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FHWA, FRA, AND FTA ADOPT JOINT NEPA/4(f) REGULATIONS

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In a final rule issued on October 29, the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration jointly adopted new regulations governing compliance with the National Environmental Policy Act (NEPA) and Section 4(f) of the U.S. Department of Transportation Act.[1] The updated regulations, codified at 23 CFR Parts 771 and 774, took effect on November 29, 2018.

Context for the New Regulations

The last three transportation bills - SAFETEA-LU in 2005, MAP-21 in 2012, and the FAST Act in 2015 - all included numerous provisions intended to streamline the environmental review process for transportation projects. The streamlining provisions in SAFETEA-LU and MAP-21 primarily applied to FHWA and FTA. With the FAST Act, Congress addressed environmental review requirements for FHWA, FTA, and FRA projects.

The final rule published on October 29 implements changes required by MAP-21 and the FAST Act. For FHWA and FTA, the changes in the new regulations are largely incremental. For FRA, this rulemaking is more significant because FRA has adopted Part

[1] 83 Fed. Reg. 54480 (Oct. 29, 2018).

771 and Part 774 for the first time. As explained below, FRA will apply Part 771 only to newly initiated projects but will apply Part 774 to ongoing as well as newly initiated projects.

Key Changes in Part 771

1. Part 771 Has Been Updated to Reflect Changes to the Section 139 Process

Originally enacted in SAFETEA-LU, the environmental review process in 23 U.S.C. 139 is essentially an overlay on the National Environmental Policy Act (NEPA) process: it prescribes a method for carrying out NEPA requirements in coordination with other federal and non-federal requirements for projects that require an environmental impact statement (EIS). Among other things, Section 139 specifies obligations of the federal lead agency, the project sponsor, and participating and cooperating agencies in the environmental review process. A key component of this process is the requirement for a project schedule and coordination plan.

Section 139 was significantly amended in both MAP-21 and the FAST Act. To date, those changes have been implemented only through informal guidance posted on the agencies' websites. With the final rule, Part 771 has been comprehensively updated to reflect the current Section 139 requirements. Legislative changes implemented by the new regulations include:

- Participating agencies are explicitly directed to "provide input during the times specified in the coordination plan ... and within the agency's special expertise or jurisdiction."[2]
- The lead agency, in consultation with participating agencies, "must develop an environmental checklist, as appropriate, to assist in resource and agency identification."[3]
- The federal lead agency must respond within 45 days to a notice submitted by a project sponsor requesting initiation of an environmental impact statement.[4]
- Invitations to participating agencies must be issued within 45 days after the Notice of Intent to prepare an EIS is issued.[5]
- The range of alternatives carried forward for detailed study in the EIS "must be used for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, unless the lead and participating agencies agree to modify the alternatives in order to address

[2] 23 CFR 771.109(c)(7).
[3] 23 CFR 771.111(a)(3).
[4] 23 CFR 771.111(b)(2).
[5] 23 CFR 771.111(d).

significant new information and circumstances or to fulfill NEPA responsibilities in a timely manner."[6]

Following the adoption of this final rule, the agencies will turn next to updating their guidance. The existing Section 139 guidance was issued in 2006 and does not reflect any of the changes made in MAP-21 or the FAST Act. The final rule commits to issuing updated Section 139 guidance but does not indicate when it will be issued.

2. All Newly Initiated FRA Projects Must Follow Part 771

The final rule extends Part 771 for the first time to environmental reviews led by the FRA. Prior to this rulemaking, Part 771 applied only to FHWA and FTA, while FRA followed its own separate Environmental Procedures, which were issued in 1999. As explained in the final rule, FRA's main reason for adopting Part 771 is that, under the FAST Act, FRA is now required to follow the Section 139 process "to the maximum extent feasible" for its projects. Since Section 139 requirements are woven into Part 771, the adoption of Part 771 provides a way for FRA to come into compliance with Section 139.

To avoid disrupting ongoing studies, FRA will apply Part 771 only to "actions initiated after November 28, 2018." FRA-led environmental reviews that were under way as of that date will remain subject to FRA's 1999 Environmental Procedures. There are a few nuances that practitioners should note:

- The Environmental Procedures also include guidance with respect to the content of NEPA documents. FRA will be issuing new guidance regarding NEPA document content; until that new guidance is issued, FRA will continue to rely on certain sections of the Environmental Procedures as guidance regarding NEPA document content.
- All FRA projects initiated since enactment of the FAST Act (December 4, 2015) must comply with Section 139, as stated in FRA guidance. FRA-led projects that were initiated after December 4, 2015 but before November 28, 2018 are subject to Section 139 but not Part 771. Even so, it may be prudent for such projects to follow Part 771 as a means of ensuring compliance with Section 139.
- The final rule does not define or provide guidance regarding the term "initiated" as used in this provision. It is unclear, for example, whether FRA will treat a reevaluation of a completed NEPA document as being subject to Part 771.

3. FHWA, FTA and FRA Can Use Each Other's Categorical Exclusions

The final rule amends Part 771 to allow any of these three USDOT agencies to apply a categorical exclusion found in any of the other agencies' categorical exclusion lists. Making the categorical exclusions interchangeable will broaden the universe of

[6] 23 CFR 771.123(c).

categorical exclusions available to each agency. There is a statutory provision in 49 USC 304 that allows similar flexibility, but it only allows one USDOT agency to use another's categorical exclusion for "multimodal" projects. With the new Part 771 regulations, any of these agencies (FHWA, FTA, or FRA) may apply any of these CEs on the other agencies' lists, and this flexibility is not limited to multimodal projects.

