Federal Transit Administration

Standard Operating Procedures for Managing the Environmental Review Process

The Federal Transit Administration (FTA) Office of Environmental Programs developed standard operating procedures (SOPs) to provide additional direction and recommendations to FTA staff who are managing the environmental review process. The environmental review process SOPs are supplements to existing resources, such as FTA environmental regulations and various guidance documents.

Applicability/Scope

Implementation of the National Environmental Policy Act (NEPA) and other Federal environmental laws is flexible in that the laws are broad enough to accommodate varied Federal actions around the country and across Federal agencies, yet those laws also carry specific requirements. The FTA environmental review process SOPs were developed to reflect the flexibility provided by NEPA while addressing requirements found in the Council on Environmental Quality's NEPA implementing regulations (40 CFR parts 1500-1508), FTA's environmental impact and related regulations (23 CFR part 771), and statutory provisions that affect the implementation of NEPA for transit projects. In addition to considering Federal statutory provisions and regulations, FTA considered guidance and executive orders when developing the SOPs, which include mandated actions as well as recommendations or best practices. The SOPs outline FTA staff roles and responsibilities in managing the environmental review process, including development of all levels of environmental documentation (i.e., categorical exclusions, environmental assessments, findings of no significant impacts, environmental impacts statements, and records of decision) and consideration of other environmental requirements where appropriate.

Responsibilities

For most projects, FTA Regional staff is responsible for managing the environmental review process. While the project sponsor may perform the technical studies, conduct outreach, and prepare documentation, FTA maintains responsibility for compliance with NEPA and other relevant Federal environmental laws (e.g., Section 106 of the National Historic Preservation Act, Section 4(f) of the DOT Act).

Standard Procedures

The following table identifies FTA's Environmental SOPs:

SOP No.	SOP Name	Purpose
1	Environmental Project File and Considerations for Administrative Records	Provides guidance to ensure that FTA has records of all necessary written materials, electronic or hard copy, that pertain to FTA's environmental review process for a project.
2	Project Initiation and Determining NEPA Class of Action	Provides guidance for the earliest phase of the environmental review process for FTA projects.

SOP No.	SOP Name	Purpose
3	Early Scoping	Provides guidance on early scoping, an optional step in the public planning and environmental processes that precedes formal NEPA scoping.
4	Purpose and Need	Provides guidance on the purpose and need statements, which provide the rationale and justification for undertaking a major Federal action and forms the basis for the range of alternatives to be studied in the environmental document.
5	Alternatives	Provides guidance on the identification, development, and evaluation of alternatives in the environmental review process.
6	Notice of Intent	Provides guidance on the preparation of a notice of intent (NOI), which announces that FTA and other lead agencies intend to prepare an environmental impact statement.
7	Scoping	Provides guidance on scoping—an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.
8	Annotated Outline	Provides guidance on the development of annotated outlines, which can be used to create the framework for the environmental document.
9	Review and Distribution of Environmental Assessments	Provides guidance for the review and processing of environmental assessments for actions in which the significance of environmental impacts is not clearly established.
10	Managing Content, Review, and Distribution of Environmental Impact Statements	Provides guidance on the drafting and processing of environmental impact statements required for any action that significantly affects the quality of the human (including natural) environment. This SOP also discusses combined final environmental impact statement/record of decision documents.
11	Receiving and Responding to Public and Agency Comments	Provides guidance on the public and agency comment process for the environmental review process.
12	Documentation of Mitigation Commitments	Provides guidance on consideration and documentation of mitigation commitments for impacts identified through the environmental review process.

SOP No.	SOP Name	Purpose
13	Findings of No Significant Impact	Provides guidance on preparing a finding of no significant impact based on an environmental assessment that identifies no significant impacts.
14	Record of Decision	Provides guidance on preparing a record of decision, the decision document for an environmental impact statement.
15	Limitations on Claims	Provides guidance on FTA publication of a Limitation on Claims notice in the *Federal Register* announcing that FTA has taken a final agency action on a project, thereby limiting legal claims against that project.
16	Review and File Management of Categorical Exclusions	Provides guidance on the review and application of categorical exclusions for projects.
17	Re-Evaluations and Supplemental Documents	Provides guidance on re-evaluations and supplemental documents to determine whether a completed environmental document or decision requires supplemental analysis.
18	Section 4(f) Evaluations	Provides guidance on the recommended timing of the Section 4(f) processes and to improve understanding in the transit context.
19	Consideration of Contaminated Properties including Brownfields	Provides guidance on assessment and acquisition considerations for property that is or may be contaminated (brownfields or suspected brownfields).
20	Agency Roles and Government-to-Government Coordination	Provides guidance on agency roles and responsibilities during the environmental review process.
21	Section 106 Process	Provides guidance on agency roles, responsibilities, and consultation procedures in the Section 106 process.
22	Water Resources	Provides overview of several water resource-related requirements and identifies high-level steps for compliance.
23	Biological Resources	Provides information on agency roles, responsibilities, and consultation procedures for biological resources under numerous requirements.

References

Each SOP includes a list of resources and associated links referenced in the SOP. In many of the SOPs, the SAFETEA-LU Environmental Review Process Final Guidance (2006) is listed. While the Federal Highway Administration and FTA published a draft update to that guidance in 2015 for public review and comment, a final version has not been published. Practitioners must use the 2006 version until further notice, keeping in mind the statutory changes made since then by the FAST Act and MAP-21 (various FAST Act and MAP-21 guidance/Q&A resources are available).

Title: Environmental Project File and Considerations for Administrative Records
Date: March 2019
SOP No.: 1
Issued by the Office Planning and Environment (TPE)

1. Purpose

This document provides guidance to ensure that FTA has records of all written materials, electronic or hard copy, that pertain to FTA's environmental review process for a project.

An environmental project file (project file) should be part of FTA's management of the environmental review process. The project file may be needed when the DOT Office of the Inspector General or the Government Accountability Office conducts a review of the FTA grant process. More importantly, the project file serves as the basis for developing an administrative record to document FTA decisions and is crucial when litigation occurs.

2. Applicability/Scope

FTA Regional staff should start compiling a project file when a project sponsor signals its intent to seek funding from FTA. Best practice is to keep a comprehensive collection of files in a shared library (e.g., SharePoint, network drive, or contractor-initiated site). Shared network drives can be used but are not ideal due to lack of version control. Additionally, some FTP sites are used for file transfer only. If using a site managed by a contractor, the project sponsor should have an agreement in place where the contractor agrees to collect and keep records in accordance with FTA policy. The Region should retain the project file past the completion of the environmental review process, until the grant is closed out and the project is in operation. The Region should follow established FTA policies and practices for records management of all written materials—electronic and hard copy. It is preferable to maintain electronic files over hard copy.

There are instances, typically if there is litigation or anticipation of litigation, when FTA Regional Counsel or FTA Headquarters Counsel will direct staff to compile a more comprehensive record of the project, called the administrative record. The administrative record is a compilation of all the written documents that FTA relied upon when it made its National Environmental Policy Act (NEPA) determination. The administrative record must be able to satisfy a Federal court that:

- The FTA decisionmaker (the Regional Administrator or designee) was not arbitrary or capricious in its decisionmaking;
- The FTA decisionmaker relied on documentation in the administrative record to support its determination. In other words, the Regional Administrator considered relevant data and information, and objectively evaluated all the information before him/her before issuing a determination in accordance with the applicable laws; and
- The final agency action is supported by the administrative record.

Issuance of a categorical exclusion (CE), a finding of no significant impact (FONSI), a record of decision (ROD), or a final environmental impact statement (FEIS)/ROD is a "final agency action" per the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-9 and 701-6. A person who wants to challenge a final agency action may sue for judicial review per APA Section 706(2)(A). Any judicial review will rely

primarily on an agency's administrative record. An agency's action will be upheld unless the court finds it "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law" (APA Section 706(2)(A)).

3. Responsibilities

FTA Regional staff responsible for an environmental review will maintain the project file. For some projects, FTA Headquarters staff may maintain the project file in coordination with Regional staff. FTA Regional Counsel and FTA Headquarters Counsel are responsible for determining when to compile an administrative record for a project. Project sponsors or their consultants should also maintain a project file during the environmental review process. The collection of files should be comprehensive, and not limited to the working documents that FTA is actively reviewing.

4. Standard Procedures

4.1. Designate responsibility. Management at the FTA Regional Office will designate the FTA staff member responsible for retaining the project file.

4.2. Communicate with the project sponsor. At the initiation of environmental review process, Regional staff should discuss with the project sponsor the process for maintaining the project file. The Region may advise the project sponsor to maintain its own file similar to FTA's; this may include items not included in FTA's file, such as minutes of internal meetings.

4.3. Material to include in the project file. The list below includes documents that should reside in the project file. Documents in the project file should relate directly to the environmental review process, should identify the persons involved (e.g., include cover letters indicating "to" and "from"), and should be dated. Generally, deliberative material (e.g., draft project plans presented during meetings) should be retained, as appropriate, until the project is constructed and in operation.

- **Conflict-of-interest forms.** Include the disclosure forms signed by the project sponsor's consulting firms, attesting to the lack of a NEPA conflict of interest.
- **Correspondence among FTA staff.** Correspondence (emails, transcribed phone conversations, letters, etc.) between staff can be useful to show that FTA considered an issue before making a decision. General email conversations, in particular those concerning particularly complex issues, must be retained.
- **Correspondence with agencies and stakeholders.** Correspondence (including memos, letters, and significant emails) to and from resource agencies and stakeholders should be included in the project file.
- **Environmental documents and decision documents.** The project file should always include the environmental documents themselves (e.g., draft EIS (DEIS), ROD or combined FEIS/ROD, environmental assessment (EA), finding of no significant impact (FONSI), and/or the CE substantiation and their supporting materials (e.g., appendices and technical reports). In addition, the project file should include re-evaluations and supplemental documents. If "working drafts" contain information pertinent to decision-making they should also be included in the project file, but clearly labeled as "working", "internal", or "administrative" draft.

- **Meeting agendas, minutes, and supporting materials.** For larger projects, the project sponsor or consultant often prepares these products. For smaller projects, FTA staff should note when meetings or conversations took place with resource agencies.
- **Public notices and supporting materials.** Copies of notices issued by FTA, or notices issued by the project sponsor on behalf of FTA, should include an indication of the method(s) of distribution, and project materials distributed at public meetings.
- **Technical reports.** Technical reports (or memos) can be an efficient means of compiling supporting data for major topics under review through the environmental review process and should be retained in the project file.
- **Telephone memos.** A telephone conversation should be documented if the conversation yields substantive information that will not be reproduced in writing. We expect this to occur rarely, as most such conversations would be documented in writing.

4.4. Attorney-client and internal files. Certain files are used for internal deliberation within FTA/DOT or for discussion of legal issues between attorneys or between an attorney and a client. Those types of files and communications should be labeled accordingly, when possible.

4.5. Paper records. In an effort to reduce paper use, retention of paper records should be limited to documents essential to FTA's decisionmaking; however, paper records should include documents having original signatures and important handwritten notations. The electronic file folder should contain copies of all items included in the paper file.

4.6. Retention of files. Unless otherwise directed, the Regional Office taking the final agency action should retain the project file until the project is open for revenue service and all grants providing funds for the project have been closed out. Project files may be stored in an archive, as appropriate.

5. References

- Maintaining a Project File and Preparing an Administrative Record for NEPA Study (AASHTO, 2006)
- Records Management by Federal Agencies, 41 U.S.C. §§ 3101-3107
- FTA Order 1324.1D, Records Management Guidelines (2017), internal – FTA only
- National Archives and Records Administration guidelines
- Guidance to Federal Agencies on Compiling the Administrative Record (DOJ, 1999)

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Project Initiation and Determining NEPA Class of Action
Date: March 2019
SOP No.: 2
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance for the earliest phase of the environmental review process for FTA projects.

2. Applicability/Scope

FTA determines if and when it will be involved in the environmental review process. Prior to initiating review, FTA needs to decide if there is an FTA action (i.e., a transit project proposed for FTA funding; see 23 CFR 771.107 for full definition). If there is no FTA action, FTA will likely not be involved. If there is an FTA action, FTA Regional staff should determine the appropriate time for project initiation (i.e., the action is sufficiently defined that assessment of its environmental impacts is feasible) in consultation with the Regional Counsel, as appropriate. The Regional Office must also make a National Environmental Policy Act (NEPA) class of action determination.

3. Responsibilities

The FTA Regional Administrator, or designee, as appropriate, is generally responsible for all environmental decisions, including project initiation and determining the class of action, related to any FTA action, in consultation with the Regional Counsel. The project sponsor (generally the sponsoring transit agency) may recommend a certain class of action based on the project's potential impacts.

FTA Regional staff is responsible for managing the environmental review process for the project. This means the staff is responsible for regularly communicating with the project sponsor and ensuring FTA has the necessary information and documentation, as appropriate, to support the Regional Administrator's decisions on a project.

4. Standard Procedures for Project Initiation

4.1. Project information. Project sponsors should coordinate with FTA Regional staff for an initial determination as to whether an environmental impact statement (EIS) will likely be required. Per 23 U.S.C. § 139(e), for projects that will be evaluated with an EIS, the project sponsor must provide Regional staff with project initiation information on the proposed project, including the project description (i.e., the type of work, termini, length and general location of the project), a list of any anticipated Federal approvals, and any additional information that the project sponsor considers important for initiating a project. Additionally, FTA recommends the project sponsor provide a summary of prior planning work on the project; the project's general purpose and need (EIS); and, a graphic showing the location of the proposed project–its proposed termini, station and maintenance facility locations and sizes, and other pertinent project features. The project sponsor fulfills this information requirement by providing FTA Regional staff with any relevant documents that contain the required and suggested project information; the information may take the form of a draft notice of intent (NOI) for an EIS.

If a project may qualify for a categorical exclusion (CE) or environmental assessment (EA), the information needed is normally less than that described above, but the project sponsor should at a minimum provide a basic project description and location map/graphic.

4.2. Review of application. Once FTA has received the project initiation information from the project sponsor, FTA Regional staff evaluate the information to determine whether there is sufficient information to initiate the environmental review process, including confirming the class of action. The information should be used to determine the factors below.

4.2.1. Eligibility and likelihood of Federal funding. The Regional Office should determine (1) whether the project is eligible for FTA funding, and (2) whether the project sponsor seeks FTA funding. In determining whether a project is eligible and may be funded by FTA, the Region should consider the following:

- **Metropolitan Transportation Plan (MTP).** The Regional Office should verify the project is eligible for Federal funding by demonstrating that the proposed project has been adopted into the Metropolitan Planning Organization's (MPO) fiscally constrained MTP. The project may also be identified in the MPO's transportation improvement program (TIP) for "environmental study" or "preliminary engineering" or another phase of project development, but it is not necessary to program a project for "construction" in the MPO's TIP prior to initiation of the NEPA process. As the MTP is financially-constrained, it is reasonably likely that any project included in the MTP will be funded and there will be an FTA action (23 CFR part 450). However, there are occasions when FTA expects to fund a project that is not initially in the MTP; the decision to initiate NEPA for these projects should be made on a case-by-case basis.
- **Funding nexus.** Occasionally, a project sponsor will request FTA conduct an environmental review for a project that has no identified or planned/programmed FTA funding (i.e., the project has not been adopted into the MTP). FTA does not generally conduct NEPA reviews for projects with no FTA funding currently identified or planned, but that decision is at the discretion of the Regional Administrator.

4.2.2. FTA's role in the process. After determining that a project is eligible for and will likely receive FTA funding, the Regional Administrator determines FTA's role in the environmental review process (e.g., lead vs. cooperating agency). This should be done in coordination with the project sponsor and may include discussions with other Federal, State, and local agencies. The environmental review process roles and responsibilities are discussed in detail in 23 U.S.C. § 139, 23 CFR part 771, and 40 CFR parts 1500-1508. For more information see the Agency SOP.

4.2.3. Scope requirements (23 CFR 771.11(f)). The Regional Office should ensure that any project under consideration connects logical termini (if linear) and is of sufficient length to address environmental matters on a broad scope; has independent utility or significance (i.e., is a useable and reasonable expenditure even if no additional transportation improvements in the area are made); and does not restrict consideration of alternatives for

other reasonably foreseeable transportation improvements. This applies to all classes of action.

