

Department of Transportation Proposes New NEPA Procedures

The U.S. Department of Transportation has proposed comprehensive changes to update its procedures under the National Environmental Policy Act in response to the Council on Environmental Quality's July 16, 2020, overhaul of the regulations implementing NEPA. See [85 Fed. Reg. 74640](#) (Nov. 23, 2020).[1] The proposed changes would replace the current Department NEPA procedures found in DOT Order 5610.1C, "Procedures for Considering Environmental Impacts," which was issued in 1979 and last updated in 1985. The Department is accepting comments on the proposed rule through December 23, 2020.

In addition to implementing the new CEQ rules, the Department's proposal would also incorporate legislative changes to the environmental review process enacted over the past two decades, including the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users; Moving Ahead for Progress in the 21st Century Act (MAP-21); and the Fixing America's Surface Transportation Act. According to the Department, the updated procedures would modernize its procedures and promote collaboration and efficiency in the implementation of NEPA.

Environmental Review Policy

The proposal would codify language in the Department's current procedures and would state that the Department's policy is to: (1) integrate federal environmental objectives into Department programs while avoiding or minimizing adverse environmental effects wherever practicable; (2) synchronize NEPA and other environmental requirements into a single, concurrent process; and (3) apply sound science, reliable data, and a systematic interdisciplinary approach. The Department states that it is not necessary to include in its new procedures specific references to a variety of environmental concerns, including: preservation of the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites; preservation, restoration, and improvement of wetlands; improvement of the urban physical, social, and economic environment; and provision of opportunities for disadvantaged persons. The Department proposes to delete these references in its existing procedures, in order to align with the updated CEQ regulations and section 1301 of the MAP-21 statute, which directs the Department to accelerate transportation project delivery, reduce costs, and ensure that transportation projects are completed in a streamlined manner and that environmental reviews are efficient and effective. See 23 U.S.C. § 101 note.

Managing NEPA Compliance

The proposed rule would designate the assistant secretary for transportation policy as the "senior agency official" responsible for implementing NEPA, establishing NEPA policy, and identifying the operating administration (OA) that will serve as the lead agency for all actions taken by the Department. In accordance with the CEQ definition of this position (40 CFR § 1508.1(dd)), the senior agency official may designate one OA to act as the lead agency and to prepare the environmental documentation on behalf of all OAs for certain actions, such as when a multimodal project receives funding from or requires approval by one or more OAs within the Department. In addition, the new rules would allow, in certain instances, either the assistant secretary or an OA administrator to act as the senior agency official for purposes of allowing a NEPA review to exceed the

presumptive time and page limits set forth in the CEQ regulations for an environmental assessment or an environmental impact statement.

Environmental Review of Multimodal Projects

The Department states that its proposed rule would enhance and modernize its environmental review processes, bring consistency to the agency's environmental analyses, and incorporate strategies to complete environmental reviews more efficiently in accordance with streamlining efforts developed by the Department at Congress' direction. In particular, the proposed rule is intended to reflect the Department's modern NEPA practices and unique project delivery statutory authorities by providing direction on analyzing multimodal projects in an expedited and streamlined manner. To that end, the proposal would implement its authority departmentwide, under 49 U.S.C. § 304, to establish a process by which OAs could apply categorical exclusions (CEs) to "multimodal projects," as defined in 23 U.S.C. § 139(a)(5), including the ability for an OA to use a CE established by another OA.

Categorical Exclusions

CEs are categories of actions that normally do not have a significant effect on the human environment, and therefore do not require environmental assessments or EISs except under extraordinary circumstances. 40 C.F.R. § 1501.4. The Department's proposed rule would add eleven new CEs, modify five existing CEs, and eliminate two existing CEs—namely, "CE 3" for project amendments that do not significantly alter the environmental impact of the action, and "CE 6b" for enforcement proceedings related to economic regulation of airlines. The proposed rule also adds new conditions for what may qualify as "extraordinary circumstances," for purposes of determining when an otherwise applicable CE may not apply in situations where such circumstances may cause a significant environmental impact.

Most notably, modified "CE 5" would allow one OA to apply the CE of another OA. For one OA to apply another OA's CE to a proposed action, the OA that established the CE would need to confirm that the OA seeking to use it is applying it correctly and that the proposed action was contemplated when the CE was established. The Department states that modified CE 5 would provide greater flexibility for the Department to administer its projects and programs more effectively and efficiently, taking advantage of multiple OAs' resources and expertise, while ensuring that CEs are appropriately applied.

Notable new CEs include "CE 7" (remodeling existing buildings and facilities); "CE 8" (landscaping that does not cause or promote the introduction or spread of invasive species that would harm the native ecosystem); and "CE 11" (safety standards, rules, and regulations that do not result in a substantial increase in emissions of air or water pollutants, noise, or traffic congestion, or increase the risk of reportable release of hazardous materials or toxic substances in any mode of transportation).