4. The Categorical Exclusion for Projects in the "Operational Right-of-Way" Has Been Expanded

The final rule broadens the applicability of an existing categorical exclusion for projects constructed within the "operational right-of-way" for highway and transit facilities. When this categorical exclusion was first adopted in response to MAP-21, it was limited to right-of-way that was previously "disturbed" or "maintained for a transportation purpose." Those restrictions were strongly opposed by State DOTs and other transportation stakeholders, who contended in rulemaking comments that the restrictions had no basis in the statute. In the final rule, the agencies agreed with those comments and removed those requirements, adopting language that directly echoes the statute. The categorical exclusion now applies to "all real property interests acquired for the construction, operation, or mitigation of a project."

5. FRA's Categorical Exclusions Have Been Updated and Moved into Part 771

The final rule brings FRA's categorical exclusions into Part 771 and also makes several substantive changes to FRA's categorical exclusions, which previously were included in FRA's Environmental Procedures. Key changes include the following:

- Adding a categorical exclusion for geotechnical and other investigations that are needed to provide information for preliminary design and for environmental analyses and permitting. Previously, only FHWA and FTA had a categorical exclusion for these activities.[7]
- Broadening a categorical exclusion for emergency repair projects to include "upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the rail facility's original construction."[8]
- Broadening a categorical exclusion for "environmental restoration" activities to include explicit coverage for "mitigation" activities and by dropping language that limited the categorical exclusion to activities "proximate to" railroad infrastructure.[9]

[7] 23 CFR 771.116(c)(4).
[8] 23 CFR 771.116(c)(10).
[9] 23 CFR 771.116(c)(20).

6. Third-Party Contracting is Now Allowed for FRA Projects

The final rule amends Part 771 to authorize the use of "third-party contractors" to prepare EISs on projects where FRA is the lead agency. Under this practice, a private-sector project sponsor could retain a consultant to prepare the EIS, subject to the control and direction of FRA. This practice is well-established in the NEPA procedures for other federal agencies that routinely prepare EISs for privately sponsored projects, including the Surface Transportation Board.

Two caveats should be noted. First, the regulations allow any applicant—including a private-sector entity—to prepare an EA and submit the document to FRA (or FHWA or FTA) for consideration. Second, the regulations allow a state or local government when acting as a project sponsor to be directly involved in preparing an EIS as a joint lead agency; in that role, a State or local government can directly retain a consultant to prepare the EIS.

7. Electronic Distribution of EISs is Allowed and Encouraged

Before the new regulations were issued, Part 771 required hard-copy "printing" of NEPA documents. Part 771 now states that "[t]o minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means" to make NEPA documents available. The final rule also eliminates the reference to "printing" and instead refers to "publication" in the provision governing release of a Draft EIS (23 CFR 771.123(h)). Taken together, these changes make clear that electronic publication of NEPA documents is both allowed and encouraged.

8. Private-Sector Project Sponsors Can Be Held Responsible for Implementing Environmental Mitigation Commitments

The final rule amends 23 CFR 771.109 to clarify that a "project sponsor" can be made responsible for implementing mitigation commitments required in a NEPA decision document. The term "project sponsor" is defined to include private-sector as well as public entities.

9. Clarifications regarding Part 771 Compliance

In addition to changes included in the Part 771 regulations themselves, the preamble to the final rule includes important clarifications regarding compliance with NEPA and Section 139:

- Lead agencies can assume a participating agency's concurrence in a project schedule if the participating agency does not concur within the time allowed for comment.[10]

[10] 83 Fed. Reg. at 54483.

- Participating agencies are "are expected to comment within their area of special expertise or jurisdiction."[11]
- Private-sector project sponsors are limited to "providing technical studies and commenting on environmental review documents."[12]
- Private-sector project sponsors "cannot be lead agencies or contract directly with consultants to prepare a Draft EIS," except with a third-party contracting arrangement.[13]
- Identifying a preferred alternative in the Draft EIS is the norm. If a preferred alternative is not identified in the Draft EIS, the lead agencies must publicly identify the preferred alternative and invite public comment on it before making a final decision.[14]
- The preferred alternative may be developed to a higher level of detail to facilitate the development of mitigation measures or compliance with permitting requirements.[15]
- FRA will adopt FHWA and FTA's practice of preparing "reevaluations" under 23 CFR 771.129 as the basis for determining whether a supplemental EIS is required.[16]
- FTA will require project sponsors to determine the scope of the project—with FTA concurrence—before finalizing a consultant contract to prepare an EA.[17]

Key Changes in Part 774

1. Section 4(f) Regulations Apply to FRA

The final rule extends the Section 4(f) regulations to apply for the first time to FRA projects. The preamble to the rule also confirms that FRA intends to continue using FHWA's Section 4(f) guidance, known as the Section 4(f) Policy Paper. The practical significance of this change is modest, because FRA has generally looked to the Part 774 regulations and Policy Paper as guidance. Even so, FRA's adoption of Part 774 is a significant step because those regulations now are legally binding requirements, not merely guidance, for FRA projects.

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[11] *Id.*
[12] *Id.* at 54482.
[13] *Id.* at 54488.
[14] *Id.* at 54489.
[15] *Id.*
[16] *Id.* at 54485.
[17] *Id.* at 54487.

