion was an analysis of the *direct* effect that compliance with the requirements of NEPA has on the ultimate schedule and cost of delivering a completed transportation project. The baseline study attempted to determine or define that connection. Following are significant conclusions drawn by the FHWA study:

- For projects requiring an EIS, the mean time required for the *entire* project development process was approximately 13.1 years.
- For projects requiring an EIS, the NEPA process generally comprises approximately 27% to 28% of that total project development period (from the time that either preliminary engineering or the NEPA process begins, whichever is first, to the end of construction).
- The time to prepare an EIS has increased from a mean of 2.2 years in the 1970s to a mean of 5.0 years in the 1990s.
- The time to prepare an EIS increased by almost two years when a Section 404 permit or Section 4(f) approval was also required (e.g. the average time to complete an EIS was 4. 3 years when a Section 404 permit was involved, but only about 2. 4 years when no Section 404 permit was involved); the increase when a Section 106 approval was required was negligible.
- The length of time to prepare an EIS varied between regions, with the greatest time required in the Northeast (with a median value of 4.5 years) and the least time required in the Northwest (with a median value of 1 year).[43]

During Congressional oversight hearings on streamlining, transportation stakeholders have noted the increase in time to complete an EIS from the 1970s to the 1990s.[44] In its baseline study, FHWA does not comment on the cause of this

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[42] 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].

[43] The value of quoting "mean" versus "median" number of years, in looking at a given statistic, was discussed in the survey. It was determined that, since NEPA data were not normally distributed, the mean, or average, value was not always a good indicator of central tendency. Therefore, in some instances, it was determined that the median, or mid-point value, was the most relevant value.

[44] See testimony of John C. Horsley, Executive Director of the American Association of State Highway and Transportation Officials; Brian Holmes, Executive Director, Maryland Highway Contractors Association, on behalf of the American Road & Transportation Builders Association; and Hal Kassoff, Vice President, Parsons Brinckerhoff, on behalf of

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increase. However, there are a variety of factors that contribute to lengthened reviews. For example, the process for completing an EIS in the 70s differs substantially from the process undertaken in the 90s. Until November 1978, there were no CEQ regulations outlining EIS requirements. While an EIS may have been completed relatively quickly during the 70s, compared to the 90s, it may not have withstood judicial review. FHWA did not promulgate its own regulations until 1987. Such regulations may have served to make the process take longer, but may have resulted in fewer overall project delays, in situations where adherence to the regulations resulted in a more legally sound EIS. Also, the complexity of projects in the 1970s are not comparable to those of the 1990s and public is more involved in the highway construction process in the 1990s than was the case in the 1970s.

The difference in time to complete projects from region to region may be attributed to differences in the types of projects likely to occur in those regions. For example, projects in the Northeast that simply expand or upgrade existing highway systems, but occur in the heavily-developed regions, may involve a wide range of significant impacts. While projects in the less-developed Northwest may generate fewer overall impacts and be easier to implement.

FHWA Study of EIS Delays. In September 2000, FHWA issued a study that explored causes of delay of certain projects requiring an EIS.[45] This study was done in response to a question submitted by the House Committee on Transportation and Infrastructure in March 2000 regarding causes of delay for highway projects that had not had a ROD approved after five years. FHWA identified 89 projects that fit the specified criteria.

Survey respondents were asked to provide a brief assessment of the reasons that each project had taken more than five years to complete the NEPA process. In the study, over 60% of project delays could be attributed to lack of funding, low priority, local controversy, or project complexity. The results of this report were often quoted by interested stakeholders as evidence that neither NEPA, nor any environmental issues related to NEPA compliance, was a significant cause of transportation delays.

At the request of Representative Don Young, GAO reviewed the FHWA study's methodology to determine the usefulness of its results.[46] In the report, released in January 2003, GAO determined that some elements of the study's methodology called into question the usefulness of the final results. For example, if respondents provided more than one cause of project delays, only one response was included, typically the answer written first. It could not be definitively determined if the one

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[44](...continued)
the American Council of Engineering Companies, before the Subcommittee on Highways and Transit Committee on Transportation and Infrastructure, United States House of Representatives, October 8, 2002.