4.2.4. Limitation on actions prior to and during environmental review.

- **Evaluation of prior actions.** Regional staff should ensure that the project sponsor has not prematurely taken action that would affect FTA's ability to comply with NEPA and other environmental requirements, such as Section 4(f) and Section 106. Examples of impermissible actions include demolition of buildings on the proposed project site without prior FTA approval or certain cases of advance acquisition of real property. For more information on permissible early acquisition of real property, see FTA's Corridor Preservation Guidance and FTA's Categorical Exclusion Guidance.
- **Limitations on activity during the environmental review process.** A project sponsor may exercise pre-award authority to take certain implementation activities, but many restrictions on such actions still apply. Pre-award authorities and restrictions are detailed in FTA's Annual Appropriation Notice in the *Federal Register*.

4.2.5. Class of action. As detailed further in Section 5, Regional staff should make a preliminary determination on class of action, in particular, whether the proposed class of action is an EIS, in order to be able to provide a written response to the project sponsor on a timeline and anticipated *Federal Register* publication date for a NOI to prepare an EIS.

4.3. Written response to project sponsor. For EIS documents, no later than 45 days after the date when the Regional Office received the project initiation information from the project sponsor, the Regional Office must provide a written response in the form of a letter or email to the project sponsor. The response to the project sponsor will provide the determination of the Regional Administrator, or designee, to:

- Initiate the environmental review process and provide a timeline and expected date for publishing a NOI in the *Federal Register*;
- Decline the application and explaining the reasons for that decision; or
- Request additional information in order to make a determination on project funding eligibility and likelihood of funding, scope, history, and likely class of action.

5. Standard Procedures for Determining the NEPA Class of Action

5.1. Timing of class of action determination. After taking into account the above considerations regarding project initiation, the Regional Administrator, or their designee, will confirm the class of action—deciding initially whether the project requires the preparation of an EIS or an EA, or is categorically excluded from the need to prepare either an EIS or an EA. FTA should notify the project sponsor of its class of action determination as well as our expectations for the review process (e.g., project tasks to be completed, FTA's role in the review).

5.2. Determining significance. The class of action for a project should reflect the level of significance of the potential impacts. For example, NEPA requires an EIS for major Federal actions that "significantly" affect the quality of the human and natural environment. The term "significantly" requires consideration of both the context and intensity of the action (40 CFR 1508.27).

5.2.1. Context. Context means that the significance of an action (both long- and short-term) should be analyzed in several contexts relative to environmental conditions at an appropriate scale, such as society as a whole (human, national), the affected region, the affected interests, and/or the locality. Significance varies with the proposed action's setting.

5.2.2. Intensity. Intensity refers to the severity of impact. FTA typically considers the following in evaluating the intensity of project impacts: unique characteristics of the project, such as its location in park lands, wetlands, or ecologically critical areas; difficulties in relocating displaced businesses or residences, especially environmental justice populations; the degree of controversy regarding environmental matters; the degree to which the action may adversely affect resources on or eligible for the National Register of Historic Places; the degree to which the action may adversely affect an endangered or threatened species or designated critical habitat; and whether the action may lead to a violation of a Federal, State, or local environmental law or requirement.

5.3. Classes of action (23 CFR 771.115). There are three classes of actions that prescribe the level of documentation and the associated environmental review process requirements.

5.3.1. Categorical Exclusion (CE). CEs are categories of actions that in the absence of unusual circumstances do not individually or cumulatively have a significant environmental effect and are ordinarily excluded from the requirement to prepare an EA or EIS. See 23 CFR 771.118. CEs are not exempt from NEPA; they are a NEPA action.

- **"C-list" actions (23 CFR 771.118(c)).** To apply a c-list CE, FTA must determine that the proposed action falls within the scope and conditions described for the CE. An action not explicitly described in the c-list but is similar in nature to an action described within a c-list CE may still qualify as a c-list CE.
- **"D-list" actions (23 CFR 771.118(d)).** The d-list provides examples of actions that may qualify as d-list CEs. These examples are broader than those in the c-list; the d-list is representative and not an exhaustive list of all actions. When determining whether a d-list CE is appropriate for a project, the Regional Office should work with the project sponsor to prepare concise documentation supporting the selection of the CE.
- When considering whether to process an action that is not explicitly found in the c-list or d-list as a CE, Regional staff should consult with the Regional Counsel to ensure the action can be categorically excluded (i.e., the action meets the conditions found in 23 CFR 771.118(a) and (b)) through 23 CFR 771.118(d). Alternatively, FTA may apply the Cross-Agency CE at 23 CFR 771.118(e) to a project if a Federal Highway Administration or Federal Railroad Administration CE (23 CFR 771.117 and 771.116, respectively) most appropriately captures the action.

5.3.2. Environmental Assessment (EA). EAs are concise public documents that include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted (40 CFR 1508.9). Typically, FTA requires an EA in two situations:

- Further investigation is needed to determine if the project would significantly affect the quality of the human and natural environment and require an EIS (23 CFR 771.119(a)); or
- For other purposes in compliance with NEPA (40 CFR 1508.9).

5.3.3. Environmental Impact Statement (EIS). EISs are detailed written statements for major Federal actions that will significantly affect the quality of the human and natural environment. Per 23 CFR 771.115(a), FTA actions that normally require an EIS include:

- Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way (ROW); or
- New construction or extension of a separate roadway for buses not located within an existing transportation ROW.

If a project qualifies for an EIS, FTA must determine whether the project meets the definition of a "major infrastructure project," as defined in Executive Order 13807—*Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (Aug. 15, 2017). The Regional staff should contact the Office of Environmental Programs when they anticipate a new EIS, and must contact the Office thirty days prior to NOI signature.

5.4. Distinguishing between CEs and EAs. If Regional staff has determined that an EIS is not necessary, FTA must then decide between an EA and a CE. There is no clear line that distinguishes whether a project warrants an EA or CE. If a proposed project fits within one of the c-list or d-list CEs, it does not automatically mean that an EA will not be required. Likewise, if the action is not explicitly listed on the c-list or among the d-list examples, it does not automatically trigger an EA. Regional staff should consider the factors below in deciding between an EA and a CE.

5.4.1. Unusual Circumstances. Section 771.118 includes the requirement for considering unusual circumstances, which is how the agencies consider extraordinary circumstances, in accordance with the CEQ regulations (40 CFR 1508.4). The presence of "unusual circumstances" requires that the agencies "conduct appropriate environmental studies to determine if the CE classification is proper" pursuant to section 771.118(b). The potential for unusual circumstances for a project does not automatically trigger an EA or EIS, but Regional staff needs to consider them to determine whether applying a CE to the project is appropriate. Unusual circumstances include significant environmental impacts, substantial controversy on environmental grounds, significant impact on Section 4(f)- or Section 106-

protected properties, or inconsistencies with other Federal, State, or local environmental laws or requirements.

5.4.2. Agency and public involvement. An EA ensures that agencies and the public have information on the project and an opportunity to comment through its required 30-day public availability period, while CEs do not carry any public involvement requirements. When public involvement seems appropriate due to potential impacts or environmental controversy, FTA may wish to consider an EA. For example, a transit bus center with a number of impact areas located within an environmental justice community might warrant an EA, whereas a CE would be adequate for the same kind of project in a predominantly commercial area. Either a c-list or d-list CE can, however, be accompanied by public involvement in situations such as these.

5.4.3. Alternatives. An EA may sometimes be appropriate if the proposed project site is currently occupied by a resource that is protected by a statute, regulation, or executive order that requires the consideration of alternatives. Examples include Section 4(f) resources (e.g., parks, recreation areas, wildlife refuges, and historic sites), where the use of the resource results in impacts that are greater than *de minimis*, and wetlands or other waters of the United States, where the encroachment would not qualify for a nationwide permit from the U.S. Army Corps of Engineers (33 CFR part 323). Usually, the project sponsor considers alternative sites before coming to FTA and the possibility of using a d-list CE for the project will incentivize the project sponsor to select a site that has no significant impacts and does not require the consideration of alternatives. Either a c-list or d-list CE may still be used, however, for these types of projects if determined appropriate.

5.5. Distinguishing between EAs and EISs. FTA has occasionally diverged from the list of actions that typically require an EIS (found in section 771.115(a)). This demonstrates that FTA considers projects on an individual basis when determining whether an EIS is the correct class of action. The Regional Office should consider the following:

5.5.1. Potential for significant impact. To determine whether a project's environmental document should be an EA vs. an EIS, FTA considers the significance (i.e., context and intensity) of the environmental impacts, as well as potential mitigation. For example, per section 771.115(a), an EIS is typically required when constructing rail transit facilities (including new stations and park-and-ride lots) outside of existing ROW due to the potential for significant impacts. If the new rail transit project or extension is predominantly located within existing railroad ROW, then a lesser class of action is possible because the land is likely previously disturbed.

5.5.2. Interagency and public involvement. Both EA and EIS documents carry agency and public involvement requirements, but the EA process has fewer requirements. At times, it may be appropriate to select an EIS class of action in order to satisfy project concerns (e.g., response to public controversy regarding environmental issues) or another Federal agency's requirements when FTA is a joint lead Federal agency (e.g., U.S. Army Corps of Engineers' requirements pursuant to the Clean Water Act).

5.6. Contracting and the environmental review process.

5.6.1. FTA review of the consultant's scope of work. Where possible, Regional staff should offer input on the consultant's scope of work or performance work statement, as appropriate, prior to finalization to ensure an effective and efficient review process, helping the project sponsor to avoid the development of analysis not needed for compliance with environmental review requirements.

5.6.2. Conflict of interest form. Regional staff must require the project sponsor's environmental contractor and subcontractors (if any) to fill out and return a conflict of interest form (see attachment to SOP No. 1) as required by CEQ regulations (40 CFR 1506.5) and FTA regulations (23 CFR 771.119(a)(2) and 771.123(d)).

6. References

- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- FTA's Metropolitan Planning Regulations, 23 CFR part 450
- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- FTA's CE Guidance
- FTA's Corridor Preservation Guidance
- SAFETEA-LU Environmental Review Process Final Guidance (2006)

APPROVAL: _____

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Early Scoping
Date: March 2019
SOP No.: 3
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on early scoping, an optional step in the public planning and environmental processes that precedes formal National Environmental Policy Act (NEPA) scoping. When employed, early scoping is the first opportunity for the public to learn about a proposed project in regards to the environmental review process. Its purpose is to identify possible issues prior to making any significance or class of action determinations, but it can also facilitate the use of planning work later in the formal environmental review process.

2. Applicability/Scope

Formal NEPA scoping follows FTA's publication of a Notice of Intent (NOI) in the *Federal Register* for projects requiring an environmental impact statement (EIS). However, scoping "may be initiated earlier [early scoping], as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively" ("Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Council on Environmental Quality (CEQ)). Early scoping may be beneficial to conduct regardless of class of action but level of effort should be commensurate with class of action. Early scoping activities can refine project definition, identify stakeholders and potential concerns/interests, and help determine the class of action.

FTA encourages prior planning activities in order to refine the project that will be evaluated in the NEPA document, thereby streamlining the environmental review process. Incorporating environmental review process considerations (e.g., purpose and need, alternatives, significant environmental issues) during planning generally is referred to as "planning and environmental linkages," but it can also be referred to as early scoping when you are determining the scope of the environmental issues associated with a project. Performing preliminary data analysis and requesting input from the public and agencies on issues before NEPA begins is early scoping. This opportunity normally occurs prior to the formal environmental review process, and can be concurrent with planning.

Early scoping is appropriate when a proposed action has not yet been identified and a large number of transit mode and alignment alternatives in a broad study area are under consideration. For example, a transit agency, metropolitan planning organization (MPO), or other planning entity may be performing a planning study of a number of transit options in a large metropolitan travel market, and the project sponsor and FTA Regional staff want public and agency input about environmental resources and proposed alternative locations to help narrow the range of alternatives. The project team can then incorporate products or decisions documented during planning directly into the environmental review process for the proposed project that emerges from the planning study (23 CFR 771.111(i)(2)).

3. Responsibilities

FTA Regional staff should work with the project sponsor to identify an opportunity to apply early scoping (e.g., timing, appropriate scenarios), and to provide process guidance (e.g., notice and documentation

expectations). Regional staff, in consultation with the Regional Counsel, will publish an early scoping notice in the *Federal Register* to provide notice to the public and our partner agencies.

4. Standard Procedures

4.1. Early scoping notice. When the project team engages in early scoping and wants the results to be considered during the environmental review process, FTA publishes an early scoping notice in the *Federal Register*. Per CEQ guidance, an early scoping notice must provide enough information to allow the public and relevant agencies to participate effectively. The notice should:

- Clearly describe the process of early scoping;
- Include information about the planning study;
- Request comment on the range of alternatives to be considered, potential impacts, and draft Purpose and Need statement; and
- Identify opportunities for public comment, including meetings (if applicable).

The early scoping notice can request comment on whatever the project team would like to receive comments on as long as there is enough information for the public and agencies to respond effectively. Early scoping is quite flexible in that respect as it depends on the level of planning development at the time of the notice.

Per CEQ guidance, FTA must clearly state in the notice that it intends to substitute early scoping for the formal NEPA scoping process when that possibility is under consideration.

4.2. Outreach. Early scoping activities can include public meetings, newspaper advertisements, and meetings with Federal, State, and local agencies, or tribal governments that may have an interest in the outcome of the study. Outreach may coincide with activities for earlier planning work. It is a good practice to conduct early scoping in a manner similar to formal NEPA scoping and engage all interested parties, rather than being limited to designated stakeholders (e.g., the downtown business community) in the event early scoping substitutes for traditional scoping. FTA Regional staff should remain aware of early scoping activities but may not be involved in the decisionmaking as much as during the formal NEPA scoping process.

4.3. Early scoping as substitute for NEPA scoping. Early scoping cannot substitute for the normal scoping process after publication of the NOI to prepare an EIS, unless the early scoping notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the Purpose and Need, scope of alternatives and impacts will still be considered. Additional outreach to Federal, State, and local agencies, and tribal governments, during the environmental review process may still be recommended. For example, early scoping may be used if a project proceeds directly from planning to the environmental review process.

4.4. Planning & Environmental Linkages. Early scoping can serve not only to streamline the environmental review process, but also to securely "link" transportation planning and NEPA. (See 23 CFR 450.318(a)-(c) and 23 CFR part 450, Appendix A for more information.) While similar decisions can result from transportation planning or early scoping, early scoping may be appealing to project sponsors when used to formally begin the environmental review process because it is a clear link to NEPA.

4.5. Documentation. If the project team intends to use decisions made during early scoping in the environmental review process, FTA must ensure the decisions and supporting processes or information are documented in the project file. The project file should document the process, such as the process to screen alternatives or resources, any decision(s) to be carried forward into NEPA, and agency/public involvement. FTA should ensure the environmental document includes the decisions made as a result of early scoping briefly and where appropriate within the document; early scoping materials and decision documents should be made available upon request.

5. References

- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1981) (see answer to Question 13)
- FTA's Environmental Impact and Related Procedures, 23 CFR 771.111(i)(2)
- Linking the Transportation Planning and NEPA Processes, 23 CFR 450.212, 450.318, and Appendix A

APPROVAL: _____

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Purpose and Need
Date: March 2019
SOP No.: 4
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the purpose and need statement for Federal environmental reviews. The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) require every environmental impact statement (EIS) to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action" (40 CFR 1502.13). This discussion, typically one or two paragraphs long, is the foundation of the environmental review process; it provides the rationale and justification for undertaking a major Federal action and forms the basis for the range of alternatives to be studied in the environmental document. This document provides guidance on that requirement.

2. Applicability/Scope

Only EISs have formal purpose and need statements. CEQ regulations require an environmental assessment (EA) to include a brief discussion of the "need for the proposal" (40 CFR 1508.9); EAs typically include language similar to a purpose and need statement and may be titled as such.

A categorical exclusion (CE) does not require a purpose and need statement but the documentation for a CE normally includes the project description and a very brief discussion of its transit objective. These help FTA to ensure that the proposed action is eligible for FTA financial assistance and represents a reasonable expenditure of Federal transit funds.

Purpose and need development ordinarily starts early, such as during transportation planning, and is refined during the environmental review process in response to agency and public comments, and incorporated into the EIS. A project's purpose and need should exhibit continuity from planning, through each project development phase, to project approval. Per 23 U.S.C. § 139(d)(8)(B), to the maximum extent practicable, the lead agency must develop an environmental document sufficient to satisfy the requirements for any Federal approval or other Federal action required for the project, including permits issued by other Federal agencies. Consequently, FTA needs to coordinate the development of the purpose and need with other Federal agencies, as applicable.

3. Responsibilities

FTA Regional staff is responsible for reviewing the draft purpose and need statement, provided by the project sponsor, and should ensure the purpose and need are developed in coordination with any co-lead agencies, including project sponsors. The Regional Office should ensure that the purpose and need statement is appropriately drafted for each project.