Unlike Part 771, Part 774 does not include a provision limiting those to "newly initiated" FRA projects. Therefore, Part 774 applies to ongoing as well as newly initiated FRA projects.

2. New Section 4(f) Exemptions for Historic Transportation Facilities

The final rule updates Part 774 to incorporate statutory Section 4(f) exemptions for two types of historic transportation facilities: (1) "common post-1945 concrete or steel bridges and culverts" and (2) projects involving improvements to historic railroad and rail transit lines, except for train stations and certain bridges and tunnels on those rail or transit lines. The categories of resources covered by these Section 4(f) exemptions are also covered by "program comments" issued by the Advisory Council on Historic Preservation for post-1945 steel and concrete bridges and for railroad rights-of-way under Section 106 of the National Historic Preservation Act. The Council's program comments eliminate the need for project-level review under Section 106, while the Section 4(f) exemptions do the same under Section 4(f).

Next Steps

With the Part 771 and 774 regulations issued, the environmental streamlining provisions in MAP-21 and the FAST Act have largely been implemented. Practitioners should be on the lookout for guidance implementing these regulations. FHWA, FTA and FRA will be issuing new guidance on Section 139, and FRA will be issuing guidance on the transition from its Environmental Procedures to Part 771.

NEPA ASSIGNMENT: A PRIMER

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The "National Environmental Policy Act (NEPA) Assignment" program (23 U.S.C. § 327) is a topic of interest among many transportation environmental practitioners. More States are seeking NEPA Assignment from Federal transportation agencies for highway and railroad transportation projects. The following article presents an introduction to NEPA Assignment, including basic facts, history, and open questions for practitioners to consider as they come across new issues. Currently the States which are assigned some or all NEPA responsibilities for highway projects include Alaska, Arizona, California, Florida, Nebraska, Ohio, Texas, and Utah.

What is NEPA Assignment?

The Surface Transportation Project Delivery Pilot Program, more commonly known as NEPA Assignment, was first authorized by Congress under Section 6005 of the Safe, Affordable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144 (Aug. 10, 2005).[18] It originally started as a pilot program exclusively to the Federal Highway Administration and limited to five States. Since 2005, the NEPA Assignment program has been amended twice: in 2012 under the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-41, 126 Stat. 405 (July 6, 2012) and in 2015 under the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94), 129 Stat. 1312 (2016). The MAP-21 amendments converted the program into a permanent program allowing the renewal of program participation, removed the five State limit, and expanded the program to include environmental review responsibilities from the Federal Transit Administration (FTA) and Federal Railroad Administration (FRA) if the State participates in the program for highway projects. In 2015, FAST Act Section 1308 clarified that project-level NEPA responsibilities assigned to a State do not require FHWA's involvement or approval. Section 1308 does not expand decision-making responsibilities to program-level NEPA issues or non-environmental matters.

Under NEPA Assignment, the U.S. Secretary of Transportation "may assign, and the State may assume, the responsibilities of the Secretary with respect to one or more highway projects within the State under the National Environmental Policy Act of 1969." 23 U.S.C. § 327(a)(2)(A). The Secretary may also assign "to the State, and the State may assume, all or part of the responsibilities of the Secretary for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a specific project." *Id*. at § 327(a)(2)(B). In lay terms, this means FHWA, FTA, and FRA may assign to a State transportation agency the responsibility for preparing Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs) and related decision documents required for complying with other Federal laws. Assignment does not extend to responsibilities for metropolitan and statewide planning under 23 U.S.C. §§ 134 and 135. Nor may the Secretary assign project-level air quality conformity determinations required under Section 176 of the Clean Air Act, 42 U.S.C. § 7506. *See* 23 U.S.C. § 327(a)(2)(4).

In addition to the pilot program, SAFETEA-LU, in Section 6004, also created a permanent program that permits a State to take on NEPA responsibilities for categorical exclusion determinations through the State assumption of responsibility for categorical exclusions (CE Assignment) program. *See* 23 U.S.C. § 326. Under this statute, the Secretary may assign, and a State may assume, responsibility for determining whether certain designated activities are included within classes of action identified in regulation

[18] Although the statute authorized the eligibility of up to five States, California was the only State at the time to take on NEPA Assignment under the pilot program.

by the Secretary that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality. A State DOT may choose to apply for responsibilities under either 23 U.S.C. § 326 (CE Assignment only) or 23 U.S.C. § 327 (NEPA Assignment), or a combination of both. One reason a State may opt for both CE Assignment and NEPA Assignment is that, unlike the NEPA Assignment program, 23 U.S.C. § 326 does not prohibit States from making project-level Clean Air Act conformity determinations for projects that qualify for CEs.

What is the Sovereign Immunity Waiver Requirement?

To participate in either NEPA Assignment or CE Assignment, a State must consent to waive its sovereign immunity under the 11th Amendment to the U.S. Constitution for purposes of any decisions it makes and accept the exclusive jurisdiction of the United States district courts for any civil action brought against it for failure to carry out any of its assumed responsibilities. 23 U.S.C. §§ 327(c)(3)(B), 327(d)(1), 326(c)(4). The authorizing statute expressly requires that a State assuming either program responsibility "shall be solely responsible and solely liable for carrying out, in lieu of and without further approval of the Secretary, the responsibilities assumed…." 23 U.S.C. § 327(e); *see also* 23 U.S.C. § 326(b)(2).

By waiving their sovereign immunity, a State subjects its decisions to the authority of the Federal courts and accepts legal responsibility and liability for its decision making if granted assignment.