The CEQ regulations allow the Department to establish a process to use other federal agencies' CEs for its proposed actions after consultation with such agencies to ensure that use of their CEs is appropriate. The Department is not currently proposing procedures to take advantage of this CEQ regulation, but requests comments on whether, and if so how, the Department should create such a process.

Environmental Assessments and Findings of No Significant Impact

Consistent with the policy of integrating all environmental reviews into the NEPA process, the proposed rule states that EAs should reflect compliance or plans for compliance with other applicable environmental laws. The proposed rule also includes requirements for describing mitigation and monitoring plans in a mitigated finding of no significant impact, building upon an approach provided by the new CEQ regulations (40 CFR 1501.6(c)).

EIS and Record of Decision

The proposed rule would emphasize that the draft EIS should identify the OA's preferred alternative(s), if one or more exists, unless in conflict with other laws. If the draft EIS does not identify a preferred alternative, the OA should provide agencies and the public with an opportunity to assess the environmental consequences of the preferred alternative prior to issuing a combined final EIS and record of decision under 49 U.S.C. 304a and 23 U.S.C. 139. These provisions direct the Department, when it acts as the lead agency, to issue the FEIS/ROD as a single document "to the maximum extent practicable," unless (1) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and the circumstances or information bears on the proposed action or the impacts of the proposed action. Otherwise, the OA should provide the public with an opportunity to evaluate the preferred alternative during a waiting period after the publication of the notice of availability of the FEIS. The proposed rule would set forth the timing requirements for the OA's final decision, including the ability to reduce or extend time periods.

The CEQ regulations require supplementation of an EIS if a major federal action remains to occur and (1) the agency has made substantial changes to the proposed action that are relevant to environmental concerns or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The Department uses a reevaluation process to document findings of no new significant impacts, as provided for in the revised CEQ NEPA regulations (40 C.F.R. § 1502.9(d)(4)). The Department proposes to expand from three to five years the interval for reevaluation of a draft or final EIS if the OA has not issued an FEIS within five years of publication of the draft EIS or if major steps toward implementation have not commenced within five years of FEIS approval.

To ensure the integration of all environmental reviews into the NEPA process, as with an EA, the proposed rule would direct the FEIS to reflect compliance or plans for compliance with other environmental requirements. Where compliance would not be possible by the time the FEIS is prepared, the FEIS would reflect consultation with the appropriate agencies and provide reasonable assurance that the OA can meet the requirements. This compliance would not include the current NEPA procedure for determinations under Section 4(f) of the DOT Act, which applies when a Department-approved transportation program or project proposes to use a recognized historic site or a publicly owned park, recreation area, or wildlife refuge. The Department states that a discussion of Section 4(f) determinations is outside the scope of its NEPA procedures.

The proposed rule clarifies that when a proposed action requires approval by multiple federal agencies, the OA should issue a single ROD with the other federal agencies. The proposed rule also includes a requirement that the ROD provide a certification by the decisionmaker that the agency has considered all the alternatives, information, analyses, and objections submitted as part of the NEPA review process for an EIS. The Department maintains that this certification entitles the OA to a presumption that the agency has properly considered all of this information consistent with the new CEQ rules.

Anticipated Next Steps

The Department's proposed rule would not implement all aspects of the CEQ regulations. Instead, it directs the Department's OAs to promulgate NEPA procedures implementing other provisions such as the identification of exemptions from NEPA (40 CFR 1506.1, NEPA Thresholds) and the identification of OA actions that normally require preparation of an EIS or an EA. See 40 CFR 1507.3(e). Because the CEQ regulations direct agencies to propose updates to their individual NEPA regulations by September 14, 2021, the Department indicates that it expects OAs to address many of the provisions of the CEQ regulations in their proposals for updated NEPA procedures. The revised CEQ NEPA regulations are subject to current lawsuit challenges and potential withdrawal or change by the new administration. Therefore, there is a good deal of uncertainty at present regarding the finalization of the Department's proposal or the ultimate scope or timing of any further changes to OA NEPA procedures.

Endnote

[1] The CEQ NEPA regulations, which were adopted in July 2020 and took effect in September, are codified at 40 C.F.R. §§ 1500-1508. See [85 Fed. Reg. 43304](#) (July 16, 2020).

© 2020 Perkins Coie LLP

Authors



[Edward Boling](#)

Partner

TedBoling@perkinscoie.com [202.661.5872](tel:202.661.5872)

Explore more in

[Environment, Energy & Resources](#) [Infrastructure Development](#)

Related insights

Update

[**Ninth Circuit Rejects Mass-Arbitration Rules, Backs California Class Actions**](#)

Update

[**CFPB Finalizes Proposed Open Banking Rule on Personal Financial Data Rights**](#)