4. Components of the Purpose and Need Section

4.1. Purpose. The purpose is the "what" of the proposed action (i.e., what is the project sponsor trying to accomplish?). The purpose should be stated as the positive outcome that is expected (e.g., "the purpose is to reduce traffic congestion in the corridor"). It should avoid stating a

solution as a purpose (e.g., "the purpose of the project is to build a bypass"). It should generally consider the entire multimodal transportation system and may be stated broadly so more than one transportation mode or alternative can be considered (if it is appropriate for the transportation problem), although it should not include extraneous information.

4.2. Need. The need identifies the problem(s) the proposed project would address (i.e., why is the proposed action is needed?). The need should establish the evidence that the deficiency or problem exists or will exist if projected population and planned land use growth are realized. Ideally, the need provides quantitative data, but it can also reference planning or modeling studies or other analyses that identify or support the need. There are generally different needs or different measures for demonstrating the need (e.g., population growth, degraded roadway conditions, land use plans calling for more density, lack of high-capacity transit access, communities lacking connections, numerous transit-dependent residents, etc.).

4.3. Objectives. Per statute, FTA must include a clear statement of the objectives that the proposed action is intended to achieve in the purpose and need (23 U.S.C. § 139(f)). These objectives can be fully encompassed by the purpose or need statement or discussed separately. Objectives should be achievable and measurable and may be used to evaluate alternatives, especially for complex projects. Examples are provided in statute, but include planning objectives, economic development, and national security. They may also reflect the project sponsor's values (e.g., expanding the system within the long-range budget).

4.4. Other environmental laws. In order to comply with other Federal environmental laws, such as the Clean Water Act, purpose and need statements may need to be drafted considering those other environmental laws and the needs of other Federal agencies with jurisdiction by law. When this occurs, FTA/the project sponsor should coordinate with the Federal agency with jurisdiction by law to ensure, to the maximum extent practicable, that the environmental document satisfies the requirements for other Federal approvals or actions.

5. Standard Procedures

5.1. Drafting the purpose and need. The lead agencies (i.e., FTA and the project sponsor) begin by preparing a draft purpose and need for publication in the EIS notice of intent. This allows for cooperating/participating agency and public input; the purpose and need may be refined after scoping based on new information or the agency and public feedback.

5.2. Length and content. FTA should make every effort to develop a concise purpose and need statement that focuses on the primary challenges to be addressed. FTA should ensure that the purpose and need is not too directive or narrowly defined. The purpose and need should not discuss alternatives.

5.3. Format. The purpose and need often has its own chapter or section in the environmental document. The purpose and need statement must be brief, though the entire section may be a few pages long once other elements are included, such as project history (background, planning history, actions taken to date, and funding status or schedule), and graphics or maps that may be helpful to the reader.

5.4. Participating agencies and public involvement. In developing the purpose and need for EISs, the lead agencies must provide an opportunity for the involvement of participating (including cooperating) agencies and the public, and must consider their input (23 U.S.C. § 139(f)). This ordinarily occurs during scoping.

- **Public involvement.** FTA has flexibility in how to involve the public, but the opportunity for involvement must be publicized. Public involvement may be done through public workshops or meetings, solicitations of verbal or written input, conference calls, website notices, distribution of printed materials, or other public involvement techniques.
- **Role and coordination with participating agencies.** Per 23 U.S.C. § 139(d)(8)(B), to the maximum extent practicable, the lead agency must develop an environmental document sufficient to satisfy the requirements for any Federal approval or other Federal action required for the project, including permits issued by other Federal agencies. FTA must coordinate with other Federal agencies that have jurisdiction under those laws (23 U.S.C. § 139(d)(8)). This practice is consistent with the One Federal Decision process under Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 FR 40463 (August 24, 2017).
- **Nonparticipation of participating agencies**. A participating agency that states in writing that they are not participating in the development of the purpose and need (or the range of alternatives) for an EIS, is required to comply with the schedule developed in the coordination plan. As required by 23 U.S.C. § 139(o)(1)(A)(ii), FTA will publish on the Federal Permitting Dashboard (Dashboard) the names of participating agencies that state in writing they will not participate in the development of the purpose and need for an EIS.

5.5. Linking planning and NEPA. Prior planning studies and results can be used to narrow the purpose and need statement and subsequent range of reasonable alternatives. However, Regional staff should ensure that prior planning followed the requirements under 23 CFR 450.318(a)-(c). Guidance on use of those provisions for bringing planning results forward into the environmental review process are outlined in Appendix A of 23 CFR part 450. If prior planning studies are used to support decisions carried into the environmental review process, then the planning studies should be incorporated by reference and copies of/links to the relevant planning documents should be available to the public throughout the environmental review process. FTA Regional staff should retain or archive the study(s) until construction is complete in the environmental project file.

6. References

- CEQ regulations implementing NEPA, 40 CFR part 1502
- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- Linking the Transportation Planning and NEPA Processes, 23 CFR 450.212, 450.318, and Appendix A

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Alternatives
Date: March 2019
SOP No.: 5
Issued by the Office Planning and Environment (TPE)

1. Purpose

This document provides guidance on the identification, development, and evaluation of alternatives in the environmental review process.

2. Applicability/Scope

The consideration of alternatives may occur during transportation planning or the environmental review process. This SOP focuses on alternatives development in the environmental review process but recognizes that the results of prior planning work may be incorporated into the environmental review process.

The Council on Environmental Quality (CEQ) implementing regulations at 40 CFR 1502.14 state that the evaluation of alternatives is the heart of the environmental document, and that FTA must:

- Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives eliminated from detailed study, briefly discuss the reasons for their having been eliminated;
- Include the alternative of no action; and,
- Include appropriate mitigation measures not already included in the proposed action or alternatives.

3. Responsibilities

FTA Regional staff ensures the description of alternatives is appropriately drafted and that the alternatives are developed in enough detail to evaluate the impacts of each alternative. Regional staff, working closely with the project sponsor and any other agencies covered by section 4.2.1 (below), will ultimately decide the project alternatives to carry forward into the environmental document.

4. Standard Procedures

4.1. Define alternatives. At the start of scoping, FTA and the project sponsor should propose a set of alternatives to be evaluated in the environmental document based on the project's purpose and need and the alternatives developed during the transportation planning process, if applicable. Through the scoping process, FTA and the project sponsor can validate the elimination of alternatives made through prior planning studies. Additionally, FTA may identify new alternatives designed to eliminate or reduce environmental impacts or to better meet the purpose and need. FTA Regional staff must ensure that a discussion of alternatives is included in each environmental assessment (EA) or environmental impact statement (EIS), as required by 42 U.S.C. §4332(2)(E) and as defined in 40 CFR 1508.9(b). Additional guidance is also found in the *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act (NEPA) Regulations*, Questions 1a (Range of Alternatives) and 36a (EAs). The types of alternatives identified in an environmental document are as follows.

- The **No Action/No Build Alternative** typically includes improvements already committed to in transportation plans and regular maintenance of the transportation infrastructure. The No Build Alternative does not contain the proposed action in its definition, but must be included in the range of alternatives under consideration (see 40 CFR 1502.14).
- The **Build Alternative(s)** is a proposed course of action in meeting the project's purpose and need.
- The **NEPA Preferred Alternative** is the alternative identified as the favored course of action by the lead agency(s) during the environmental review process.
- The **Environmentally Preferred Alternative(s)** is a record of decision (ROD) requirement and must be identified in the project's ROD, per 40 CFR 1505.2(b); it does not apply to other classes of action. In the ROD, FTA must identify all alternatives considered for the project and specify which of the alternatives were considered to be environmentally preferable.

4.2. Considerations for developing alternatives.

4.2.1. Other laws requiring the evaluation of alternatives. Other environmental laws, regulations, and Executive Orders (e.g., Endangered Species Act, the Floodplain Management Executive Order 11988, as amended; Section 4(f) of the U.S. DOT Act; Section 106 of the National Historic Preservation Act; and Section 404 of the Clean Water Act) can influence a project's development and evaluation of alternatives. Per 23 U.S.C. § 139(d)(8)(B), to the maximum extent practicable, the lead agency must develop an environmental document sufficient to satisfy the requirements for any Federal approval or other Federal action required for the project, including permits issued by other Federal agencies. Alternatives developed to comply with these other environmental requirements, when applicable, should be evaluated or identified in the EA or EIS, and FTA must coordinate the development of the purpose and need and alternatives with other Federal agencies that have jurisdiction under those laws (23 U.S.C. § 139(d)(8)).

4.2.2. Prior planning study. Prior planning studies and results can be used to narrow the range of reasonable alternatives. FTA Regional staff should ensure that prior planning followed the requirements under 23 CFR 450.318(a)-(c) when evaluating whether to incorporate the evaluation of alternatives conducted through prior transportation planning work into the environmental review process. Guidance on use of those provisions for bringing planning results forward into the environmental review process are outlined in Appendix A of 23 CFR part 450 – Linking the Transportation Planning and NEPA Processes. If FTA staff conclude that prior planning work can be utilized, then the planning studies should be incorporated by reference and copies of/links to the relevant planning documents should be available to the public throughout the environmental review process. FTA Regional staff should retain or archive the study(s) until construction is complete in the environmental project file.

4.2.3. Logical termini and segmentation. Pursuant to 23 CFR 771.111(f), in order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the proposed alternatives must:

- Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

- Have independent utility or independent significance (i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made); and
- Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

4.2.4. Scope of alternatives. FTA Regional staff should encourage project sponsors to develop "complete" alternatives that have taken into account the complete project build out (e.g. limits of disturbance, required right of way, auxiliary facilities, etc.). Depending on the project, Regional staff may ask the project sponsor the following questions:

- Would a new maintenance and vehicle storage facility or expansion of an existing facility be necessary for the project? If needed, where would traction power substations or converter plants be located?
- Where would stations be located and would they include buildings or bus shelters, bus bays, parking lots, and/or pedestrian improvements?
- How much space would be required for construction staging and what are the general locations for the staging areas (e.g., tunnel boring locations or sites for storing, staging, and pre-casting major guideway components)?

4.2.5. Consideration of alternatives outside FTA jurisdiction. CEQ states that an alternative that is outside the jurisdiction of the lead agency must still be analyzed in the EIS or EA if it is reasonable. This may preclude alternatives that have been eliminated from consideration during a planning process due to excessive costs (as compared to other comparably priced projects which meet the purpose and need), but FTA should consider an alternative that (1) is comparable to other alternatives in project cost and (2) meets the project's purpose and need, even if the alternative is outside the jurisdiction of FTA.

4.3. Determining range of alternatives.

4.3.1. Range of alternatives. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents, per CEQ's "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" guidance (1981; see Q.1a). Ultimately what constitutes a reasonable range of alternatives depends on the nature of the proposal and the project's purpose and need statement.

FTA and the project sponsor should begin with a list of reasonable alternatives[1] that is comprehensive so as to not revisit the range of alternatives later. FTA Regional staff should also review the range of alternatives selected for evaluation, typically provided by the project sponsor, and decide whether alternatives should be added or removed from the

[1] Reasonable alternatives are economically and technically feasible, and can be implemented if they were chosen. Unreasonable alternatives may be those that are unreasonably expensive; that cannot be implemented for technical or logistic reasons; that do not meet FTA directives; that are inconsistent with carefully considered, up-to-date planning studies; or that have adverse environmental impacts that cannot be mitigated. Alternatives that do not resolve the need for the proposed action or fulfill the stated purpose in taking the proposed action should be eliminated as unreasonable before the environmental analysis begins.

proposed list of alternatives based on the project's purpose and need or other environmental laws/requirements.

4.3.2. Agency and public participation. FTA and the project sponsor must provide an opportunity for agency and public review and comment on the alternatives to be considered during the environmental review process (23 U.S.C. § 139(f)(4)), which typically occurs during the formal public scoping phase of the EIS. To the maximum extent practicable and consistent with Federal law, the range of alternatives developed with agency and public participation must be used for all Federal environmental reviews and permit processes required for the project unless the alternatives must be modified (1) to address significant new information or circumstances or (2) to fulfill the lead agency's or a participating agency's responsibilities under NEPA (see 23 U.S.C. § 139(f)(4)(B)).

Further review and comment on alternatives occur during the public circulation of the draft EIS or on the EA, at which point, the public and Federal, State and local agencies and interested tribal governments can comment on the evaluation of alternatives.

4.3.3. Dashboard. FTA must identify any participating agencies not participating in the development of the range of alternatives on the Federal Permitting Dashboard (Dashboard) per 23 U.S.C. § 139(o)(1)(A)(ii) for EISs. FTA Regional staff includes the participating agency's identification after receiving written notice (e.g., email, letter) from the participating agency stating the agency does not wish to participate in determining the project's range of alternatives.

4.4. Evaluation of build alternatives. After identifying the alternatives to carry through the environmental review process, FTA and the project sponsor will:

- Conduct a thorough analysis of the alternatives;
- Compare the impacts, positive and negative;
- Be responsive to the values and concerns of the cooperating agencies, participating agencies, and the public; and,
- Document the decisions and ensure they are objective and meet the project's purpose and need.

4.4.1. Comparable level of detail. When evaluating alternatives, each build alternative (not including the No Action/No Build Alternative) should be developed to a similar level of detail to ensure a fair comparison among the alternatives. For example, if one alternative includes identification of station locations, then all build alternatives need to include identification of station locations. The level of design and engineering for each alternative should be consistent and include enough detail to be able to complete the environmental analysis and deliberate on an alternative's merit compared to another alternative.

4.4.2. Comparable level of detail exception. The preferred alternative may be developed to a higher level of detail to facilitate development of mitigation measures or concurrent compliance with other applicable environmental laws (e.g., Clean Water Act), pursuant to 23 U.S.C. § 139. If the preferred alternative is developed to a higher level of detail in the Draft EIS (DEIS) as compared to the other build alternatives, the FTA Regional staff must ensure the objective consideration of all alternatives, including the preferred alternative.

4.5. Identification of preferred alternative. Ultimately, the alternatives will be narrowed to the point that the lead agencies can identify the preferred alternative. FTA should identify the NEPA preferred alternative in the EA or DEIS, but no later than in the Final EIS (FEIS). Due to the creation of the combined FEIS/record of decision (ROD) document, the NEPA preferred alternative should be identified in the DEIS in order to give the public and Federal, State, and local agencies, and tribal governments an opportunity to comment on the preferred alternative prior to the combined FEIS/ROD publication. When the DEIS does not include identification of the preferred alternative, the lead agency should give other agencies and the public an opportunity to provide input on the preferred alternative and its impacts either (1) by a separate notice announcing the preferred alternative (which was evaluated in the DEIS) and seeking public comment when FTA still intends to publish a combined FEIS/ROD or (2) through review of an FEIS not combined with a ROD.

4.6. Consistent terminology. FTA and the project sponsor should ensure terms are used properly and consistently throughout the environmental document, including "No Action Alternative" or "No Build Alternative," "Build Alternative(s)," and "Preferred Alternative."

5. References

- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1981)
- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- Executive Order 11988: Floodplain Management
- Executive Order 13690: Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- Section 4(f) regulations, 23 CFR part 774
- FTA's Metropolitan Planning Regulations, 23 CFR part 450 and Appendix A
- Federal Permitting Dashboard
- Section 404(b)(1) guidelines, 40 CFR part 230

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Notice of Intent
Date: March 2019
SOP No.: 6
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the preparation of a notice of intent (NOI), which announces that FTA and other lead agencies intend to prepare an environmental impact statement (EIS). The NOI, published in the *Federal Register*, also formally starts the 30-day scoping comment period for EISs (23 U.S.C § 139 (g)(2)(B).

2. Applicability/Scope

This guidance applies to all EISs. The NOI is published at the start of the environmental review process for projects requiring an EIS (NOIs are not required or issued for environmental assessments or categorical exclusions). A project sponsor may initiate the environmental review process by providing FTA Regional staff with a draft NOI.

3. Responsibilities

FTA Regional staff and the Regional Counsel are responsible for preparing and reviewing the NOI, respectively, and having it published. Regional staff or the Regional Counsel transmits the NOI to the *Federal Register* liaison in FTA Headquarters' Office of Chief Counsel for publication. The liaison will send the NOI to the Office of the Federal Register (OFR) for publication.

4. Standard Procedures

4.1. FTA Regional Office publishes the NOI. Regional staff should coordinate with TCC regarding publication requirements for *Federal Register* notices as specified in FTA Order 1334.1, *Federal Register Documents; Standard Operating Procedures (SOP)*. Project sponsors may prepare the draft NOI for the Region, but the Region is ultimately responsible for the content and coordinating with TCC on an accurate and timely publication.