How do States Apply for Assignment?

Since 2012, all States can participate in NEPA Assignment or CE Assignment. There are three major steps a State must undertake before it may be granted assignment: first, it must apply; then it must enter into an agreement with FHWA, FTA, or FRA; and finally, the State must submit to follow-up auditing by the Federal agency.

1. Application Process

The application process is governed by regulations found at 23 C.F.R. Part 773. An application cannot be submitted to the U.S. Department of Transportation (US DOT) until the State has waived its sovereign immunity—usually through a legislative action—and it has provided an opportunity for public comments through that State's own public involvement requirements. After waiving sovereign immunity, the State typically submits a letter of interest to the U.S. Department of Transportation (US DOT) modal agency (FHWA, FTA, or FRA). Then it works with the US DOT modal agency to get an application ready for State public involvement.

The application serves several purposes: (1) to specify the scope of FHWA's responsibilities that the State proposes to assume, (2) to publicly disclose how and in the variety of ways the State is "ready" and sufficiently prepared (e.g., through an understanding of the assignment program, through the addition of staff, procedures,

manuals, and revisions to their project development process), (3) post these intentions and expectations publicly and to request public comment, and (4) to consider all comments on the application and to describe how the State's application was revised in response to comments. The application must include how the State DOT currently manages project delivery; how the State DOT will manage project delivery, staffing and capital availability; and certifications from the Attorney General.

Generally, the US DOT modal agency and the State DOT work closely to share information and establish expectations about the program. The US DOT agency staff reviews the State DOT environmental manuals and procedures for compliance with Federal requirements. Additionally, both the US DOT and the State DOT consult with Federal and State agencies involved in transportation projects to explain the changed roles and responsibilities for the State DOT and FHWA under assignment.

At the end of the State public comment process, the State considers and responds to comments received, incorporates them into the application, and submits the application to the US DOT modal agency for consideration.

2. Memorandum of Understanding

Both NEPA and CE Assignment require a written agreement between the US DOT modal agency and the State seeking assignment. This agreement takes the form of a memorandum of understanding ("MOU"). The Secretary delegated the authority to enter into a MOU to the respective Administrators of the US DOT modal agencies. The general requirements of a NEPA Assignment MOU are set forth in 23 U.S.C. § 327(c). By entering the MOU, the State agrees to assume all or part of the responsibilities of the Secretary of Transportation for NEPA purposes. 23 U.S.C. § 327(c)(1). The State has "stepped into the shoes" of the Federal government in discharging its NEPA responsibilities. Accordingly, the State is solely responsible and liable for carrying out the program and all legal standards apply to the State that would have applied had FHWA taken the action. 23 U.S.C. § 327(e). Once the agreement is executed, the US DOT modal agency will no longer act on project-level environmental review issues and instead act only on broad program questions.

Drafting an MOU between the State and the US DOT modal agency may require several meetings in order to exchange information, provide requested documentation, and ensure that Federal requirements are met. The meetings mainly serve to 1) assure the parties share expectations about responsibilities the State proposes to assume and 2) for FHWA to assist the State in becoming "ready" to assume FHWA's responsibilities through training and technical assistance. Assistance may take the form of review of the State's procedures, forms, project filing systems, project file documentation, approaches to quality control and quality assurance, and overall progress towards "readiness." This ongoing communication and coordination is necessary to ensure a seamless transition into the State's shifted roles and responsibilities under NEPA assignment. The coordination on the terms of the MOU is usually done parallel to the

development of the NEPA Assignment Application with higher intensity and emphasis after the application has been submitted.

In terms of content, an MOU contains commitments the State must make to ensure responsible administration of the NEPA Assignment program, including, for example, documentation regarding decisions, consultation with resource agencies and the public, training requirements, and performance measurement standards. In addition to documenting the responsibilities assigned to the State, the MOU specifies those responsibilities or projects that will be "retained" by the US DOT modal agency. Although templates exist to assist States in the MOU process and to ensure nationwide consistency, each State has an opportunity to draft its own MOU in consultation with FHWA. A MOU has a term of no more than five years, yet is renewable.[19] 23 U.S.C. § 327(c)(5) and (6).

The MOU also requires certain assurances by the State that it is has laws in place and the financial resources necessary to carry out the responsibilities it has assumed. *See* 23 U.S.C. § 327(c)(3)(C) and (D). For example, there must be a State law in place that is comparable to the Freedom of Information Act (FOIA). 23 U.S.C. § 327(c)(3)(C). The State must agree to provide any information the Secretary reasonably considers necessary to ensure the State is adequately carrying out its assigned responsibilities. 23 U.S.C. § 327(c)(4).

Once the State and the US DOT modal agency agree on the terms, the draft MOU is published in the Federal Register for a 30-day comment period. At the end of the period, the State and the US DOT modal agency evaluate the comments and determine how to respond if necessary, including possibly making modifications to the terms of the MOU. Once the State and the US DOT modal agency are satisfied with the agreement and the resolution of comments, the parties move forward with its execution.

An MOU's terms are the benchmarks against which the NEPA audit will be conducted and monitored for compliance. Although NEPA Assignment termination procedures are allowed if an audit finds the State is not carrying out its responsibilities in accordance with the signed MOU, termination procedures have not been invoked to date for any State with NEPA Assignment.

3. The Audit

Section 327 requires audits of the State program to ensure commitments under the statute and the MOU have been met. The term "audit" is not defined in the statute; however, those audits conducted by FHWA have included reviewing the processing projects according to procedures and manuals; documenting decisions; appropriately consulting with agencies and the public; and measuring performance.