[45] FHWA, *Reasons for EIS Project Delays*, available at [http://www.fhwa.dot.gov/environment/strmlng/eisdelay.htm#image].

[46] General Accounting Office, *Federal Highway Environmental Analysis*, GAO-03-338R, January 16, 2003.

answer chosen was the most serious cause of delay, or if multiple causes were similarly relevant.

In the 2003 report, GAO concluded that, by relying on often general narrative responses, without directing its division offices to indicate the relative importance of responses, FHWA limited its ability to provide useful insights. Furthermore, by not describing its methodology, FHWA limited the ability of the Congress and the public to evaluate the strengths and weaknesses of the study in order to understand its reliability. In response to the GAO report, FHWA has updated its study results to explain the survey methodology.

2003 GAO Reports on Stakeholder Views of the NEPA Process. Perceptions regarding the time it takes to conduct required environmental reviews for highway projects vary among stakeholders. This is the finding of a May 2003 GAO report that looked at the views held by environmental stakeholders and transportation improvement stakeholders.[47] "Environmental stakeholders" included resource agencies, state historic preservation agencies, and environmental advocacy organizations. "Transportation improvement stakeholders" included state departments of transportation, FHWA division offices, and transportation advocacy organizations.

Stakeholders of highway construction projects contacted by GAO identified 43 aspects that they said added undue time to complete an environmental review of federally funded highway projects. "Undue time" was considered more time than the stakeholder viewed as necessary to complete the review. Of the 43 total aspects identified, five were identified by one or both groups of stakeholders as occurring most frequently (see **Table 4**). Each group of stakeholders disagreed on the degree to which each of those five aspects impacted the review process.

Table 4. Environmental and Transportation Improvement Stakeholders' Most-Frequently Cited Aspects Adding "Undue Time" to Environmental Reviews of Highway Projects.

Aspect Identified	Environmental Stakeholders[a]	Transportation Stakeholders
State DOTs do not consider environmental and historic preservation impacts early enough in the highway planning process.	70%	13%
State DOTs do not include important stakeholders early enough in the process.	64	19
State DOTs lack sufficient staff to perform responsibilities in a timely manner.	50	69

[47] General Accounting Office, *Highway Infrastructure: Stakeholders' Views on Time to Conduct Environmental Reviews of Highway Projects*, GAO-03-534, May 23, 2003.

Requirements under "Section 4(f)" are burdensome.	30	56
Obtaining wetlands permits under Section 404 of the Clean Water Act is time consuming.	0	56

[a] Values listed represent the percentage stakeholders in each category that chose this aspect as one that added undue time to the environmental review process.

Source: Table prepared by the Congressional Research Service (CRS) based on data from the GAO analysis of stakeholder response presented in GAO-03-534, pg. 6.

Findings in the May 2003 GAO report were consistent with findings in an April 2003 GAO report on stakeholder perceptions of the most promising approaches to to reduce completion time for highway projects (as opposed to perceptions of *causes* of delays).[48] The April 2003 GAO report looked at all aspects of a highway project from planning through construction. In this report, survey respondents were from organizations representing a wide range of federal, state, tribal, and advocacy interests. Following are approaches identified by a majority of respondents that were deemed most promising with regard to improving the environmental review process:

- Establish early partnerships and coordination among stakeholders so that technical, environmental, policy, and other issues can be resolved in a timely and predictable manner (identified by 90% of all respondents).
- Revise Section 4(f) – use Section 106 procedures for consideration of historic properties and other historic resources (70%).
- Use programmatic agreements as a means of delegating review or permitting authority to states for routine projects or commonly occurring resource effects (68%).
- Establish time frames for environmental reviews (60%).
- Use interagency funding agreements to provide staff at resources agencies (59%).
- Prepare a preliminary environmental assessment report that will provide information on any environmental conditions and constraints before determining project costs or schedule (53%).
- Unify NEPA and Section 404 reviews so that Section 404 reviews are addressed concurrently with other environmental issues (58%).