4.2. Required content for an NOI. The NOI should follow an outline consistent with previous FTA NOIs or examples available from headquarters. Per 40 CFR 1508.22, the NOI must briefly:

- Describe the proposed action and possible National Environmental Policy Act (NEPA) alternatives;
- Describe FTA and the project sponsor's proposed scoping process, and include the time, date, and location of scoping meetings, if scoping meetings are held; and
- Provide the contact information (e.g., name, mailing address, email, and telephone number) of the Regional staff who will be managing the environmental review process. FTA's policy is to include contact information for the project sponsor in the NOI, as well.

4.3. Other content for NOI. The NOI, in addition to meeting the informational needs of 40 CFR 1508.22, should include:

- A concise statement of the purpose of and need for the proposed action;
- Identification of the reasonable NEPA alternatives that meet the purpose and need;

- A list of potentially significant environmental impacts;[1]
- Identification of any joint lead agencies, including the project sponsor, and any cooperating agencies already identified;
- A description of FTA's Federal action – the likely Federal funding source for the project (e.g., FTA may provide Federal funding for a proposed project through the Capital Investment Grants program);
- Identification of State or local planning documentation that preceded publication of the NOI and supports project elements (e.g., purpose and need, range of alternatives, mitigation sites);[2]
- The project sponsor's general website or project-specific website, if applicable.[3]
- The following statement regarding the distribution of the EIS:
  The Paperwork Reduction Act seeks, in part, to minimize the cost to the taxpayer of the creation, collection, maintenance, use, dissemination, and disposition of information. Consistent with this goal and with principles of economy and efficiency in government, it is FTA policy to limit insofar as possible distribution of complete printed sets of environmental documents. Accordingly, unless a specific request for a complete printed set of the environmental document is received before the document is printed, FTA and its project sponsors will distribute only electronic copies of the environmental document. At a minimum, a complete printed set of the environmental document will be available for review at the project sponsor's offices; an electronic copy of the complete environmental document will be available on the project sponsor's website [insert web address].
- Notice that FTA is considering combining the FEIS and ROD pursuant to 23 U.S.C. § 139(n)(2);[4] and,
- Notice that the NOI provides an opportunity to comment on the purpose and need, the lists of potentially significant environmental impacts, and the alternatives.

4.4. Tone of NOI. Regional staff should review the language and tone of the NOI, in addition to the content, to ensure it is objective and neutral. The NOI should not promote the project, any of the individual project elements, or the project sponsor.

4.5. Other considerations. Prior to publication, Regional staff should advise the project sponsor that:

- TCC will not submit an NOI to the OFR unless it conforms to specific formatting rules.

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[1] The project sponsor, its consultant, or Regional staff should conduct a survey of the project/study area and the proposed project alternatives to identify potentially significant environmental impacts; a laundry list of resources that *may* be present is unacceptable.

[2] While the FAST Act created a new planning and environmental linkages process in 23 U.S.C. § 168 and 23 U.S.C. § 139(f)(4)(E), project sponsors are instead encouraged to apply the simpler planning and environmental linkages concepts in 23 CFR 450.318 (a)-(c), using Appendix A of 23 CFR part 450 as guidance on that approach.

[3] Regional staff should strongly encourage project sponsors to create a public website for projects requiring EISs and EAs, or to post environmental documents on the project sponsor's general website (see 23 CFR 771.111(i)). Materials that may be posted include maps of a proposed project, the draft purpose and need, descriptions of NEPA alternatives, and any prior planning studies or technical documents relevant to the proposed project.

[4] This allows interested parties to provide input regarding the use of a combined FEIS/ROD for the proposed action. This will assist FTA in making a determination whether a single document is practicable or whether it is appropriate to issue the documents separately.

- Publication of an NOI triggers public scoping requirements (see SOP No. 7-Scoping) and accelerated project delivery requirements per 23 U.S.C. § 139(m) (see next section for more details).
- The comment period can be extended for good cause (e.g., to account for the project sponsor's or State's public involvement procedures).
- FTA encourages notice of the project through mailings, flyers, bulletin board announcements, websites, and other means, as appropriate.

4.6. Next steps. Following publication of the NOI, the project sponsor and Regional staff will work together to draft a coordination plan, identify participating agencies and prepare an annotated outline for the EIS reflecting information obtained during the scoping process. Regional staff and the project sponsor will also need to collect information to post on the Federal Permitting Dashboard (Dashboard). The following statutory or guidance deadlines must be met:

- No later than 45 days after the publication of the NOI, FTA must identify participating agencies; and,
- No later than 90 days after the publication of the NOI, FTA must:
  - Develop a coordination plan, and
  - Post the project name, descriptive information, and anticipated schedule on the Dashboard.

4.7. Rescission of an NOI. There are a variety of reasons why a Region would rescind an NOI. For example, the project may have dramatically changed from its original scope, the project may not have advanced toward a FEIS or combined FEIS/ROD, or the project may no longer anticipate needing a Federal action. The notice to rescind the NOI should be prepared similarly to the original NOI and published in the *Federal Register*. The notice to rescind should include:

- A summary of the action;
- Brief project background;
- A clear explanation for why the NOI is being rescinded; and
- Anticipated next steps with the project, if any.

FTA does not seek comment on the notice to rescind. However, if FTA receives comments, Regional staff should respond, with the response being similar to any other project-related inquiries.

5. References

- CEQ regulations implementing NEPA, 40 CFR 1508.22
- Guidance Establishing Metrics for Permitting and Environmental Review of Infrastructure Projects (OMB, 2015)
- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- Federal Permitting Dashboard

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Scoping
Date: March 2019
SOP No.: 7
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on "scoping" as part of the environmental review process. Scoping is "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" (40 CFR 1501.7).

2. Applicability/Scope

Scoping is a process, not a meeting or event. It is through the scoping process that potentially significant environmental impacts and alternatives to avoid or minimize impacts should be identified for further evaluation in the environmental document, as appropriate. Considering the scope of the proposed action includes considering the range of actions (i.e., whether segmentation is occurring), alternatives (no build alternative, build alternative(s), and mitigation measures), and impacts (direct, indirect, cumulative) (40 CFR 1508.25). Through the scoping process, formal and informal, the project team can identify impacts that are inconsequential and need no further evaluation or only require limited evaluation, thereby keeping the environmental document focused on impacts of consequence.

3. Responsibilities

FTA Regional staff's scoping responsibilities include reviewing scoping material and ensuring the material is appropriately shared and publicized with the public, stakeholders, and potentially affected agencies, participating in scoping discussions, and considering public and agency scoping comments.

4. Standard Procedures

4.1. Scoping for EISs. The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) provide for a thorough, formal scoping process that applies to projects evaluated with environmental impact statements (EISs) (see 40 CFR 1501.7). Those requirements are supplemented by the framework provided in 23 U.S.C. § 139.

4.1.1. Public notice. The notice of intent (NOI) (see SOP No. 6) formally announces scoping and begins the 30-day comment period for scoping. All NEPA-related public meetings, including scoping meetings, must be announced to the public; if known at the time of publication, the NOI should include scoping meeting(s) details as a best practice. Meeting information should also be announced through other media, such as local newspapers and the project sponsor's public and/or project website.

4.1.2. Scoping information packet. The project team may provide a packet of information for the public and agency partners during scoping. The packet should be provided at the scoping meetings (if held), attached to the invitations to potential participating and cooperating agencies, and posted on the project website if possible. FTA encourages project sponsors to post scoping information and materials on the project website. Regional staff

should review any scoping materials prior to finalizing and publishing. The scoping packet usually contains the following information:

- Description of the proposed action;
- Draft purpose and need statement;
- Proposed alternatives (maps or drawings may be included);
- References to any prior planning work that support decisions being carried forward into NEPA;
- Identification of the range of potential environmental impacts expected to be evaluated due to their significance;
- A brief explanation of scoping and FTA's environmental review process;
- Contact information, including where to send comments; and
- A draft coordination plan, including a high-level schedule within the plan.

4.1.3. Permitting Dashboard. EISs have 90 calendar days from the NOI to be included in the Federal Infrastructure Permitting Dashboard (Dashboard), whereas, environmental assessments (EAs) are to be added 90 calendar days from "project initiation" (see 23 U.S.C. § 139(o)). The Dashboard requires project sponsors enter a project summary, total estimated costs, a geographic location, and a detailed project schedule. The project schedule should be consistent with the coordination plan required by 23 U.S.C. § 139, although it is likely to be more detailed, depending on Dashboard guidance.

4.1.4. Outreach, including meetings. Per CEQ's Memorandum for General Counsels, NEPA Liaisons, and Participants in Scoping (1981), "there is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three." In other words, scoping meetings are not required; other public outreach methods may be more appropriate depending on the project. The process should be determined through discussions between the FTA Regional staff and project sponsor, and it should be tailored to the project.

Scoping meeting considerations include the necessity and purpose of a meeting, and where additional agency/public input would contribute to FTA's understanding of the project area. If FTA Regional staff and the project sponsor decide that a meeting or meetings should be held, then FTA Regional staff should jointly plan the scoping meeting(s) with the project sponsor; the meeting(s) should be conducted during the 30-day scoping period identified in the NOI and at least two weeks after the NOI is published in the *Federal Register*.

- **FTA attendance.** FTA Regional staff should attend and participate in the scoping meetings in-person when possible; otherwise participation can occur via teleconference line. If the FTA Regional staff cannot participate, then staff should be involved in planning the meeting and request a meeting summary.

- **Information collected at scoping meetings.** Meetings should seek comment on the draft purpose and need, the alternatives proposed for evaluation, and the issues and impacts expected to be crucial to a decision. As scoping meetings are not normally (nor required to be) transcribed, attendees should be instructed to submit written comments for the record. A member of the project team should note any new issues received during the scoping meeting. Project staff should commit to

reviewing all new issues to determine appropriateness for inclusion in the EIS. Relevant new issues of potential significance should be discussed with Regional staff to determine whether the EIS should address them.

4.1.5. Interagency scoping. Regional staff and the project sponsor must identify any other Federal and non-Federal agencies that may have an interest in the project within 45 days of publishing the NOI (23 U.S.C. § 139(d)(2)). FTA and the project sponsor must invite the identified agencies to become participating agencies in the environmental review process for the EIS (23 U.S.C. § 139 (d)(2)). Regional staff should ensure that "participating agency" and "cooperating agency" invitation letters include the scoping information packet described above along with the invitation to the scoping meeting, and that the letters are sent to appropriate tribes and agencies. FTA or the project sponsor, or a combination of the two, can send the invitation letters, with the exception of the letters to Indian tribes, which FTA must send. Note that the Section 139 guidance addresses how to identify which agencies should be “cooperating” and which should be “participating.” In order to comply with other Federal environmental laws, such as the Clean Water Act, purpose and need statements may need to be drafted considering those other environmental laws. When this occurs, FTA/the project sponsor should coordinate with the Federal agency with jurisdiction by law and ensure they are invited to participate.

A separate scoping meeting, whether held in-person or via teleconference, with the participating and cooperating agencies is highly recommended for EIS projects and should include discussion of the purpose and need, the alternatives, issues, and impacts to be studied, the impact assessment methodologies to be used, and the coordination plan. FTA staff should encourage all agencies to share additional information regarding the resources in the project study area, present concerns, and identify trade-offs to be discussed in the EIS. FTA Regional staff should participate in the interagency meetings.

4.1.6. Coordination plan. No later than 90 days after the publication of an NOI, FTA and the project sponsor must develop a coordination plan (23 U.S.C. § 139(g)(1)). The required coordination plan should describe how the project sponsor and FTA will engage with the public, tribes, and agencies during the environmental review process (especially at identified milestones). It will also identify tribal and agency roles and responsibilities. Typically, FTA and the project sponsor will draft the coordination plan at the outset of scoping and finalize it by the end of scoping or shortly thereafter. The coordination plan may be incorporated into a memorandum of understanding. The coordination plan should identify anticipated interagency coordination and public involvement activities and general timeframes, though the plan should not be used as the means for public or agency input on the project purpose and need or alternatives under consideration. Note that on many projects, unforeseen developments require the sponsor to update the plan periodically. The plan should be posted on the project website.

4.1.7. Schedule. FTA Regional staff, together with the project sponsor, must prepare a high-level schedule consisting of high-level milestones (e.g., month/year or quarter/year) for the environmental review process and related authorization decisions (e.g. environmental permits) and include it in the coordination plan; for purposes of the Federal Permitting Dashboard, however, target dates must be stablished (month, day, year). As lead agencies, FTA and the project sponsor must consult with and reach concurrence with all participating

agencies on the schedule and any later revisions to it (see 23 U.S.C. § 139(g)). FTA will assume concurrence of participating agencies if no written objections are received within 30 days of distribution of the schedule.

4.1.8. Annotated outline. After the scoping comment period closes, FTA Regional staff and the project sponsor will conclude the scoping process by analyzing the comments received and producing an annotated outline of the draft EIS (encouraged, but not required).

4.1.9. Recording and documenting scoping. A summary of the scoping process, including participation methods and a list of which agencies were invited, would be included in the public involvement/ agency coordination technical report of the EIS. The comments received during scoping are considered in the development of the annotated outline. The annotated outline can include a brief scoping summary of the comments and input, but the actual comments received would be saved in the project file. The scoping process and input received may be summarized in a scoping report or memo but is neither necessary nor required.

4.2. Scoping for EAs. Formal scoping for EAs is allowed though not required. If scoping is conducted, it is substantially less formal than EIS scoping. FTA Regional staff should review the proposed project and determine the appropriate level of effort needed to scope the proposed action.

4.2.1. Public notice. FTA encourages public notice of the proposed project at the outset of the environmental process in certain situations, but it is not required nor would scoping need to be announced.

4.2.2. Agency consultation. FTA encourages early consultation with responsible officials and agencies that may have an interest in the proposed action. Interagency discussions may occur on an individual basis or at a larger meeting, and may occur only when the need or issues arise.

4.2.3. Coordination plans. A coordination plan for an EA is not required but a similar written plan may be appropriate, especially for a complicated EA.[1] It would generally include the content as described above for EISs, including the Permitting Dashboard requirements, but tailored to the less formal EA process.

4.2.4. Annotated Outline. FTA recommends annotated outlines for EAs, especially for complicated projects or when the project team wants to use the annotated outline as a document-framing tool. Regional staff will review an annotated outline of the EA after informal scoping and before the actual assessment of impacts and preparation of the EA.

4.3. Scoping for CEs. Formal scoping is not required for categorical exclusions (CEs). The element of scoping that applies to CEs is the consideration of impacts to ensure there are no unusual circumstances that would affect the application of a CE determination to the project (see 23 CFR 771.118 (a)-(b)). This may include limited consultation and outreach; the supporting

[1] A coordination plan is only required for an EA if FTA decides to apply the 23 U.S.C. § 139 environmental review process to the EA.

documentation/project file would include a description of the interagency consultation, including the result of the consultation.

5. References

- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- CEQ regulations implementing NEPA, 40 CFR 1501.7, 1508.25
- Memorandum for General Counsels, NEPA Liaisons, and Participants in Scoping (CEQ, 1981)
- Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act (CEQ, 2012)
- Forty Most Asked Questions Concerning the Council on Environmental Quality's National Environmental Policy Act Regulations (CEQ, 1981) (see answers to Question 36)
- SAFETEA-LU Environmental Review Process Final Guidance (2006)
- Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects (OMB/CEQ, 2015)

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Annotated Outline
Date: March 2019
SOP No.: 8
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the development of annotated outlines. An annotated outline is a useful tool for managing the development of the environmental document (an environmental impact statement (EIS) or environmental assessment (EA)). It can provide FTA Regional staff and the project sponsor with an opportunity early in the environmental review process to establish the foundation for the document to assure it meets the goals of the National Environmental Policy Act (NEPA) implementing regulations and reduces delays and costs associated with its development, including those associated with review times.

2. Applicability/Scope

An annotated outline provides the foundation for preparing the environmental document, outlining, with some detail, what will be covered by the document in detail and what will not. The annotated outline is a stand-alone document developed from input received from the public and other agencies during scoping for an EIS (or informal scoping for an EA). The annotated outline helps define and prioritize the impact areas for further consideration and provides key information on document development (e.g., chapter content, identification of maps and other graphics, page number goals). To accomplish these purposes, annotated outlines should: (a) focus the discussion on major issues to be treated (40 CFR 1501.7(a)(2) and (3)); (b) set goals for conciseness and clarity by setting page limits (40 CFR 1501.7(b)(1), limiting descriptive passages to only what is necessary to understand the nature of the issues (40 CFR 1502.15), avoiding duplication of discussions in different sections (40 CFR 1502.16), and incorporating information by reference where possible (40 CFR 1502.21); and (c) set schedules, as appropriate, for the NEPA process (40 CFR 1501.8)).