Audit steps include: the State DOT providing pre-audit information; the State DOT conducting a self-assessment; the Federal Audit Team reviewing project files and

[19] An MOU for CE assignment expires after three years and is also renewable.

conducting interviews with State DOT staff; and lastly, the FHWA Audit Team meets in person with the State DOT to discuss audit results. An FHWA lawyer will interview the State counsel to ensure legal requirements are being met. While the audit team is determined solely by FHWA, the State has an opportunity to review and provide comments on the proposed members of the audit team.

The FAST Act reduced the number of audits from six to four during the first four years of State participation in the program (one audit each year). The FAST Act also established a time frame of 180 days following the execution of a NEPA Assignment MOU for FHWA to meet with the State to review implementation of the agreement and discuss plans for the first annual audit. The FAST Act requires each audit to be completed within 180 days. Once a State has completed the last of the four required audits, MAP-21 establishes a process for monitoring going forward.

Audit results often lead the State to update the policies, procedures, and guidelines necessary to meet NEPA requirements. A draft audit report is placed in the Federal Register for a 30-day notice and opportunity for comment. After the close of the comment period, any comments are considered in finalizing the audit report. The final audit report is also published in the Federal Register.

Since the inception of both Assignment programs, several States have gone through audit and monitoring reviews. Ohio, Texas, Florida, Utah, and Alaska have all been audited. California, under the terms of the current 23 U.S.C. § 327 NEPA Assignment program, is no longer subject to auditing, but subject to monitoring. The original SAFETEA-LU pilot program required FHWA to audit Caltrans' performance twice a year for the first two years of the pilot program, and once a year thereafter to ensure that Caltrans was meeting Federal requirements. Now, under MAP-21 and the 23 U.S.C. § 327 MOU signed in 2016, FHWA reviews Caltrans' performance through monitoring rather than with audits.

Status of Assignment

Currently, eight States have some form of assigned responsibilities under the Assignment programs. The majority of these States have full NEPA assignment, while Arizona and Nebraska currently only have CE assignment but are actively pursuing NEPA Assignment. Both States are following a path towards obtaining full responsibilities under both programs; i.e., first take on CE assignment under 23 U.S.C. § 326 and then assume full program assignment thereafter. It is up to the individual State the scope of, or path to, assignment. Some States, for example, decide to take on the entire NEPA assignment program, without first participating in the smaller CE assignment program. The California High Speed Rail Authority is also pursuing NEPA Assignment for some High Speed Rail projects within the State.

States which currently have NEPA Assignment MOUs are represented in Table 1 below.

Table 1. States with NEPA Assignment

State	Scope	Effective Date	Audits	Link to MOUs
California	23 U.S.C. § 326 & 23 U.S.C. § 327	July 1, 2007 (Pilot Program)	Sixth and final audit completed May 9, 2012	http://www.dot.ca.gov/env/nepa/
Alaska	23 U.S.C. § 327	November 10, 2017 (full assignment)	First audit completed April 20, 2018.	http://dot.alaska.gov/stwddes/desenviron/resources/nepa.shtml
Florida	23 U.S.C. § 327	December 14, 2016	Second audit underway as of October 2018	http://www.fdot.gov/environment/NEPAAssignment.shtm
Ohio	23 U.S.C. § 327	December 28, 2015; amended June 6, 2018	Second audit completed March 31, 2017	http://www.dot.state.oh.us/NEPA-Assignment/Pages/default.aspx
Texas	23 U.S.C. § 327	December 17, 2014	Fourth audit completed August 1, 2017.	https://www.txdot.gov/inside-txdot/division/environmental/nepa-assignment.html
Utah	23 U.S.C. § 326 & 23 U.S.C. § 327	January 17, 2017 (full assignment); July 1, 2008 (CEs)	Second audit underway as of October 2018	https://www.udot.utah.gov/main/f?p=100:pg:0:::1:T,V:2053,; https://www.udot.utah.gov/main/f?p=100:pg:0:::1:T,V:4542,

For up-to-date information on the status of States seeking assignment, please refer to FHWA's NEPA Assignment website: https://www.environment.fhwa.dot.gov/nepa/assignment.aspx.

Food for thought

The NEPA Assignment program and the trend toward State assumption of Federal environmental responsibilities is proving to be interesting for environmental practitioners. As the NEPA Assignment program expands and more States express an interest in participation, several open questions remain. For example, with the participation of only eight states in some form of NEPA assignment, many of which joined only fairly recently, not much data exists yet on the efficiency of the NEPA Assignment program. Additionally, the long-term effect to litigation and outcomes remains to be seen. It will be interesting to see whether federal courts view NEPA Assignment states different than the federal government. Consequently, we should take notice if states will be as successful defending NEPA actions as the federal government. Practitioners should also note whether NEPA Assignment results in more or less litigation in those states participating in the program.

Additionally, as the program expands, that may increase the difficulty of ensuring nationwide consistency in discharging responsibilities set forth by a Federal statute while at the same time accommodating the program to meet a State's particular needs and circumstances. It will also be interesting to see how other Federal agencies evaluate the merits of the NEPA Assignment program and whether they choose to replicate a similar model.

As environmental practitioners, we will need to examine whether and how our role will change. It is very possible that Federal practitioners may be expected to take more of a "hands off" approach and adopt more of a stewardship and oversight role – or perhaps a technical assistance role. As NEPA assignment grows and evolves, we encourage you to watch how the issues and challenges facing environmental practitioners change as well.