In the April report, GAO recommended that FHWA consider the benefits of the most promising approaches and act to foster the adoption of the most cost effective and feasible approaches. FHWA generally agreed with this recommendation and stated that most, if not all, of the most promising approaches coincide with its current streamlining activities.

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[48] General Accounting Office, *Highway Infrastructure: Perceptions of Stakeholders on Approaches to Reduce Highway Project Completion Time*, GAO-03-398, April 2003.

The Transportation Equity Act for the 21st Century

In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178) that 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. Although not specifically defined in TEA-21, FHWA defines environmental streamlining as the timely delivery of federally-funded transportation projects, while protecting and enhancing the environment. A summary of the streamlining provisions of TEA-21 and the Administration efforts to implement them are discussed below.

"Streamlining" Provisions of TEA-21. The streamlining provisions in Section 1309 of TEA-21 were intended to better coordinate federal agency involvement in the NEPA process. Following are key elements of Section 1309:

- Directs the Secretary of Transportation to establish a "coordinated environmental review process" that, among other provisions, establishes time frames for completion of the environmental review process;
- Directs the Secretary to resolve interagency disputes when established time limits are not met;
- Allows state DOTs to direct relevant state agencies to participate in the coordinated environmental review process; and
- Provides state DOTs with the ability to request funds to reimburse agencies for expenses associated with expediting environmental reviews.

Coordinated Environmental Review Process. Subsection 1309(a) and (b) of TEA-21 outlined provisions regarding the development and implementation of a "coordinated environmental review process." The Secretary of DOT was required to develop this process for any project requiring an EIS or EA under NEPA. The Secretary may, however, choose not to apply this review process to EAs or other environmental documentation (i.e., reviews, analysis, or permits) required by law. The coordinated review process may be delineated in a memorandum of understanding. TEA-21 specified elements to be included in the coordinated review process. At a minimum it was required to provide:

- The early identification of federal or state agencies with jurisdiction over environmental issues related to the project or that may be required by law to participate in the environmental review process;
- The establishment of time frames for completion of any agency comments or other environmental requirements (i.e., reviews, analyses, opinion, permits, licenses or approvals), to be determined jointly by DOT and the agencies identified for participation; and
- A requirement that time frames for completion of requirements be undertaken by all agencies concurrently, unless the agency can show that the concurrent review would alter operation of federal law, would result in a significant

adverse impact to the environment, or would not be possible without information developed as part of the environmental review process.

Established time frames were required to be consistent with current Council of Environmental Quality (CEQ) regulations and any other environmental regulations. DOT was directed to set time limits for the proposed project as long as the limits are consistent with the purposes of NEPA.[49]

Dispute Resolution Procedures. Section 1309(c) allows the Secretary to close the record on an activity, after notice and consultation with the affected agency, if the agency has not completed it by an established deadline. If an unresolved matter involves an activity required by law, the Secretary and the agency are directed to resolve the matter within 30 days. However, this section does not give the Secretary additional authority over agencies outside DOT. Consequently, the requirement for an agency to meet the 30-day time period would not supersede statutory responsibilities under other laws (e.g., the Endangered Species Act or Clean Water Act).

State Agency Participation. Under Section 1309(d), a state may require that all state agencies, with jurisdiction over environmental issues potentially applicable to a project, be subject to the coordinated environmental review process unless the Secretary of DOT determines that a state's participation would not be in the public interest. For a state to require state agencies to participate in the review process, all affected agencies of the state would be subject to the review process.

Financial Assistance and Judicial Review. Section 1309(e) 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. Section 1309(f) specifies that nothing in Section 1309 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.

Of the provisions discussed above, TEA-21's streamlining requirements did not permit the Secretary to override the authority of another agency to conduct environmental reviews. For example, the U.S. Fish and Wildlife Service would not be required to complete biological assessment of an impacted endangered species within a time frame that would not allow it to meet its own statutory obligations under the Endangered Species Act.