TPE recommends completing annotated outlines for all projects requiring an EIS or an EA.

3. Responsibilities

FTA Regional staff should participate in developing the annotated outline and rely on it when reviewing drafts of the environmental document.

4. Standard Procedures

4.1. When to develop the annotated outline. Regional staff should ask the project sponsor to prepare a draft of the annotated outline during the scoping process. Once scoping is complete, the Regional staff should review and edit the draft annotated outline, and ultimately approve the document (formally or informally) as it will guide the project team. Substantive FTA comments can include direction on the content, scope, and organization of the environmental document. Once the project sponsor responds to FTA comments and finalizes the annotated outline, the project team may begin the necessary analyses and field work to draft the environmental document and can opt to post the final annotated outline on the project sponsor's website to inform the public.

4.2. What to include in the annotated outline. The annotated outline should include information the project team needs to draft the environmental document, including the following:

- **Results of scoping.** The annotated outline should include input from scoping. The results of the scoping process will help FTA and the project sponsor identify the major issues for each section, or resource, and how they will be addressed in the environmental document. A thorough scoping process will refine the purpose and need statement, alternatives, and number and nature of the environmental issues relevant to the project; the annotated outline should reflect those refinements.

- **Purpose and Need.** The annotated outline should summarize the purpose and need developed in response to comments received during scoping, and may also identify any additional information to be included in the purpose and need chapter/section of the environmental document. If applicable, this section should note any previous planning studies/decisions that helped to determine the project's purpose or need.

- **Alternatives.** The annotated outline should include the list of alternatives retained for detailed study through the environmental review process, and may include the list of dropped alternatives, as appropriate. If applicable, this section should note any previous planning studies/decisions that affect the alternatives being evaluated. Additionally, as it is especially helpful to include graphics in the Alternatives chapter/section of the environmental document; the outline should note (and possibly describe) any intended use of graphics, tables, or maps.

- **Environmental impact areas.** The annotated outline should identify the major environmental impact areas that will be addressed in the EIS or EA. The project team should also identify the level of detail needed after considering the relative importance of the impact (e.g., provide a bulleted list of resources with no impact and a brief summary of the resources with major impacts).

- **Applicable Federal and State regulations, guidance, and other authorizations.** The annotated outline may include a list of the Federal and State laws and regulations, guidance, and executive orders that apply to the project, including any associated consultation or coordination requirements, or authorizations (e.g. permits) needed during the environmental review process (e.g., coordination with the U.S. Army Corps of Engineers for impacts to Waters of the United States).

- **Document planning.** For each section, the annotated outline should include an estimated page length and a description of any appropriate figures or graphics.

4.3. Revisions to the annotated outline. There is no need to regularly update an annotated outline, but the project team may want to revise it to increase transparency if major changes occur after scoping (e.g., the addition of a new alternative or a new major environmental impact). Most changes to the project will be captured in the environmental document and/or administrative record as necessary, and do not need to be reflected in an annotated outline.

4.4. Using the annotated outline. The project sponsor should consult the annotated outline frequently when drafting the environmental document. Substantial deviations from the annotated outline should be discussed in advance by FTA staff managing the project. FTA should refer to the annotated outline when reviewing the draft of the environmental document.

5. References

- Keys to Efficient Development of Useful Environmental Documents (FTA, 2007)

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Review and Distribution of Environmental Assessments
Date: March 2019
SOP No.: 9
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance for the review and processing of environmental assessments (EA).

2. Applicability/Scope

This guidance applies to all EAs.[1] EAs are needed for actions in which the significance of the environmental impact is not clearly established (23 CFR 771.115). EAs are prepared when the actions are not categorically excluded and do not require the preparation of an environmental impact statement (EIS) because no significant impacts are anticipated, or when the agency believes preparation of an EA would assist in determining the need for an EIS.

3. Responsibilities

FTA Regional staff is responsible for managing the environmental review process, including for projects that require an EA. Managing the process includes providing guidance to the project sponsor regarding EA document development as well as the environmental review process. FTA Regional staff is also responsible for entering project information on the Federal Permitting Dashboard.[2]

Per 23 CFR 771.119(c), the EA is subject to Administration approval before it is made available to the public as an FTA document. Administrative approval is usually assigned to the Regional Office in consultation with the Regional Counsel. Therefore, the Regional Administrator, or designee, must approve/sign the EA prior to its public distribution.

4. Standard Procedures for Environmental Assessments

4.1. Annotated outline. After informal scoping for an EA (if conducted) or project review by Regional staff (see SOP No. 7, Scoping, Section 4.2), FTA recommends the project sponsor prepare an annotated outline (see SOP No. 8, Annotated Outline) for review, revision, and approval by FTA Regional staff. The Region should provide direction to the project sponsor on key environmental issues and how these issues will be addressed during the environmental review process. Consistent with Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA), the annotated outline should reflect that an EA is a concise public document that should not contain long descriptions or detailed data (40 CFR 1502.10). CEQ recommends that EA document length be about 10 to 15 pages, though the length of the EA should be commensurate with the potential impacts and issues. Data or other supporting studies may be provided in technical reports appended to the EA.

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[1] This guidance is based in part upon FTA's interpretation that 23 U.S.C. § 139 is limited to projects for which an EIS is prepared and does not apply to projects for which an EA is prepared unless FTA decides to apply it (see 23 U.S.C. § 139(b)).

[2] https://www.permits.performance.gov

4.2. Content of EA. The EA must contain brief discussions of the need for the proposed action, reasonable alternatives to the proposed action, an evaluation of the environmental impacts of reasonable alternatives (including mitigation), and a list of agencies and persons consulted (40 CFR 1508.9). The EA should also document compliance, to the extent possible, with all applicable environmental laws and executive orders, or provide reasonable assurance that their requirements can be met (23 CFR 771.119(g)).

4.2.1. Alternatives. Alternatives should be described in sufficient detail that their impacts can be evaluated and mitigation measures can be designed into the project, where appropriate. The alternatives evaluated in an EA will normally include the proposed action and the no action alternative, though others may be included. For example, another build alternative might be developed in order to comply with Section 4(f) of the DOT Act (49 U.S.C. § 303).

4.2.2. Impacts. EAs must disclose the impacts of the proposed action on the human and natural environment, and include mitigation measures, as appropriate. When informal scoping raises major transportation-related issues, the EA should address transportation-related impacts with the focus on how transportation affects the human and natural environment (e.g., how congestion may affect localized air quality impacts).

4.3. Sufficient analysis of impacts before publishing an EA. Prior to publishing an EA, Regional staff must review the EA to ensure that sufficient analysis and consultation have been completed to disclose potential environmental impacts and to identify reasonable mitigation measures. Reviewers should also assure that the EA is concise and clearly written.

4.4. Cooperating agency review. It is rare for FTA to invite cooperating agencies to participate in EA development and review. However, if there are cooperating agencies involved due to anticipated permits or other authorization decisions, then FTA should provide an opportunity for these agencies to review administrative drafts of the EA or sections thereof withing sufficient time to incorporate their input. Cooperating agency participation should be established during any scoping that is held.

4.5. Approval by FTA. As discussed in Section 3, the EA is subject to FTA approval before it is made available to the public (23 CFR 771.119(c)). FTA's approval may be in the form of an FTA signature on the EA (preferred), or in the form of a letter, memo, or email to the project sponsor from the Regional Administrator or designee. The EA signature date must be recorded in the Federal Permitting Dashboard within 10 days of signature, pursuant to USDOT's *Federal Permitting Dashboard Reporting Standard* (Dec. 2018) (internal only).

4.6. Copies for FTA. Regional staff should direct the project sponsor to send at least one hardcopy set of the EA and any associated technical reports to the Regional Office, along with CDs (number to be determined by the Regional staff, but should include at least one CD/DVD for FTA's Office of Environmental Programs).

4.7. Public availability of EAs.

4.7.1. Distribution and notice of EAs. Availability of an EA is governed by 23 CFR 771.119, paragraphs (d) through (f). Acceptable methods for providing access to the EA include

publishing it on the project website, CD distribution, or hard copy distribution; FTA recommends posting the EA prominently on the project website and maintaining it there until the project is in operation. The EA must be available at the project sponsor's office, the FTA Regional Office, and at the public meeting (if one is held), and may be available at other public institutions, such as public libraries or other local government offices in the project area. The project sponsor should publish a notice of availability in local newspapers and on the project sponsor's website, noting (1) where the public can access the document; (2) the 30-day review period; (3) where comments should be sent; and (4) public meeting details, if one will be held. A formal notice of availability (i.e., a notice published in the *Federal Register*) is not required and not normally used for EAs.

4.7.2. Public meetings/hearings. A public meeting or hearing is not required for an EA under NEPA, but one may be held to satisfy other environmental laws (such as Section 106 and Section 4(f)). Any such meeting/hearing should be announced in the notice of availability.

4.8. Distribution of EAs to Federal and State Agencies. A hard copy or electronic copy of the EA or notice of its website location should be sent to any Federal, State, or local agency determined during preparation of the EA that have an interest in the project or jurisdiction over its impacts. This includes redistribution to NEPA cooperating agencies who may have reviewed and provided comments on the administrative draft. Unlike an EIS, there is no formal filing of an EA with the U.S. Environmental Protection Agency.

4.9. Actions covered by an EA that typically require an EIS. Consistent with the CEQ regulations implementing NEPA, when FTA expects to issue a finding of no significant impact (FONSI) for an action described in 23 CFR 771.115(a) (describing actions normally requiring preparation an EIS), a 30-day public review period of the proposed FONSI shall be provided before the final determination whether to prepare an EIS is made and before the action may begin (40 CFR 1501.4(e)(2)).

4.10. Atypical EA procedures.

4.10.1. Substantial comments on an EA. Generally, FTA addresses any comments on an EA within the text of the FONSI or attached to a FONSI. On occasion, the comments on the EA are so substantive that the project or its impacts, as presented in the EA, must be revised. When this happens, the revised EA is included in the project file as the basis for the FONSI. Redistribution of the revised EA is not required, but may be done as a means of responding to the extensive comments received. Further comments are not sought on the revised EA if there are no changes that alter environmental impact information and determinations made in the original EA, and there is no waiting period after distribution of the revised EA before issuing a FONSI. However, if the revised EA presents new information or analysis that result in changes to impacts presented in the original EA, then the revised EA may be recirculated with a 30-day comment period.

4.10.2. Change class of action from EA to CE. If, at any point in the EA process, FTA determines: (1) there is no potential for significant environmental impacts, and (2) there is no reason to provide additional opportunity for public involvement in the environmental process, the project may be more appropriately advanced as a categorical exclusion (CE) under 23 CFR 771.118. The EA should be terminated and a CE applied to the project, per the Regional Office's

CE process (e.g., checklist, project description, template, etc.). If the EA was publicly announced, then the Regional Office and the project sponsor should discuss whether (depending on the level of public interest) and how to inform the public of the change (e.g., notice on the project sponsor's website).

4.10.3. Change of class of action from EA to EIS. If, at any point in the EA process, FTA determines that the project is likely to be a Federal action that significantly impacts the environment, the EA should be terminated and a Notice of Intent for an EIS should be issued (see 23 CFR 771.119(i)). Any environmental study or consultation performed in support of the EA would apply in the EIS process.

4.10.4. Supplemental EA. After FTA has issued a FONSI, combined final EIS (FEIS)/record of decision (ROD), or ROD for a project, changes to the project resulting from unanticipated engineering or design issues or legal challenges may necessitate a "supplemental EA." This FTA practice is supported by 23 CFR 771.130(c), which discusses the use of an EA to evaluate whether there is a need for a supplemental EIS. The scope of the supplemental EA should be strictly limited to the area of the change, consistent with 23 CFR 771.130 (see SOP No. 17, Re-Evaluations and Supplemental Documents).

5. References

- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- FTA's Environmental Impact and Related Procedures, 23 CFR 771.119 and 771.130
- Section 4(f) regulations, 23 CFR part 774
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1981) (see answer to Question 36a)
- Section 404(b)(1) guidelines, 40 CFR part 230
- USDOT Federal Permitting Dashboard Reporting Standard (2018), internal—FTA only

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Managing Content, Review, and Distribution of Environmental Impact Statements
Date: March 2019
SOP No.: 10
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the drafting and processing of environmental impact statements (EISs).

2. Applicability/Scope

This guidance applies to draft EIS (DEIS), final EISs (FEIS), and combined FEIS/record of decision (ROD) documents. The National Environmental Policy Act (NEPA) requires Federal agencies to prepare an EIS for a major Federal action that significantly affects the quality of the human environment, and 23 U.S.C. § 139 contains certain requirements that apply specifically when an EIS is prepared. The typical process for preparing an EIS includes: (1) publishing a notice of intent (NOI); (2) preparing an annotated outline with input from the scoping process; (3) preparing a DEIS, followed by a 45-day review and comment period; and, (4) preparing a combined FEIS/ROD or a separate FEIS, followed by a ROD.

3. Responsibilities

FTA Regional staff is responsible for managing the environmental review process, including for projects that require an EIS. Managing the review process includes providing guidance to the project sponsor throughout the typical process for preparing an EIS. FTA Regional staff is also responsible for entering project information on the Federal Permitting Dashboard.[1]

The FTA Office of Chief Counsel (TCC) is responsible for reviewing the FEIS or combined FEIS/ROD for legal sufficiency; this is usually assigned to the Regional Counsel.

The FTA Regional Administrator or designee must approve the EIS when satisfied that it complies with NEPA prior to its public distribution. Approval will be made by signing and dating the cover sheet.

4. Standard Procedures for Environmental Impact Statements

4.1. Annotated outline. After the scoping process, Regional staff should direct project sponsors to prepare an annotated outline of the EIS for FTA review and approval. The annotated outline should reflect input from scoping and establish the framework for the EIS.

4.2. Preliminary/internal versions. The preliminary or internal version (may also be referred to as the administrative draft, review draft, screen check, etc.) of the DEIS, FEIS, combined FEIS/ROD, or supplemental EA/EIS is a version of the document that FTA reviews before approving the EIS for public review. FTA may request a cooperating agency to review part or all of the preliminary version, depending on the cooperating agency's jurisdiction by law, special expertise, and any agreement made on timing and coordination of reviews from the project coordination plan.

[1] https://www.permits.performance.gov

FTA's Office of Environmental Programs (TPE-30) recommends that all preliminary versions be labeled as "preliminary," and include the date, to avoid confusion.

4.3. Standards for length and format of the EIS.

4.3.1. Length. Council on Environmental Quality (CEQ) regulations implementing NEPA state that an EIS should normally be less than 150 pages, and proposals of unusual scope or complexity should normally be less than 300 pages (40 CFR 1502.7). The analysis for any given impact area, though, should be proportional to the complexity and importance of the issue. Additional data or information should be included in appended technical reports.

4.3.2. Format. Regional staff should use a format for an EIS that encourages sound analysis and clear presentation of the alternatives, including the proposed action. The format should be consistent with CEQ's recommended format (40 CFR 1502.10) and contain the following:

- Cover Sheet[2]
- Summary
- Table of Contents
- Purpose of and need for the action
- Alternatives
- Affected environment
- Environmental consequences
- List of preparers
- List of agencies, organizations, and persons to whom copies are sent
- Index
- Appendices

This format can be modified, but it must reflect all components found in the list, per 40 CFR 1502.10. For example, Regional staff may encourage the project sponsor to combine the "affected environment" and "environmental consequences" chapters in an effort to make the environment discussion more succinct. In addition to the components listed above, an EIS may include public involvement and agency coordination summaries and sections for an environmental justice analysis and/or a Section 4(f) evaluation, as appropriate. For an EIS that is prepared under joint Federal and State environmental laws, every effort should be made to give greater deference to the Federal format, and State-required determinations not relevant to NEPA considerations (such as the significance of any particular impact) should be labeled clearly as being included for purposes of State law.

4.4. Alternatives. The EIS should adequately describe the consideration of a range of reasonable alternatives, including documentation of alternatives withdrawn from consideration. Any prior planning work leading to the development and selection of alternatives for detailed study should be incorporated by reference. Alternatives evaluated should be described in sufficient detail that

[2] A DEIS should include a notice in the cover sheet abstract (40 CFR 1502.11) stating that FTA will prepare a combined FEIS/ROD unless conditions are present (such as practicability issues) that preclude the use of the combined FEIS/ROD.

their impacts can be evaluated and that mitigation measures can be designed into the project where appropriate.