WISCONSIN DOT 'HYBRID' STYLE HEARING FORMAT UPHELD

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The federal district court for the Eastern District of Wisconsin upheld the validity of a 'hybrid' style public hearing format employed by the Wisconsin Department of Transportation (WisDOT) for highway projects and also rejected several NEPA-related claims by plaintiffs related to the West Waukesha Bypass project in Waukesha County, Wisconsin. (*Waukesha County Environmental Action League et al v USDOT,* No. 15-cv-

801-pp,). The district court's decision was handed down on October 23, 2018 and no appeal was filed.

WisDOT and local lead agency Waukesha County Department of Public Works Bypass proposed to construct what is locally known as the Waukesha Bypass, a long-planned 4-lane roadway on the west side of the City of Waukesha. The project involved widening an existing 2-lane roadway that would then connect to a new 4-lane roadway on new alignment. The overall length of the project is about 5 miles, and the portion on new alignment would affect a high-quality stream corridor containing wetland, primary environmental corridor and threatened and endangered species habitat.

Waukesha County, WisDOT and the Federal Highway Administration prepared a Draft EIS in 2012 and conducted a public hearing in November 2012. A Final EIS was approved in January 2015 and a Record of Decision later that year. Subsequent design modifications result in three separate re-evaluations of the Final EIS, the most recent one in 2016. Construction started in 2017 and will be completed in 2020.

WisDOT began employing what it calls a hybrid style public hearing format after the Eastern District's 2009 *Highway J Citizens Grp v U.S. Dep't of Transp. (656 F. Supp. 2d)* decision found that its previous 'open house' format was deficient. On the Highway J project and other projects, WisDOT's open house format allowed hearing attendees to talk with project team staff, ask questions, and provide written testimony or verbal testimony to a court reporter in a private setting. The *Highway J* decision found the open house style hearing deficient because there was no opportunity for publicly-presented testimony.

A hybrid style public hearing keeps the option of providing verbal testimony privately to a court reporter but adds a public presentation component in an auditorium before a hearing chairperson and any members of the public that wish to attend. While the public testimony portion of the West Waukesha Bypass was occurring, project team staff were available in a different room to answer questions from the public in an open house format and there were several project-related exhibits the public could view. Another court reporter was also transcribing verbal testimony in yet another room in a private setting concurrent with the publicly-presented testimony.

Plaintiffs alleged that having project staff available to speak with hearing attendees in another room and allowing attendees who preferred to give their verbal testimony in a private setting detracted from the publicly-presented testimony and as a result "diluted" the public's ability to hear their fellow citizens input. Plaintiffs stated the hearing did not "provide the direct link between the people and the government" quoting from the *Highway J* decision.

Defendants argued that the *Highway J* decision merely requires the opportunity for hearing attendees to present their testimony in a public setting and does not preclude other forms of testimony nor the cessation of informal discussion.

In rejecting the plaintiff's argument the court noted that Section 128 of the Federal Aid Highways Act does not prescribe the type of hearing, only that the public must be provided the opportunity to testify at the hearing. The court's decision stated that "neither the statute, the implementing regulation nor the *Highway J* decision provide citizens with a right to influence all other citizens. Judge Adelman's decision held only that the procedure must give citizens an *opportunity* to express their views in front of agency representatives and other citizens." 656 F. Supp. 2d at 896 (emphasis added)." Judge Adelman presided in the *Highway J* case.

Plaintiffs also included several NEPA issues related to the West Waukesha Bypass in their suit. All were rejected by the court.

- Plaintiffs argued that WisDOT and Waukesha County defined the purpose and need of the project so narrowly that a four-lane road could be the only outcome of the alternatives analysis. The purpose and need statement cited safety and expected future traffic volumes as key reasons for the project and also noted the project has been in local transportation plans for decades. Plaintiffs stated that WisDOT and Waukesha relied too heavily on the previously prepared transportation plans to reject 2-lane alternatives and justify a 4-lane roadway.

The court noted that the EIS cited reasons other than consistency with transportation plans as reasons for rejecting the 2-lane alternatives. "The defendants both (a) considered more than just the project's history in defining their purpose and need and (b) rejected the two-lane alternatives for many reasons, not just because they did not comport with old transportation plans."

- Plaintiffs argued that the EIS improperly dismissed alternatives like transportation demand management and transportation system management that that individually may not meet purpose and need but in combination with an improved 2-lane roadway may adequately meet it. Failing to consider combination of alternatives violated NEPA according to the plaintiffs. The plaintiffs relied on two 10th Circuit cases, *Davis v Mineta,* 302 F.3d 1104 (10th Cir. 2002) and *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152 (10th Cir. 2002) in which the courts found the agencies erred by not considering transit improvements combined with roadway improvements. In both cases the record contained evidence that transportation system management measures combined with transit improvements and roadway improvements could possibly address the project's purpose and need. In the West Waukesha Bypass case, no agencies had proposed transit improvements in the vicinity.

The court noted that, unlike the two 10th Circuit cases, there was nothing in the extensive West Waukesha Bypass record to suggest that combinations of alternatives could address the purpose and need.