Administrative Actions to Implement TEA-21. 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

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[49] Time limits are to be consistent with requirements stipulated under 40 CFR 1501.8 and 1506.10

Procedures for Transportation Decisionmaking."[50] 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 argued, and increased the potential for litigation. There was also a concern that the proposed rule lacked specific provisions addressing the establishment of 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 under the Bush Administration in September 2002.[51]

Since withdrawal of the proposed rule came within a year of the legislative reauthorization of federal 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 signed Executive Order 13274, "Environmental Stewardship and Transportation Infrastructure Project Review."[52] The Order established a policy that directed federal agencies to "take appropriate actions, to the extent consistent with applicable law and available resources, to promote environmental stewardship in the Nation"s transportation system and expedite environmental reviews of high-priority transportation infrastructure projects." To meet this policy, agencies were required to formulate and implement administrative, policy, and procedural mechanisms to enable each agency required to participate in the environmental reviews process to ensure that completion of such reviews occur in a "timely and environmentally responsible manner."

Among the criteria required for a project to be designated a "high-priority project" are whether it is of national or regional significance and whether it may experience delays from lack of federal interagency coordination. To date, 13 FHWA projects (10 highway and 3 transit projects) have been chosen for priority review.

As required by the order, an "Interagency Transportation Infrastructure Streamlining Task Force" was created that is chaired by the Secretary of Transportation. Task Force members are from federal agencies likely involved in environmental project reviews. Members include the Secretaries of Agriculture, Commerce, the Interior, and Defense, the Administrator of EPA, Chairman of the Advisory Council on Historic Preservation, and Chairman of the CEQ, or their designee. The Task Force monitors work on expedited projects, reviews the list of suggested projects, and identifies and promotes policies that aid in streamlining. The Task Force reports to the President through the Chairman of the CEQ.

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[50] 65 *Federal Register* 33960.

[51] 67 *Federal Register* 59225.

[52] This Executive Order is available at [http://www.fhwa.dot.gov/stewardshipeo/index.htm].

Reports to Congress. Conference report language (H.Rept. 108-10) for the Consolidated Appropriations Resolution for 2003 (P.L. 108-7) directed FHWA to provide the House and Senate Appropriations Committees with a report, by April 15, 2003, summarizing FHWA's streamlining efforts. In April 2003, FHWA submitted its Report to Congress, providing an update on the status of the accomplishments in the following areas:[53]

- Solidifying interagency partnerships
- Re-engineering the environmental review process
- Issuing guidance to enhance process predictability
- Evaluating the performance of environmental streamlining
- Institutionalizing dispute resolution
- Supporting state environmental streamlining efforts
- Sharing information on best practices

FHWA issued a similar Report to Congress in 2002 for environmental streamlining activities during 2001.[54] The 2002 report detailed state streamlining activities and interagency cooperative efforts to facilitate TEA-21's streamlining requirements.

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.[55] Workshops in the application and use of alternative dispute resolution procedures are currently being scheduled and will use the guidance as the principal reference document.

Training and Guidance Materials. FHWA has sponsored training, seminars, and workgroups, and issued a variety of guidance documents aimed at assisting state DOTs or other federal agencies in implementing the NEPA process more efficiently. FHWA sponsored workshops with the U.S. Army Corps of Engineers, EPA, FWS, and NOAA Fisheries. Workshops identified innovative streamlining practices as well as issues that cause interagency conflict.

In January 2003, FHWA issued interim guidance to help state DOTs analyze indirect and cumulative impacts and streamline the NEPA process.[56] In February 2003, FHWA guidance documents to assist state DOTs in using interagency funding

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[53] The report is available at [http://www.fhwa.dot.gov/environment/strmlng/final02rpt.htm].

[54] This report is available at [http://www.fhwa.dot.gov/environment/strmlng/ssprtcr.htm].

[55] "Collaborative Problem Solving: Better and Streamlined Outcomes for All," February 2003, is available at [http://www.fhwa.dot.gov/environment/strmlng/cmgtnepa.htm].