Whenever possible, FTA should work with project sponsor and appropriate participating agencies to identify the preferred alternative prior to issuing the DEIS. The CEQ regulations state that FTA must identify the preferred alternative in the DEIS if it is known at the time and identify such alternative in the FEIS (40 CFR 1502.14(e)). Identification of the preferred alternative in the DEIS helps determine whether it is practicable to use a combined FEIS/ROD process for the project.

4.5. Affected environment and impacts. The EIS must disclose the direct and indirect impacts of the alternatives on the human and natural environment (40 CFR 1502.16). The EIS should focus on the resources identified through scoping and agency consultation that are most relevant to the proposed action. Affected environmental resources and considerations may include, but are not limited to: air quality, climate change, endangered species, environmental justice, hazardous materials/contamination, historic resources,[3] noise and vibration, parks, safety, transportation, floodplains, and jurisdictional waters of the U.S. (wetlands, streams, etc.). More details on these affected environmental resources can be found in other SOPs and/or on the FTA website. The DEIS must list all Federal permits, licenses, and other entitlements that are anticipated to be needed to implement the proposed project, or if uncertain, the DEIS must state that uncertainty (40 CFR 1502.25(b)). FTA strongly encourages sufficient progress in coordination for all impact areas determined relevant for evaluation by the time the DEIS is published, especially for those impacts requiring permits or other approvals, in order to support publication of a combined FEIS/ROD later.

4.6. Mitigation. FTA encourages its project sponsors to avoid, minimize, and mitigate adverse environmental impacts. Regional staff should also be aware of potential impacts caused by mitigation measures (e.g., visual adverse effects to historic properties from noise walls). The DEIS should include mitigation proposals while the combined FEIS/ROD or ROD should commit to mitigation measures. If the EIS discusses mitigation options for a particular type of environmental impact (e.g., mitigation options for impacts to historic resources or mitigation options for impacts to jurisdictional waters of the United States), any comments received on this impact and its mitigation should be considered before one of the mitigation options is selected as a commitment in the combined FEIS/ROD or ROD.

4.7. Project funding. A chapter on financial concerns is not required for an EIS, but the source of local funds for the project should be included somewhere in the document (e.g., purpose and need chapter or alternatives chapter). Additionally, the type of Federal funding anticipated should be noted in the EIS, with an explanation that the approval of Federal funding is a Federal action which requires compliance with NEPA. Any supporting documentation regarding the financial feasibility of the project should be available for public review, typically in an appendix to the EIS or as a technical report/memo.

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[3] While not required, FTA strongly encourages state historic preservation officer (SHPO) concurrences on National Register of Historic Places eligibility and effects determinations prior to DEIS approval and publication to facilitate use of a combined FEIS/ROD later (SHPO concurrence is required prior to a combined FEIS/ROD or FEIS). If there is an adverse effect finding, the Region should include an executed Section 106 agreement (i.e., Memorandum of Agreement or Programmatic Agreement) before distribution of the combined FEIS/ROD or FEIS.

4.8. Technical studies. Technical reports and memos contain the detailed technical analyses that support the summary information and analyses presented in the EIS. Regional staff should encourage the use of technical reports (e.g., hazardous materials studies, traffic studies, noise and vibration studies, biological assessments, Section 106 reports) rather than including detailed technical information in the body of the EIS itself. Technical reports can be appendices to the EIS or stand-alone reference documents that are incorporated by reference. Technical reports should be reviewed by the Region and made available to the public (e.g., on project sponsor websites and at locations where the public can review the EIS) no later than circulation of the EIS they support.

4.9. Review, approval, and signature.

4.9.1. FTA regional review. Prior to approval and publication of an EIS, Regional staff should ensure sufficient analysis and consultation has been completed to disclose potential impacts and reasonable mitigation measures on which the public may comment. While a formal legal sufficiency review is not required for DEIS documents, consultation with the Regional Counsel assigned to the project is recommended.

4.9.2. Headquarters review. For most projects, FTA Headquarters does not need to review/concur on an EIS unless the Region requests assistance. In rare cases, as specified in 23 CFR 771.125(c), Headquarters may request formal review and concurrence on an FEIS (or the FEIS components in the combined FEIS/ROD) prior to the Regional signature of the document.

4.9.3. Signature page. When FTA, the project sponsor, and other lead agencies (if any) are satisfied with the content of the EIS or combined FEIS/ROD, the project sponsor arranges for the cover page of the document to be signed by: (a) the authorized official of the project sponsor; (b) the FTA Regional Administrator; and (c) other Federal, State, or local joint lead agencies, if there are any (e.g., FHWA, the State DOT). The EIS signature date must be recorded in the Federal Permitting Dashboard within 10 days of signature, pursuant to USDOT's *Federal Permitting Dashboard Reporting Standard* (Dec. 2018) (internal only).

4.10. Production of hard copy/electronic copy. The initial printing of the EIS must take into account the number of agencies, organizations, and individuals that can be reasonably expected to request a hard copy (see 23 CFR 771.123(f)). To assist in determining the number of copies for publication, whether hard copy or CD/DVD, Regional staff should direct the project sponsor to ask whether cooperating and participating agencies prefer a printed hard copy of the EIS, a printed summary accompanied by a CD/DVD, or only an electronic copy. FTA recommends all others receive a hard copy of the summary and an electronic copy of the full document, though other organizations or the public may request the entire EIS in hard copy and that should be considered when determining print quantity. For projects with an extremely large distribution list, it may be acceptable for the project sponsor to notify the distribution list (see 23 CFR 771.111(i)) where the EIS can be found (e.g., project website, libraries, regional offices, etc.).

Regional staff should work with the project sponsor to ensure the size of the electronic copy is reasonable for downloading (e.g., consider different Internet speeds) and that a clear and descriptive file-naming protocol has been followed.

4.11. Distribution and filing of the DEIS. The DEIS must be filed with the U.S. Environmental Protection Agency (EPA) and transmitted to Federal, State, and local government agencies with jurisdiction over or interest in the action, public officials, interest groups, and members of the public known to have an interest in the proposed action. See 23 CFR 771.123(g) for the complete distribution list. The distribution and filing steps to be taken are as follows:

- First, Regional staff should ensure that the DEIS is transmitted to cooperating and participating agencies and made available to the public (including placing the DEIS in public viewing areas and on the project website) by the time the document is submitted to EPA and publication of the notice of availability (NOA) in the *Federal Register*. This allows for the full minimum review periods prescribed in 40 CFR 1506.10(a). Note that EISs with a NOI date in the *Federal Register* after October 12, 2015 must be listed on the Federal Permitting Dashboard, per CEQ and OMB guidance.
- Second, Regional staff should file the DEIS with EPA via its *e-NEPA* electronic filing system.[4] EPA headquarters no longer accepts accept hard copies or copies of an EIS on CD/DVD. In addition to the DEIS filed with EPA headquarters, FTA Regional staff should provide a hard copy of the EIS and/or electronic copy, if requested, directly to the appropriate EPA Regional Office (see EPA contact information).
- Lastly, EPA, not FTA, drafts the NOA from the abstract on the signed cover page of the filed DEIS. The NOA will appear in the *Federal Register* on Friday of the week following the week in which FTA electronically files the EIS with EPA. The project sponsor must also publish an NOA of the DEIS in local newspapers along with public hearing information.

4.11.1. U.S. Department of the Interior (DOI). DOI recently updated its guidance on environmental document submission requirements for its review. Depending on the type of document, DOI's review is either conducted by its bureaus and offices at the field level or by its Office of Environmental Policy and Compliance (OEPC) at the headquarters level. DOI's guidance outlines which level will review an environmental document. DEISs, FEISs, and Section 4(f) evaluations should be sent to the OEPC headquarters office for interagency review. For information on DOI's review period, FTA Regional staff should refer to the Section 4(f) SOP (No. 18). In addition, Regional staff should reference DOI's Guidance on Environmental Document Submission Requirements to determine whom to contact and how to contact them, and should visit the DOI OEPC website to check for future updated guidance.

4.11.2. FTA copies of EIS. Regional staff directs the project sponsor to print and send sufficient copies to the Regional Office and FTA headquarters office for FTA's files. The Office of Environmental Programs at FTA Headquarters requests one hard copy and one electronic copy (CD/DVD or thumb drive) of each EIS.

4.12. DEIS comment period and public hearing. The project sponsor must circulate the DEIS for public comment on behalf of FTA (23 CFR 771.123(g)), and a public hearing is required during the circulation period of all DEISs (23 CFR 771.123(h)). The DEIS must be available at least 15 days prior to the public hearing (23 CFR 771.123(h)). The comment period for a DEIS must be at least 45 days from publication of the NOA, but no more than 60 days, unless (1) the lead agency, the

[4] View EPA's Environmental Impact Statement Filing Guidance for submittal instructions, such as file naming (e.g., chapter/subchapter number followed by its name, or use the EIS title if just submitting one file) and file size limits (e.g., no greater than 50 MB). Note, the e-NEPA site requires page numbers for each file you upload.

project sponsor, and all participating agencies agree to a different comment period, or (2) the lead agency extends the comment deadline for good cause (23 U.S.C. § 139(g)(2)).

4.13. Consider comments. After circulation of the DEIS, FTA and the project sponsor consider the comments received. The combined FEIS/ROD or FEIS must discuss the substantive comments received on the DEIS and supply responses to those comments, such as modifying the alternatives, supplementing or modifying the analyses, making factual corrections, or explaining why the comments do not warrant further agency response, with the substantive comments attached to the combined FEIS/ROD or FEIS. (See 40 CFR 1503.4 and 23 CFR 771.125(a)(1)).

4.14. Completing the EIS. After considering comments on the DEIS, Regional staff and the project sponsor complete the combined FEIS/ROD or FEIS.

4.14.1. Combined FEIS/ROD. Per 23 U.S.C. § 139(n)(2), FTA must prepare a combined FEIS/ROD, to the maximum extent possible, unless (1) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or (2) there have been significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action. As applicable, the combined FEIS/ROD includes:

- Definitive mitigation commitments;
- Section 106 determination and any agreements (i.e., Memorandum of Agreement or Programmatic Agreement);
- Section 4(f) finding;
- Project-level air quality conformity;
- Concurrence under Section 7 consultation
- Discussion of wetland impacts and commitment to mitigation to obtain and comply with conditions of a Section 404 permit and Protection of Wetlands Executive Order 11990 finding; and,
- Floodplain finding.

In addition to these determinations and findings, the combined FEIS/ROD must include:

- Responses to substantive comments from the public and agencies;
- Summary of changes since the DEIS;
- Clear identification of the preferred alternative. The preferred alternative includes not only the alignment but also the locations of all the stations, maintenance facilities, and associated structures.

4.14.2. Separate FEIS, followed by a ROD. If a combined FEIS/ROD is not practicable, Regional staff must follow the traditional approach of preparing a separate FEIS, followed by a ROD (23 CFR 771.125(a)). In this scenario, FTA cannot issue the ROD until 30 days after publication of the FEIS (40 CFR 1506.10(b)(2)) The FEIS should document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met. Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the FEIS. If significant issues remain unresolved,

the FEIS must identify those issues and the consultations and other efforts made to resolve them.

4.14.3. FEIS errata sheet approach. If changes to the DEIS are minor (e.g., response to comments involves factual corrections or an explanation that the comment does not warrant additional consideration), CEQ regulations allow for an abbreviated FEIS through the use of errata sheets attached to a DEIS (see 40 CFR 1503.4(c) and 23 U.S.C. § 139(n)(1)). This approach can be used with the combined FEIS/ROD or the traditional FEIS documents. Regional staff are encouraged to consult with Headquarters before planning to use this approach as FTA has not used it frequently in the past.

4.14.4. Legal sufficiency. For combined FEIS/ROD or FEIS documents that are prepared under joint Federal and State environmental laws, the project sponsor's legal counsel will attest to the legal sufficiency of the document under State environmental laws, prior to requesting signature from FTA. FTA legal counsel reviews the combined FEIS/ROD or FEIS for legal sufficiency with CEQ and FTA environmental regulations, and other environmental requirements.

4.14.5. Production, distribution, and notice. The information found in sections 4.10 and 4.11 applies to combined FEIS/ROD and FEIS documents with two exceptions.

- First, the combined FEIS/ROD or FEIS must be transmitted to any persons, organizations, or agencies that made substantive comments on the DEIS or requested a copy, no later than the time the document is filed with EPA.

- Second, the NOA for a combined FEIS/ROD or FEIS should note that the document is available to the public and where the document can be accessed, but the notice should not include a request for comments or a review period. See 23 CFR 771.125(g).

Note that as the combined FEIS/ROD is not widely used across the Federal Government, EPA does not yet have a "combined FEIS/ROD" option available on e-NEPA. Therefore, Regional staff should contact EPA regarding the NOA for the combined FEIS/ROD by sending an email to the e-NEPA contact that includes (1) the EIS number; (2) document type (i.e., FEIS); (3) Agency (FTA) and Agency contact; and (4) the following statement:

"Under 23 U.S.C. § 139(n)(2), FTA has issued a single document that consists of a final environmental impact statement and record of decision. Therefore, the 30-day wait/review period under NEPA does not apply to this action."

5. Recordkeeping

FTA Regional Offices must maintain at least one copy (hard copy or electronic version), including technical reports and studies. Preliminary versions of documents should be maintained in the environmental project file to demonstrate coordination among FTA, the project sponsor, and cooperating agencies.

6. References

- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects (CEQ & OMB, September 22, 2015)
- CEQ Regulations Implementing NEPA, 40 CFR parts 1500-1508
- Department of the Interior (DOI) Requirements for DOI Review of External Agencies Environmental Documents (February 2016)
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews. (FHWA/FTA, 2013)
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1981)
- Section 4(f) regulations, 23 CFR part 774
- Section 404(b)(1) guidelines, 40 CFR part 230
- USDOT Federal Permitting Dashboard Reporting Standard (2018), internal—FTA only

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Receiving and Responding to Public and Agency Comments
Date: March 2019
SOP No.: 11
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the public and agency comment and response process for environmental assessment (EA) and environmental impact statement (EIS) documents.

2. Applicability/Scope

This document focuses on the process for responding to public and agency comments received on EAs and EISs, as required by the National Environmental Policy Act (NEPA) (42 U.S.C. § 4332), 23 U.S.C. § 139, the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR part 1503), and the joint Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) regulations implementing NEPA (23 CFR part 771).

Given that categorical exclusion (CE) determinations are not required to be circulated for public or agency comment, this document does not address CEs. In addition, guidance on responding to public and agency comments received during an EIS scoping period is not included as it is addressed in the Scoping Standard Operating Procedure (SOP No. 7). Finally, this guidance does not focus on the public involvement requirements of other environmental laws, regulations, or executive orders.

3. Responsibilities

FTA Regional staff is responsible for reviewing all public and agency comments received during public comment periods, responses to those comments prepared on FTA's behalf, and any associated text changes to the environmental document. Regional staff should confirm that the project sponsor has: (1) provided adequate opportunity for the review of the EA or EIS by interested and affected parties, as well as Federal, State, and local agencies with jurisdiction; (2) properly documented the receipt of comments during this time for the project file; (3) considered all substantive comments received during the comment period; and (4) responded in accordance with statutory and regulatory requirements. FTA Regional staff are encouraged to attend public meetings/hearings on environmental documents if travel funds are available, especially for more complex projects.

FTA Regional Counsel, through the Office of Chief Counsel, is responsible for reviewing the response to comments, any related changes to the environmental document, and consistency with the environmental decision document.

The FTA Regional Administrator, as signatory to the decision document, is responsible for Regional staff fulfilling its responsibilities and complying with governing requirements.

4. Standard Procedures

4.1. Document availability.

4.1.1. Administrative/internal drafts. Depending on the project, participating and cooperating agencies may participate in the development and/or the review of the internal draft/administrative draft EIS (DEIS), final EIS (FEIS), or combined FEIS/record of decision (ROD). They must provide comments within their areas of special expertise or jurisdiction (23 U.S.C. § 139(d)(9)(A)) or use the process to address any environmental issues of concern to their agency (23 U.S.C. § 139(d)(9)(B)), and should follow the review timing included in the coordination plan.

4.1.2. Public availability. Project sponsors must make EA and EIS documents available for review by interested and affected parties, including Federal, State, and local agencies, and the document must be available at the project sponsor's office and the FTA Regional office (23 CFR 771.119(d) and 771.123(g)). FTA recommends posting the electronic version to the project sponsor's website (23 CFR 771.111(i)(3)), and making a hard copy available in a transit-accessible location, such as a public library or a community center for those without Internet access.