- The Plaintiffs argued that WisDOT and Waukesha County improperly rejected plaintiff's suggested "No Build.Improve" alternative. The No-Build.Improve

Alternative was described by proponents as a reconstructed 2-lane roadway that would improve tight curves and steep hills without buying new right-of-way. This alternative was never illustrated, rather it was described in a series of bullet points and submitted to Waukesha County for consideration. Waukesha County and WisDOT did not perform any analysis of this alternative because, the Final EIS explained, the No-Build.Improve Alternative was expected to be similar to the 2-lane On-alignment Alternative that was evaluated in the Final EIS and included in the Road Safety Audit performed by a design firm hired by Waukesha County. The plaintiffs offered no argument on how the No-Build.Improve Alternative was different than the 2-Lane On-alignment Alternative.

The court dismissed this argument because the defendants explained their reasoning why the No-Build.Improve was similar to the already-studied 2-Lane On-alignment Alternative while the plaintiffs did not explain why the alternatives differed from one another.

The court also rejected plaintiffs' arguments that the EIS did not establish the need for a 4-lane highway for the entire length of the project; improperly rejected the No-Build Alternative; the EIS's indirect and cumulative effects analysis was deficient; mitigation measures were not fully committed to in the Final EIS and ROD and mitigation responsibility was improperly delegated to the Corps of Engineers; supplemental EISs should have been prepared rather than re-evaluations for the post-ROD design modifications; and FHWA consultation with the Fish & Wildlife Service under the Endangered Species Act was deficient.

SUPREME COURT RULES ESA CRITICAL HABITAT MUST BE HABITAT FOR LISTED SPECIES

Submitted by

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On November 27, 2018, the U.S. Supreme Court ruled that an area is eligible to be designated as "critical habitat" under the Endangered Species Act (ESA) only if the area is habitat for the relevant threatened or endangered species. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service,* Dkt. No. 17-71. The Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit to interpret the term "habitat," which is not defined in the ESA, vacating the Fifth Circuit's decision, which had held that the ESA has no habitability requirement. Additionally, the Court held that a decision by the U.S. Fish and Wildlife Service (Service) not to exclude an area from designated "critical habitat" is subject to judicial review. These two holdings are likely to limit the Service's expansive interpretation of its authority and provide the regulated community with the ability to challenge critical habitat designations where such actions have adverse economic consequences.

Under the ESA, "critical habitat" may include areas that are not currently occupied by a listed species, if the Service determines that such areas are "essential for the conservation of the species." When the Service designated critical habitat for the dusky gopher frog (*Rana sevosa*) in 2012, it identified four areas in Mississippi with existing frog populations and designated those areas as critical habitat. But the Service determined that these four occupied areas were not adequate to ensure the frog's conservation, and so also designated a 1544-acre area in Louisiana (described as "Unit 1") as unoccupied critical habitat for the dusky gopher frog. In doing so, the Service acknowledged that Unit 1 would not sustain the frog in its current condition, but concluded that the uplands forest, currently managed for timber production, could be restored to open canopy forest and made into suitable frog habitat with "reasonable efforts." However, Unit 1 is privately owned and the owners had no intention of converting the uplands to frog habitat, as they were considering developing housing on the land, which is located not far from the New Orleans metropolitan area.

The landowners sought to have the critical habitat designation of Unit 1 vacated as inconsistent with ESA requirements and not supported by the administrative record. They argued that, as a matter of law, an area cannot be "critical habitat" for a species if it is not currently habitable by that species, and that the unoccupied parcel in Louisiana is not habitable by the dusky gopher frog. The critical habitat designation was upheld by the federal district court and a divided panel of the Fifth Circuit, which held (based only on the ESA's definition of "critical habitat"): "There is no habitability requirement in the ESA or the implementing regulations."

The Supreme Court rejected the suggestion that the criteria for unoccupied critical habitat are limited to the ESA's definitions. It looked instead to ESA section 4, the provision that directs the Service to designate critical habit, and stated its conclusion quite succinctly: "Only the 'habitat' of the endangered species is eligible for designation as critical habitat."

The Supreme Court also concluded that the ESA's definition of "critical habitat" allows the Service "to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined." The Court noted the competing definitions of "habitat" offered by the Service and Weyerhaeuser. The Service argued that habitat includes areas that, like Unit 1, require some degree of modification to sustain a species, while Weyerhaeuser insists that an area cannot be habitat if it cannot currently support a species. The Court also noted the factual dispute between the parties regarding whether or not Unit 1 could currently support a dusky gopher frog population. It remanded the case to the Fifth Circuit to consider those questions.

The Court's limited holding that critical habitat must be habitat, reserving the meaning of habitat and the factual question of whether Unit 1 is habitat for the dusky gopher frog for further consideration by the lower courts, likely reflects the efforts of Chief Justice Roberts to find common ground and forge a unanimous decision among the eight justices who heard argument in the case. Justice Kavanaugh, who was confirmed a

week after the case was argued, did not participate in the decision. With an eight justice panel, there was real potential for an even split on the question of whether an area must be currently habitable to be deemed critical habitat. If the Supreme Court had split evenly, the Fifth Circuit's holding that the ESA does not require habitability for critical habitat would have remained in place. As the unanimous decision indicates, all the justices agreed that the Fifth Circuit was wrong on this central legal point and that critical habitat must be habitat.

The Supreme Court also overturned the Fifth Circuit's determination regarding courts' abilities to review a Service decision whether to exclude an area from critical habitat based on economic impacts. The Fifth Circuit held that this determination is committed to agency discretion by law and not reviewable by the courts. The Supreme Court reversed, holding that a Service decision to not exclude an area from critical habitat, like its decision to designate critical habitat areas, is reviewable for abuse of discretion. This aspect of the decision is at least as important as the holding with respect to the definition of critical habitat, as it provides the regulated community with the ability to challenge the Service's conclusions regarding the costs and benefits of excluding areas from critical habitat.