[56] The guidance, "Interim Guidance: Questions and Answers Regarding Indirect and Cumulative Impact Considerations in the NEPA Process," January 2003 is available at [http://www.fhwa.dot.gov/environment/guidebook/qaimpact.htm] and .

agreements to hire additional staff at state and federal resource agencies to speed up the environmental review process.[57]

Support of State Streamlining Initiatives. In 2002, the American Association of State Highway and Transportation Officials (AASHTO) launched the "Center for Environmental Excellence" with technical and financial assistance from by FHWA. The Center is intended to assist its members in promoting "innovative streamlining" of the project delivery process. FHWA is also supporting individual states in implementing their own streamlining initiatives by providing program funding and technical support.

Challenges to Streamlining

Late in the 107th Congress, hearings on the streamlining issue were held by the Senate Environment and Public Works Committee and the House Subcommittee on Highways and Transit of the Committee on Transportation and Infrastructure. In conjunction with those hearings, two bills were introduced to address the streamlining issue, but neither was enacted. Representative Don 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. Both the hearings and proposed bills highlighted a variety of streamlining issues that some Members of Congress felt needed further attention. Included among those issues was the need to:

- Better coordinate the NEPA process on a nationwide basis (as opposed to achieving varying levels of success from state-to-state);
- Establish DOT as the definitive decision maker when determining a project's purpose and need and project alternatives;
- Establish a statute of limitations on judicial review of final agency actions; and
- Delegate more power to the states.

House or Senate versions of legislation reauthorizing surface transportation programs may include elements of some or all of the provisions listed above. Such provisions may serve to streamline the NEPA process for certain projects. For reasons presented below, however, challenges to streamlining highway projects may still exist.

Establishing a Statutory Environmental Review Process. Some Members of Congress have expressed frustration that DOT has not promulgated regulations to implement a coordinated environmental review process as required under Section 1309 of TEA-21. In lieu of regulations, some Members of Congress have expressed the desire to create such a process in statute. The inherent variability among highway projects may make the creation of a single environmental review process difficult to implement. The more significant a project's environmental

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[57] "Interagency Guidance: Transportation Funding for Federal Agency Coordination," is available at [http://www.fhwa.dot.gov/environment/strmlng/igdocs/index.htm].

impacts, the more complicated the environmental review process will likely be for any given highway project. Methods that are effective in streamlining one project may not be as effective in another. For example, one project may require minimal input from participating agencies, and hence little coordination among agencies, while another project may require assistance from a variety of agencies in evaluating impacts to certain resources or communities (e.g. minority neighborhoods or endangered species habitat).

Considering this variability between projects, the establishment of provisions applicable to all highway projects, such as the establishment of specific deadlines, may be difficult to implement while remaining compliant with all applicable legal requirements. Also, a participating agency may be required to provide consent to allow certain activities to proceed (i.e., they may be required to issue permits for certain activities) or to specify how certain impacts must be mitigated. Such actions are required pursuant to separate statutory authority over which the FHWA has no control. An environmental review process that allows for flexibility to respond to these various legal requirements may allow for more efficient implementation of the NEPA process.

Finally, any statutory changes that would result in changes to the way NEPA is implemented would likely generate substantial attention from a variety of stakeholders. If a coordinated environmental review process were implemented through the regulatory process, the public and interested stakeholders would be allowed to comment on the proposed process. Depended upon the changes suggested, such a process may generate significant opposition among affected stakeholders.

Establishing Lead Agency Authority. NEPA does not specify lead agency authority. However, CEQ regulations implementing the NEPA process do specify the authority and requirements applicable to both the lead agency and participating agencies. In his capacity as the Chairman of the Interagency Transportation Infrastructure Streamlining Task Force (see discussion regarding Executive Order Implementation on page 26, above), Transportation Secretary Norman Mineta sought guidance from CEQ Chairman James Connaughton regarding one element of agency authority under current regulations. The Secretary asked for clarification regarding the role of lead and cooperating agencies with regard to developing a highway project's "purpose and need."[58] Secretary Mineta referred to the sometimes extended interagency debates over purpose and need statements as a reason for delay in highway project development.