4.2. Comment periods. FTA requests comments on its EAs and EISs through formal public and agency comment periods. The length of comment periods vary by the class of action (EA or EIS). FTA's standard practice is that comment periods are measured in calendar days from the date the document is made available (the notice of availability (NOA) publication date for EISs) to the last day of the comment period. If the comment period ends on a holiday or a weekend, then the next business day is the close of the comment period.

4.2.1. Limited English proficiency. In accordance with Title VI of the Civil Rights Act of 1964 and Executive Order 13166 "Improving Access to Services with Persons with Limited English Proficiency (LEP)," project sponsors must be certain that LEP populations have meaningful access to the review of agency plans. Guidance on LEP populations specifying the requirements document translation are contained in the USDOT *Policy Guidance Concerning Recipients Responsibilities to LEP Persons* (2005). The guidance explains the four-factor analysis to be used in determining when translation for LEP populations is needed for written materials and public hearings.

4.2.2. Protecting privacy. Project sponsors should provide a notice or disclaimer[1] to commenters that their personal information, if provided, may be published in environmental documents that are publicly circulated. A member of the public may choose to exclude their personal information from comment forms and environmental documents, if desired.

4.2.3. Environmental Assessment (EA). Project sponsors must make an EA available for public inspection for a 30-day period. Circulating an EA and holding a public hearing or

[1] Any solicitation for comments (e.g., NOA) or provided comment materials (e.g., comment cards at public meetings) should include the disclaimer.

meeting[2] is optional (23 CFR 771.119(d)-(f)). A NOA, briefly describing the action and its impacts, must be provided to affected units of Federal, State, and local government (23 CFR 771.119(d)). Project sponsors should provide a website link to the electronic version and give notice of the location where interested persons can view a hard copy. They should also identify a contact person who can provide a copy of the document upon request.

When a project sponsor chooses to hold a public hearing for the project, a 30-day comment period must be held (23 CFR 771.119(e)-(f)) and the EA must be available for at least 15 days prior to the hearing. FTA Regional staff must make certain that the project sponsor gives proper notice of the EA's availability, provides information on where it may be obtained and/or reviewed, and that public hearing advertisement occurs 15 days in advance of a hearing if one is held (40 CFR 1506.6(b)).

Notification methods for an EA include: advertisement in the local newspapers announcing the availability of the EA, posting on the project sponsor's website, and hard copy viewing locations for those without Internet access. A Federal Register notice is not required for an EA and is only made upon approval of the Director of the Office of Environmental Programs on projects of national importance.

4.2.4. Draft EIS (DEIS). FTA and the project sponsor must circulate a DEIS for public and agency comment. The comment period must be at least 45 days, but no more than 60 days (23 CFR 771.123(k)). Extended comment periods are discussed in more detail in Section 4.3. The DEIS must be available for at least 15 days prior to the public hearing (23 CFR 771.123(j)). Regional staff should instruct the project sponsor to publish the public hearing information in local newspapers, on the project website, and any other appropriate means.

The comment period on a DEIS begins when the U.S. Environmental Protection Agency (EPA) publishes a NOA in the *Federal Register*. FTA Regional staff are directed to follow EPA's EIS Filing Guidance to file the NOA with EPA. EPA will publish the NOA once FTA files the DEIS and affirms that it has been made available to all other interested agencies and the public. FTA Regional staff should ensure the NOA includes the following:

- Comment period deadline is noted;
- Required 15-day EIS availability prior to the public hearing is met;
- The time, date, and location information for the public hearing is included; and
- Instructions on how to comment are provided.

FTA should also ensure the project sponsor announces the details of the comment period, public hearing, and where comments are to be sent in cover/transmittal letters of the DEIS, on the project sponsor's website, and in public hearing brochures, handouts, or other notices.

4.2.5. Combined FEIS and ROD (FEIS/ROD). A combined FEIS/ROD document (23 U.S.C. § 139(n), 23 CFR 771.124) does not have a comment period or a 30-day waiting period

[2] A public hearing is a formal meeting that is recorded and results in a transcript. A court reporter or independent third party typically prepares the transcript). A public meeting does not require having a court reporter in attendance or a transcript, and can be in the form of townhall meetings, open houses, or charrettes.

because these documents are published as a single document. EPA publishes a NOA in the *Federal Register* for combined FEIS/ROD documents.

4.2.6. Final EIS (FEIS). No comment period is required following the publication of an FEIS; however, a 30-day waiting period is required between the date of the *Federal Register* FEIS NOA and signature date of the ROD (40 CFR 1506.10(b)(2), 23 CFR 771.125 and 771.127). FTA may receive comments during this period and may consider any substantive comments received when developing the basis of decision for the ROD. If FTA chooses to establish a comment period on an FEIS, information on the comment period must be included in the introduction of the FEIS, in the NOA, on the project website, and in the newspaper NOA, depending on the purpose for the request for comments.

4.2.7. Supplemental documents. Supplemental documents are subject to the same public comment and review period requirements as an original EA or EIS, except that scoping is not required and the public involvement may be tailored to the scope of the supplemental document, as appropriate.

4.3. Comment period extensions. A comment period of an EA or an EIS may be extended for good reason, such as a request from another Federal agency, and its duration should be determined during scoping activities. The comment period for an EIS can be extended only if: (1) the lead agency, project sponsor, and cooperating and participating agencies all agree to set a longer period; or (2) the lead agency (FTA) finds "good cause" for the longer period (23 U.S.C. § 139(g)(2)).

If comment periods are extended after an EA is made available or an EIS NOA is published, the project sponsor should use the same methods used to advertise the original comment period. FTA Regional staff must amend the NOA filed with EPA to extend the comment period. Local notifications, such as updating the comment period on a project website, should also be amended.

4.4. Receiving comments. FTA Regional staff should ensure that the project sponsor has appropriately invited comments on the environmental document, either through hardcopy or electronic means. Comments may be received in various ways, such as:

- Letters or emails sent to the project sponsor or FTA Regional staff;
- Hand-written comments submitted on comment cards at public hearings or meetings;
- Oral testimony recorded in public hearing transcripts; or,
- Comments submitted through the project sponsor's website.

4.5. Consideration of comments. All substantive comments must be considered, either individually or collectively (40 CFR 1503.4(a)), to help decisionmakers make informed decisions. FTA Regional staff should work with the project sponsor to identify common concerns or major concerns expressed in the comments, and FTA Regional staff should resolve any conflicting comments between Federal agencies. Careful consideration of public and agency comments should be made by the project sponsor to determine how to respond to comments and how best to advance the project to complete the EA or EIS process.

Comments received often vary and can range from statements of support for, or opposition to, a project sponsor's action to detailed critiques of the analysis and suggestions for a new

alternative. Comments may identify errors of fact, highlight areas of controversy, identify omissions, raise environmental concerns, or provide new information.

4.6. Responding to comments. Responses to comments are required for both EA and EIS documents (23 CFR 771.119(g) and 23 CFR 771.125(a)(1), respectively). It is not required by Federal regulation to send a direct response to commenters. State and/or local regulations may, however, have a requirement to do so.

The type of response will vary based on whether the comment is substantive or non-substantive.

4.6.1. Substantive comments. Comments that raise specific issues or concerns regarding the project or the study process, suggest new alternatives, or question or raise concern over new impacts not previously addressed in the DEIS or EA are considered substantive comments.

Responses. CEQ directs that an agency must respond to substantive comments by one or more of the means listed below (40 CFR 1503.4(b)):

- Modify alternatives including the proposed action;
- Develop and evaluate alternatives not previously given serious consideration;
- Supplement, improve, or modify its analyses;
- Make factual corrections; or
- Explain why the comments do not warrant further FTA response, citing the sources, authorities, or reasons which support FTA's position and, if appropriate, indicate those circumstances that would trigger FTA reappraisal or further response.

In the *Forty Most-Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, question 29 recommends how DEIS comments questioning the adequacy of the EIS methodology or comments that raise new alternatives should be addressed. Comments should be responded to in the combined FEIS/ROD or the FEIS.

4.6.2. Non-substantive comments. These include comments that are not relevant to the topics discussed in the environmental document, such as general statements of support or opposition to the project, or comments concerning information that was already included in the document but the reader overlooked.

Responses. Responses may refer the reader to the location in the document to point out information related to the comment. If only minor edits or corrections are needed as a result of comments, they can also be addressed in an errata sheet. Responses to general support or opposition could be that the agency will consider the comment prior to making a final decision on the project.

4.7. Response format. FTA has no prescribed format for responding to comments. The response format will depend on a number of factors including the number and type of comments received. Regional staff should encourage the project sponsor to use a user-friendly format where commenters can easily find their comments and the FTA/project sponsor's responses. Voluminous comments may be summarized.

Potential formats include:

- Matrices that organize the comments into a table with individual answers for each comment. This approach provides a comprehensive record of all comments received;
- Summaries of either individual comments or single responses for comment themes. A comment response can reference the comment theme response minimizing the repetition of responses. This reduces the need to change responses in multiple locations as they are being drafted, reducing the likelihood of typos and errors, and also allows for faster and easier review. Where summaries are used, the actual comments must be made available for inspection at the project sponsor's office, on the project website, or attached to the final environmental document; or
- An in-line comment-response format that assigns a number to each individual comment and then presents the responses by number. This approach is often best for smaller documents or documents with few comments or issues.

4.8. Preparing responses. FTA must ensure the project sponsor responds to all EA and EIS comments consistently, thoughtfully, and respectfully. Prepared responses should also:

- Be in proportion to the scope and scale of the environmental issue raised;
- Be consistent with other responses and with the final decision document;
- Provide an explanation as to why FTA and the project sponsor do not feel that a revision is warranted if one isn't;
- Be objective regarding the environmental issues raised; and
- Cross-reference relevant sections in the NEPA document, and, if more information can be found elsewhere (e.g., project web site), direct the commenter to it.

If the comment includes an inaccurate statement, the response should provide the correct information. If the comment claims an issue was not analyzed, the response should either reference where in the document the issue is addressed or explain why the analysis was not done and why it was not required. If a comment results in changes to the document or additional analysis, clearly state that in the response and include the relevant document references.

4.9. Responding to late comments. FTA should consider and respond to substantive comments received after the close of the comment period, but prior to publication of the decision document, to the extent practicable.

4.10. Documenting comments and responses. FTA should ensure the project sponsor collects, organizes, and makes all comments and responses available for FTA review (23 CFR 771.119(g) and 23 CFR 771.125(a)(1)). All comments (hardcopy and electronic) must be maintained in the project file.

4.10.1. EA. The project sponsor must provide the comments received and the responses to the EA for review by FTA (23 CFR 771.119(g)). FTA uses the responses to comments on an EA in making the FONSI decision and incorporates this information into the FONSI documentation.

4.10.2. EIS. Responses to comments on DEISs are required to be assessed both individually and collectively (40 CFR 1503.4) and provided in the combined FEIS/ROD or FEIS. CEQ regulations (40 CFR 1503.4(b)) and FTA regulations (23 CFR 771.125) state that an FEIS must provide a discussion of all substantive comments received on a DEIS within the FEIS and a response must be provided even if the comment does not warrant further agency response. Copies of comment letters are usually contained in an appendix.

Comments received on an FEIS are routinely provided a response in the ROD, and in some instances, such as with a Section 4(f) de minimis impact determination identified between the DEIS and FEIS, the ROD is used as a mechanism for responding to comments where non-NEPA public involvement is specifically required. The FTA Regional Office should consider comments received on a combined FEIS/ROD to determine whether they involve issues that would lead to a re-evaluation or supplemental NEPA analysis under 23 CFR 771.129 or 771.130, respectively.

4.11. Changes as a result of public and agency comments. Occasionally, comments received on an EA or EIS results in changes in a class of action determination or requires a revised approach to completing the NEPA process, such as a supplemental document. Regional staff will review the public comment and responses to determine whether changes are necessary.

- For an EA, FTA will determine whether to: issue a FONSI, require a supplemental EA request additional public and agency review, or request an EIS based on the presence of significant impacts.
- For a DEIS, FTA will determine whether to: issue a combined FEIS/ROD document,[3] issue an FEIS, or require a supplemental EA or EIS.

4.12. Documenting the comment-response process. FTA should ensure the project sponsor documents the comment-response process in the decision document (i.e., FONSI, combined FEIS/ROD, or ROD). This will help the public and agencies understand how FTA processed and responded to their comments. Documentation should include information on the length of the comment period and whether there were any extensions; the public hearings or meetings held, if any; the number of comments; and sources of comments. The same information is also required of any supplemental environmental documents. The documentation may note issues of controversy raised by commenters and summarize changes made in response to comments.

5. References

- CEQ regulations implementing NEPA, 40 CFR 1500-1508
- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- Environmental Impact Statement Filing Guidance, (EPA)
- Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, (CEQ, 2012)
- Forty Most-Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, (CEQ, 1981)
- FTA's Environmental Impact and Related Procedures, 23 CFR 771

[3] FTA would not use a combined FEIS/ROD where there are substantial changes to the preferred alternative or where FTA has identified significant new circumstances or information relevant to environmental concerns.

- Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews. (FHWA/FTA, 2013)
- National Environmetnal Policy Act, 42 U.S.C. § 4332

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Documentation of Mitigation Commitments
Date: March 2019
SOP No.: 12
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on capturing the mitigation commitments for impacts identified through the environmental review process.

2. Applicability/Scope

This guidance applies to the consideration, development, and documentation of commitments to mitigate adverse environmental and community impacts as assessed during the environmental review process. Per 40 CFR 1508.20, mitigation includes:

- Avoiding an impact by not taking a certain action or parts of an action;
- Minimizing an impact by limiting the degree or magnitude of the action and its implementation;
- Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating an impact over time, through preservation and maintenance operations during the life of the action; and,
- Compensating for an impact by replacing or providing substitute resources or environments.

FTA considers mitigation measures for all adversely affected resources and communities identified as part of the environmental review process for proposed projects. For resources that do not have a specific mitigation requirement, FTA may still recommend project sponsors mitigate adverse environmental effects to comply with the intent of the National Environmental Policy Act (NEPA), which may also streamline the environmental review process by alleviating public controversy and/or shorten the consultation process with other resource agencies.

This SOP is applicable to all levels of environmental review as FTA documents mitigation commitments in the categorical exclusion (CE) determination, finding of no significant impact (FONSI), combined final environmental impact statement/record of decision (FEIS/ROD), FEIS (23 CFR 771.133), or re-evaluation. Grants are made conditional on the performance of these commitments.

3. Responsibilities

FTA Regional staff is responsible for managing the environmental review process. FTA Regional staff is also responsible for tracking and monitoring mitigation commitments following completion of the environmental review process as part of the grant oversight process, while the actual responsibility for performing the mitigation usually lies with the applicant.

The Office of Chief Counsel (TCC) reviews mitigation that is a condition of the FTA grant, and that function is usually assigned to the Regional Counsel. Regional Counsel also provides advice on whether the mitigation is an eligible expense.

FTA Headquarters staff in the Office of Environmental Programs (TPE-30) and TCC may advise on mitigation commitments for a particular project when the Region requests assistance.

4. Standard Procedures

4.1. Regulations/guidance. Regional staff should review the proposed project to ensure compliance with all relevant environmental requirements identified in the environmental review process as well as adequacy and reasonableness of mitigation commitments. Most environmental laws require the consideration of mitigation of adverse environmental or community impacts. But the statutory and regulatory directives on the consideration of mitigation are not all the same, and FTA may suggest mitigation for impacts when there are no statutory or regulatory directives in place to meet the intent of NEPA and/or streamline the environmental review process.

The mitigation measures should be clearly identified in environmental documents as well as in the grant. In addition, Regional staff should ensure the proposed mitigation measures are allowable FTA expenses. For example, FTA is prohibited from awarding funding to pay for incremental costs of incorporating art or non-functional landscaping into facilities (49 U.S.C § 5323(h)(2)). In order for landscaping to be considered "functional," it would need to be done to offset a particular environmental impact.

4.2. Content and structure of mitigation measures. Consistent with CEQ guidance on mitigation and monitoring, FTA Regional staff should ensure that the environmental document clearly identifies the impact(s) to be mitigated and carefully specifies any relied-upon mitigation "in terms of measurable performance standards or expected results, so as to establish clear performance expectations" ("Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," 2011). FTA Regional staff should also recommend as a mitigation measure, particularly for complex projects, that a project sponsor identify specific individuals early in the design process as responsible for making sure mitigation measures are incorporated into the project. Lastly, FTA Regional staff should ensure that timing of the mitigation measures is addressed.