ACHP STREAMLINES SECTION 106 REVIEWS WITHIN RAIL ROW

Submitted by

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On August 24, 2018, the Advisory Council on Historic Preservation (ACHP) issued its final Program Comment exempting consideration of effects of federal undertakings on historic rail properties within rail rights-of-way (ROW). The Program Comment provides two approaches – an activities-based approach and a property-based approach – that will allow federal agencies to streamline their responsibilities under Section 106 of the National Historic Preservation Act (NHPA). Currently, Section 106 review is a four-step process: (1) establish the federal undertaking, (2) identify and evaluate historic properties within the area of effect for the undertaking, (3) assess the undertaking's effects to historic properties, and (4) resolve any adverse effects. The process established under the Program Comment exempts certain listed activities and certain rail properties within rail ROW from the usual Section 106 process.

While the Program Comment is anticipated to streamline Section 106 reviews for federal undertakings within rail ROW, it does not exempt these undertakings from review under Section 4(f) of the Department of Transportation Act or alter the application of Section 4(f) to any of the designated activities or properties. Thus, while the standards for evaluating impacts under Section 106 and Section 4(f) differ, the federal agency will still need to identify relevant properties and evaluate the undertaking's potential "use" of those properties to satisfy its obligations under Section

4(f), which can be onerous in their own right. On the other hand, where a project does not result in an adverse effect determination under Section 106, it is likely to qualify for a *de minimis* use determination under Section 4(f).

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings (e.g., federal permits and other agency approvals) on historic properties in or eligible for inclusion in the National Register of Historic Places and to consult with the ACHP with respect to proposed federal undertakings. The Section 106 implementing regulationS govern the process, outlining how federal agencies must consult with State Historic Preservation Offices (SHPO), Tribal Historic Preservations Offices (THPO), Indian Tribes (including Alaska Natives), Native Hawaiian Organizations (NHO) and other interested parties, identify historic properties, determine whether and how such properties may be affected, and avoid or mitigate adverse effects.

ACHP regulations provide for alternative means that agencies can use to comply with Section 106, including an AHCP Program Comment on a category of undertakings in lieu of section 106 reviews or individual undertakings. The federal agency meets its Section 106 responsibilities for those undertakings by implementing an applicable Program Comment.

Section 11504 of the FAST Act mandated the development of a Section 106 exemption for railroad ROW, consistent with the exemption for interstate highways approved by the ACHP in 2006. The U.S. Department of Transportation (USDOT) requested a Program Comment from the ACHP to provide new efficiencies in the Section 106 review for undertakings with the potential to affect historic rail properties within railroad and rail transit ROW.

Under the activity-based approach, activities listed in Appendix A to the Program Comment (the “Exempted Activities List”) are exempt from Section 106 review, provided the conditions outlined in Appendix A are met. The activities listed generally involve maintenance, repair, and upgrades to rail properties that are necessary to ensure the safe and efficient operation of freight, intercity passenger, commuter rail, and rail transit operations. The activities listed were determined to likely have minimal or no adverse effect on historic properties. Under the activity-based approach, a SHPO, THPO, Tribe, or NHO may notify the responsible federal agency of concerns that an activity listed on the Exempted Activities List may adversely or has adversely affected a historic rail property, and the federal agency must investigate the concern within 72 hours and determine the appropriate course of action in consultation with the Project Sponsor, reporting entity, and other stakeholders.

Under the property-based approach, project sponsors may collaborate with USDOT to designate excluded historic rail properties within a defined study area. Once those properties are formally excluded, consideration of effects to all other evaluated rail properties within that study area are exempted from Section 106 review for any

undertaking by any federal agency. This property-based approach does not go into effect until the USDOT publishes implementing guidance, which is required no later than nine months from issuance of the Program Comment.

There are a number of exceptions to the applicability of the Program Comment. The Program Comment does not apply to undertakings within rail ROW that: (i) are within or would affect historic properties located on tribal lands; (ii) consist of activities not listed in Appendix A and that may affect an excluded property designated under the property-based approach; (iii) could affect historic sites that do not have a demonstrable relationship to the function and operation of a railroad or rail transit system; (iv) could affect archaeological sites located in undisturbed portions of rail ROW; and (v) could affect historic properties of religious and cultural significance to federally recognized Indian tribes. The Program Comment also does not apply to undertakings that are not within rail ROW. For those undertakings with an area of potential effects (APE) that extends beyond the rail ROW, the Program Comment applies only to the portions within the ROW.

Programmatic exemptions under the NHPA are rare, with the Program Comment for rail ROW constituting just the fifth such exemption in over 50 years. While the Program Comment streamlines the Section 106 process for applicable undertakings, it will be interesting to see how these changes play out and whether the cost and time savings are significant given the continued potential applicability of Section 4(f).

83 *Federal Register* 42920, August 24, 2018.

Editor's Note: See the lead article in this issue on revisions to 23 CFR Part 774 and exemptions to Section 4(f) coverage.

DEADLINE FOR NEXT ISSUE IS MARCH 15, 2019

The deadline for articles for the April, 2019 edition of *The Natural Lawyer* is March 15, 2019. Please submit articles to Richard.christopher@hdrinc.com and use Microsoft Word.