

Environmental Alert

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Federal Transportation Agencies Issue Interim NEPA Guidance

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On January 14, 2013, the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) issued joint guidance for implementing Section 1319 of the new Transportation Bill to streamline the final steps in the National Environmental Policy Act (NEPA) process regarding producing a Final Environmental Impact Statement (FEIS) and issuing the Record of Decision (ROD). Streamlining of the NEPA process for road and rail projects was an essential component of the October 1, 2012 transportation bill, Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. No. 112-141) (to be codified at 42 U.S.C. § 4332(a)).

This new statute amends NEPA, and therefore the law will apply to all federal agencies and any federal action subject to NEPA. The recently issued *transportation guidance* will be of special interest to transportation agencies and private clients relying upon new or upgraded roads and transit. This new guidance encourages abbreviated FEIS documents, using simple errata sheets and the draft EIS, rather than producing another lengthy document. The guidance also provides criteria for merging the FEIS and the ROD into a single document. Each of these provisions is described within.

The “Abbreviated” or “Errata Sheet” FEIS Approach

MAP-21 encouraged brief FEIS documents to streamline the NEPA process. Currently, the Council on Environmental Quality (CEQ) NEPA implementation regulations (40 C.F.R. 1503.4(c)) allow a Draft EIS (DEIS) to be finalized using an errata sheet rather than producing an FEIS, and FHWA guidance allows for an “abbreviated FEIS.” To encourage these streamlined practices, Section 1319(a) of MAP-21 specifies the circumstances where FHWA and FTA may use an errata to a DEIS in lieu of an FEIS. In this manner, disputes over the sufficiency of streamlined NEPA documents should be minimized.

The law provides that the agencies may supplement the DEIS with an errata sheet when the responses to comments are minor and confined to factual corrections or explanation as to why the agency does not need to respond further. The errata must contain a list of the corrections and the DEIS page number for reference, an explanation for the comments that the agencies consider not warranting a further response (including the sources, authorities and reasons for that position), and, where appropriate, information regarding circumstances where the agency may consider a re-evaluation or supplemental EIS. The errata sheet must also include:

- The preferred alternative and an explanation as to why it was selected;
- The final Department of Transportation Act of 1966 Section 4(f) evaluation;
- A finding on wetlands, floodplains and National Historic Preservation Act Section 106 effects;
- The committed mitigation measures;
- A copy, or a summary, of the comments received on the DEIS, public hearing and responses; and
- A description of the other findings to be made in compliance with other authorities.

This approach does not relieve the agencies of any existing requirements for an FEIS, including the legal sufficiency review under 23 C.F.R. 771.125.

Consolidating the FEIS and ROD Documents

Prior to enactment of MAP-21, the FHWA and FTA issued separate FEIS and ROD documents with at least a 30-day period in between. In many instances, the time lapsed was much longer. The newly released guidance explains that the FEIS and ROD should be issued as one document unless the FEIS makes substantial changes to the proposed action that impact environment or safety or there is substantial new information on the environmental impact of the proposed action.

Until the agencies engage in formal rulemaking to implement MAP-21, regional offices must confer with each agency’s headquarters staff to determine whether a combined FEIS/ROD document is appropriate. The agencies will consider whether:

- . Coordination with other agencies is more appropriate after issuance of an FEIS;
- . There are unresolved interagency issues;
- . The project is controversial;
- . The DEIS set forth a preferred alternative; and
- . Compliance with other substantive requirements should be resolved before a ROD is issued.

The guidance makes clear that Section 1319 does not alter obligations under other environmental laws and stresses that interagency coordination is critical before issuing a combined FEIS/ROD. Cooperating federal agencies may still issue a separate FEIS and ROD to comply with their own NEPA regulations.

Conclusion

The new guidance, especially where both provisions are combined, will likely save the agencies several months in the NEPA process. Under this guidance, a final streamlined NEPA document can be comprised of a DEIS, errata sheet, responses to DEIS comments, and the information required in an FEIS and ROD contained in 23 C.F.R. Part 771. State transportation agencies working together with FHWA and FTA on projects should be aware that the requirements of state NEPA-style laws may have additional requirements.

Counsel in Venable's **Environmental Practice Group** and **Transportation Group** are familiar with MAP-21 and the many implementation steps that are forthcoming. Contact any of the authors or your Venable counsel for more information.