In his response, Chairman Connaughton references current CEQ regulations specifying that the lead agency has the authority for and responsibility to define the a project's purpose and need. Further, Chairman Connaughton referenced previous federal court decisions giving deference to the lead agency in determining a project's purpose and need. While not addressed in this correspondence, CEQ regulations also

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[58] Text of Secretary Mineta's May 6, 2003 letter, and Chairman Connaughton's May 12, 2003 response, are available at [http://www.fhwa.dot.gov/stewardshipeo/minetamay6.htm].

specify the selection of reasonable alternatives as within the authority of the lead agency.

The establishment of lead agency authority in law may serve to reassert this authority to participating agencies. However, since this is a right already afforded DOT under current regulations, it may not significantly streamline the NEPA process.

Establishing a Statute of Limitations. It is generally the large, complex, high-profile projects that would benefit the most from an efficiently coordinated environmental review process. However, such large highway projects are also more likely to generate public interest, and possibly public opposition. If members of the public or a private interest group are adamantly opposed to a project, they may pursue all possible legal recourse to stop or change it. NEPA, and the regulations implementing it, currently contain no express provision for judicial review of agency action, and hence, no deadline on petitions for review. The absence of such a limitation has resulted, in some cases, in courts recognizing the statute of limitations used for judicial review under the Administrative Procedure Act. That statute, 28 U.S.C. Section 2401, mandates broadly that civil actions against the United States must be filed within six years after the right of action first accrues.

If a statute of limitations were established, there is no guarantee that special interest groups would not file suit within the newly specified period of time. However, establishment of a statute of limitations may streamline the NEPA process, insofar as it would require judicial action to be taken earlier in the process, when changes could be made more easily, as opposed to further along in the construction process when changes may be more costly and take a greater amount of time to address. Some environmental groups have argued that previously-suggested statutes of limitation (i.e., as specified in H.R. 5455, 107th Congress) were too restrictive and may, in fact, lead to preemptive suits in an effort to preserve their right to sue.

Delegating Authority to States. One element of the NEPA process that has been identified by some transportation stakeholders as a potential cause for delay is the added step of obtaining FHWA approval of NEPA documentation. Some transportation stakeholders argue that some federal environmental responsibilities should be delegated to states. For example, AASHTO has asserted that project review may be quickened if states were give the authority to process categorical exclusions, meet endangered species requirements, meet historic preservation requirements, meet wetlands requirements, and meet Section 4(f) requirements.[59] Such stakeholders argue that delegation of such authority to the states could speed up the environmental review process for highway projects by eliminating a significant layer of bureaucracy that federal approval entails.

This approach is not endorsed by environmental stakeholders who have expressed concern that the delegation of authority to the states would create a "fox guarding the henhouse" scenario. They argue that if a state, which has a vested

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[59] "Delegation of Federal Environmental Responsibilities for Highway Projects," prepared for AASHTO by TransTech Management, Inc., April 2002.

interest in moving a project forward, is allowed to make certain determinations, those determinations would not have the level of scrutiny that would be provided with federal oversight.

One potential challenge to state delegation of authority includes a possible lack of staff qualified to process potentially complex documentation. As discussed in the May 2003 GAO report regarding stakeholders' views on the time to conduct environmental reviews, staff shortages have been identified by transportation improvement stakeholders as a significant cause of highway project delays. If a state does not have sufficient staff to accommodate its needs, the delegation of additional authority to state or local transportation department staff may serve to slow the NEPA process instead of streamline it. Staff at the state or local level may have difficulty determining all environmental requirements applicable to their project which could further slow the NEPA process if it takes longer to ensure that NEPA documentation is complete. For example, it may be a difficult task for a highway project sponsor to review and approve the documentation that will ultimately demonstrate that all environmental requirements have been met. In the past, a state may have had a consultant to prepare NEPA documentation for an EIS, but it may have relied on FHWA oversight for more simple documentation, such as CE determination documentation.

The issues above are not an exhaustive discussion of the challenges to streamlining. They are also not likely to be factors in all projects. However, these examples are intended to illustrate that there are many complexities inherent in the NEPA process for highway projects.