Regional staff should also ensure that mitigation commitments are not overly detailed. Instead, these may be written to allow the project sponsor some flexibility to develop a tailored solution to an overall goal. This is consistent with CEQ guidance allowing for adaptive management in mitigation, and is particularly important when the project sponsor does not have the ultimate responsibility or authority to approve or implement the mitigation measure (e.g., a project sponsor may identify and commit to funding traffic-related improvements around new stations, but often city or State departments of transportation have the ultimate authority on how traffic intersections are configured). Similarly, environmental documents should list the permits that will need to be obtained by the project sponsor and provide evidence that the project sponsor will be able to obtain a needed permit, but should avoid providing overly specific mitigation commitments to allow for some flexibility during final design. Prior to publishing environmental documents with mitigation measures, FTA Regional staff should recommend that the project sponsor have an individual with appropriate transportation construction experience review the mitigation measures so that the proposed measures are practical and enforceable during construction.

4.3. Detail of mitigation measures in environmental documents. FTA makes grants conditional on the performance of mitigation commitments outlined in the environmental document. These commitments may also be captured in FTA's grant management software (TrAMS), or formal agreements (e.g., memorandum of understanding or agreement, programmatic agreement)

between appropriate parties. The project sponsor is responsible for implementing the identified mitigation measures, because they are commitments made as part of the Federal project. Information below addresses the different levels of detail for mitigation measures in different levels of environmental documents.

4.3.1. Draft Environmental Impact Statements (DEIS). In a DEIS, it is appropriate to discuss a number of alternative strategies for mitigating an adverse impact. For example, a DEIS may consider quiet zones, noise walls, alignments variations, vehicle skirts, etc., to mitigate noise impacts. The effectiveness of each measure in reducing or eliminating the impacts, the cost, and any additional impacts (e.g., right-of-way acquisition) should be presented.

4.3.2. Final Environmental Impact Statements (FEIS). After taking into account mitigation-related comments by the public and other agencies on the DEIS, FTA should incorporate mitigation into the preferred alternative presented in the FEIS. The FEIS should present the mitigation measures as commitments as specified in 23 CFR 771.109(b) and in 23 U.S.C. § 139(c)(4). Occasionally, comments on the FEIS result in FTA's inclusion in the ROD of additional mitigation not fully described in the FEIS.[1] Please see below for information in the ROD and combined FEIS/ROD.

4.3.3. Combined FEIS/ROD or ROD. The FEIS must contain a detailed description of mitigation measures. RODs should include a summary of the mitigation measures incorporated into the project (23 CFR 771.127(a)), but should reference the FEIS for a more detailed description of the mitigation measures. The mitigation summary in the ROD is presented in the form of an attached summary table that is subsequently used by the FTA Regional oversight office and the project management oversight contractor (PMOC) to monitor compliance during final design and construction.

4.3.4. Environmental Assessments (EA)/FONSI. Mitigation measures are included in the EA: (1) to satisfy other environmental laws and requirements; (2) to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS and/or, (3) to mitigate potentially non-significant impacts. FTA can use proposed mitigation measures of potentially significant adverse environmental impacts within the EA to issue a "mitigated FONSI." When FTA issues a FONSI based on the incorporation of mitigation into the project, CEQ recommends in its mitigation and monitoring guidance that FTA specify which mitigation measures reduce an environmental impact below a significant level (CEQ, 2011).[2] Additionally, the draft FONSI must be available for public review for 30 days before FTA makes any final determination on whether to prepare an EIS or proceed with the FONSI (40 CFR 1501.4(e)(2)). Mitigation measures outlined in the FONSI become binding and must be implemented by the project sponsor.

[1] This process is only available when a project releases two separate documents for the FEIS and ROD. Separate publication of FEIS and ROD documents is only allowed when the project meets the conditions outlined in 23 U.S.C. §139(n).

[2] If the project sponsor does not fulfill these specific mitigation commitments, there could be NEPA compliance implications, such as requiring a re-evaluation or a new environmental review.

4.3.5. Categorical Exclusion (CE). CEs sometimes include mitigation measures, such as measures/conditions/best practices to avoid and/or minimize impacts that do not warrant consideration of alternative sites. Examples may include the following, which is not meant to be an exhaustive list:

- Stipulations in a Section 106 Agreement;
- The mitigation or enhancements needed to support a Section 4(f) *de minimis* impact determination;
- Designing a bus maintenance facility so the building itself stands between the noise-generating maintenance activities and nearby noise-sensitive receptors, and blocks the noise; or
- Best management and construction practices that limit the generation of dust and stormwater runoff during the construction of a transit facility on a brownfield.

4.4. Mitigation contingent upon further, post-NEPA analysis. There may be situations where compliance with all applicable environmental requirements and consultations and the associated mitigation commitments cannot be completed in time for inclusion in the decision document. In these instances, "the final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met…" (23 CFR 771.133). The decision to publish a decision document in this state should be considered carefully on a case-by-case basis by Regional staff and in consultation with the Regional Counsel.

4.5. Mitigation monitoring. FTA Regional staff is responsible for mitigation monitoring after the environmental review process. FTA's monitoring of the implementation of the mitigation commitments during final design and construction is addressed in many FTA Circulars. Changes in mitigation during final design and construction may require a re-evaluation or supplemental environmental review. For example, if substantial changes to the mitigation measure or findings are made after a ROD, a revised ROD shall be subject to review, per 23 CFR 771.127.

5. References

- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, (CEQ, 2011)
- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- FTA Environmental Impact and Related Procedures, 23 CFR part 771
- Full Funding Grant Agreement Guidance, FTA Circular 5200.1A
- Grant Management Requirements, FTA Circular 5010.1D
- FTA Award Management Requirements (proposed), FTA Circular 5010.1E
- FTA's Project Management Oversight regulations, 49 CFR part 633
- Section 4(f) regulations, 23 CFR 774
- Section 106 regulations, 36 CFR part 800

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Findings of No Significant Impact
Date: March 2019
SOP No.: 13
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on preparing an FTA finding of no significant impact (FONSI), in compliance with the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) implementing regulations (40 CFR parts 1500-1508) and the FTA environmental impact regulations (23 CFR part 771).

2. Applicability/Scope

The FONSI is a document in which FTA briefly explains the reasons why, based on the results of an environmental assessment (EA), an action will not have a significant effect on the human environment and, therefore, why an environmental impact statement (EIS) will not be prepared (40 CFR 1508.13).

If FTA determines that a project not determined to qualify for a categorical exclusion would not significantly affect the quality of the human environment, a FONSI would constitute the final stage of the NEPA process for a project that was evaluated in an EA. The FONSI is FTA's environmental decision document for that project, but it does not commit FTA to approve any future grant request for the proposed project.

3. Responsibilities

After preparing an EA and allowing for public review, the FTA Regional Administrator (RA) determines whether a proposed project will significantly affect the quality of the human environment. When the RA finds the project will not significantly affect the quality of the environment, the RA, or delegated staff, issues a signed FONSI. The RA routinely consults with the Regional Counsel in making the determination.

The Office of Chief Counsel (TCC) reviews the FONSI for legal sufficiency before the RA signs the document, and that function is usually assigned to the Regional Counsel.

FTA Regional staff is responsible for overseeing the development of a FONSI and ensuring that the document meets all regulatory and statutory environmental requirements.

4. Standard Procedures for Developing a FONSI

4.1. Review public record. Before preparing a FONSI, Regional staff should review: (1) the public and interagency comments on the EA, both written and transcribed from the public hearing, if one was held; (2) responses to the comments; and, (3) any revisions made to the EA in response to the comments, as appropriate. Per 23 CFR 771.119(g), the project sponsor provides these materials to FTA, along with a recommendation for a FONSI, when no significant impacts are identified.

4.2. Drafting the FONSI. Regional staff may request the project sponsor prepare a draft FONSI for FTA review or prepare it internally.

4.3. Content and format. CEQ guidance provides the following direction regarding FONSI content: "The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment" (CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Question37(a), 1981). The FONSI, at a minimum, should consist of a signed cover letter that contains the FTA finding attached to a document that provides a brief project description and all final decisions (e.g., selected alternative, mitigation measures) and findings.

4.3.1. Description of the project. The FONSI should briefly describe the project, which may include brief summaries of the project need, alternatives considered, and public involvement, and should reference the EA for more information.

4.3.2. Brief Summary of environmental consequences and findings. The FONSI should summarize the environmental impacts. It should also identify all findings required by Federal environmental laws and executive orders, if not previously identified in the EA under 23 CFR 771.119(g). Findings may include:

- Section 106 determination and any agreements (i.e., Memorandum of Agreement or Programmatic Agreement);
- Section 4(f) finding;
- Project-level air quality conformity (if the project is in an air quality nonattainment or maintenance area); and
- Section 7 (Endangered Species Act) finding.

4.3.3. Description of mitigation measures. The FONSI should describe the mitigation measures incorporated into the project, and can be discussed in text or attached in a mitigation monitoring table. Mitigation can be incorporated by reference, as well, if it has not changed since publication of the EA and clearly identifies the mitigation as commitments (e.g., identify the action and the party responsible). When FTA issues a FONSI based on the incorporation of mitigation into the project (i.e., mitigation commitments to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS), the FONSI should specify that FTA is making the FONSI determination based on the incorporation of mitigation into the project. If specific mitigation measures reduce an environmental impact below a "significant" level, it should be noted in the mitigation commitment discussion, as well; this notation will help FTA quickly determine later if a supplemental environmental document is needed should changes to the proposed mitigation occur. Lastly, when relying upon the mitigation to support a FONSI, it is especially important to monitor the mitigation, consistent with "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact" guidance (CEQ, 2011).

4.3.4. Responding to comments. Regional staff may document responses to comments on the EA as part of the FONSI, but it is not required. This can be in the form of an attachment to the FONSI that summarizes the comments received and includes responses to those comments, or in the text of the FONSI. All comments and responses must be included in the project file, whether the responses to comments are part of the FONSI or not.

4.4. Consider FTA funding source. FTA only has a NEPA responsibility for FTA-funded projects. Regional staff should confirm that the project is eligible to receive Federal funding and has identified FTA formula or flex funds for the project, has applied for a discretionary grant program (e.g., TIGER), or the project sponsor has stated it will seek Capital Investment Grant funds for the project prior to FONSI signature.

4.5. Public review prior to FONSI signature. When FTA issues a FONSI for a project type that is found in 23 CFR 771.115(a) and would, therefore, normally require an EIS, the draft FONSI must be available for public review for 30 days before FTA makes any final determination on whether to prepare an EIS or proceed with the FONSI (40 CFR 1501.4(e)(2)).

4.6. Signature. The Regional Administrator, or designee, may sign the FONSI after a 30-day public review period of the EA, or after the 30-day FONSI review noted in section 4.5 (above). The FONSI includes the date the finding was issued and the signature of the approving official.

4.7. Notice and distribution. Upon signature, Regional staff must provide a copy of the signed FONSI to the project sponsor, as the document must be available to the public from both FTA and the project sponsor (23 CFR 771.121(b)). The Region should direct the project sponsor to send the required notice of availability of the FONSI to the parties identified in 23 CFR 771.121(b). The Region should also request that the EA and FONSI be posted on the project sponsor's website and be maintained there until the project is open and operating (23 CFR 771.111(i)(3)). The FONSI signature date must be recorded in the Federal Permitting Dashboard within 10 days of signature, pursuant to USDOT's *Federal Permitting Dashboard Reporting Standard* (Dec. 2018) (internal only).

4.8. Limitation of claims. The FTA Regional Office should notify FTA's Office of Environmental Programs (TPE-30) when the FONSI is signed so it can be included in the next Limitation on Claims notice for the *Federal Register*. The publication of this notice will start the 150-day statute of limitations on challenges to the FONSI.

4.8 Issuing FONSI on another agency's EA. If another Federal agency issues a FONSI on an action that includes an FTA-funded element, FTA evaluates the other agency's EA/FONSI to determine whether the FTA-funded element of the project and its environmental impacts have been adequately identified and assessed (23 CFR 771.121(c)). If FTA determines that no significant environmental impact will result from the FTA-funded element, FTA will issue its own FONSI or categorical exclusion (CE), incorporating the other agency's EA/FONSI by reference. If FTA determines that the environmental issues associated with the FTA-funded element of the project have not been adequately identified and assessed for purposes of FTA's program, then FTA will require additional documentation (e.g., Section 4(f) evaluation) to satisfy FTA requirements prior to issuing a decision document or CE determination.

4.9 Pre-award authority with issuance of FONSI. The FONSI allows the project sponsor to incur certain project costs at its own financial risk, as detailed in the annual Apportionment Notice in the *Federal Register*.

5. References

- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- CEQ guidance on Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact
- Executive Order 11988: Floodplain Management
- Executive Order 13690: Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input
- Executive Order 11990: Protection of Wetlands
- FTA's Metropolitan Transportation Planning regulations, 23 CFR part 450
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- Section 4(f) regulations, 23 CFR part 774
- Section 404(b)(1) guidelines, 40 CFR part 230
- Transportation Conformity regulations, 40 CFR part 93
- USDOT Federal Permitting Dashboard Reporting Standard (2018), internal—FTA only

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Records of Decision
Date: March 2019
SOP No.: 14
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on preparing a record of decision (ROD) for an environmental impact statement (EIS) on a proposed FTA project, in compliance with the Council on the Environmental Quality (CEQ) National Environmental Policy Act (NEPA) implementing regulations (40 CFR parts 1500-1508) and the FTA environmental impact regulations (23 CFR part 771).

2. Applicability/Scope

This guidance focuses on traditional, stand-alone ROD documents issued after a final EIS (FEIS). Combined FEIS/ROD documents are discussed in SOP No. 10 (*Managing Content, Review, and Distribution of Environmental Impact Statements*). The ROD is a concise public record of FTA's decision.

3. Responsibilities

FTA Regional staff is responsible for managing the environmental review process, which includes providing guidance to the project sponsor regarding ROD document development.

The Office of Chief Counsel is responsible for reviewing RODs or combined FEIS/RODs for legal sufficiency pursuant to 23 CFR 771.127(b) or 23 CFR 771.125(b), which is usually assigned to the Regional Counsel.

The FTA Regional Administrator or designee must approve the ROD when satisfied that it complies with NEPA prior to its public distribution. Approval will be made by signing and dating the ROD.

4. Standard Procedures for Developing a ROD

4.1. Review public record. Before preparing a ROD, Regional staff should review: (a) any written public and interagency comments on the draft EIS (DEIS); (b) the responses to those comments; and, (c) the FEIS. Note, FTA usually does not solicit comments on a FEIS, but comments may be received during the 30-day waiting period following EPA's *Federal Register* notice of availability for the FEIS. In some instances, public comment may be solicited on an FEIS to facilitate compliance with other requirements, such as a *de minimis* determination under Section 4(f).

4.2. Content. The Region must ensure that the ROD states FTA's decision and presents the basis for the decision (i.e., all of the factors considered and how those factors entered into the decision). The ROD is FTA's environmental decision document; it does not commit FTA to approve any future grant request for the proposed project.

4.2.1. Description of the project. The ROD should briefly describe the project, which may include brief summaries of the project purpose and need.

4.2.2. Alternatives. The ROD must identify: (1) all alternatives considered by FTA; (2) the NEPA selected alternative; and (3) the environmentally preferable alternative(s) (40 CFR 1505.2). If the selected alternative is also an environmentally preferable alternative, both aspects must be noted in the ROD.

4.2.3. Brief Summary of environmental impacts and findings. The ROD should summarize the environmental impacts and identify all findings required by Federal environmental laws and executive orders in order to present a complete record, including:

- Section 106 determination and any agreements (i.e., Memorandum of Agreement or Programmatic Agreement);
- Project-level air quality conformity (if the project is in an air quality nonattainment or maintenance area);
- Section 7 (Endangered Species Act) finding; and,
- Any required Section 4(f) approval in accordance with 23 CFR part 774, per 23 CFR 771.127(a).

4.2.4. Mitigation. Per 40 CFR 1505.2, the ROD must state whether all practicable means to avoid or minimize environmental harm have been adopted for the selected alternative, and if not, explain why they were not. It should summarize the mitigation measures that will be incorporated into the project to comply with any applicable statute, regulation, or executive order (23 CFR 771.127(a)). Additionally, if a monitoring plan is developed for a mitigation measure(s) (e.g., Section 404 or Section 106 compliance), it must be adopted (either through a corresponding agreement or the ROD), and summarized in the ROD (40 CFR 1505.2).

4.2.5. Response to comments. The ROD should respond to any new substantive comments received on the FEIS or supplemental environmental document, as appropriate. A brief summary of comments and responses may appear in the body of the ROD or in an attachment to the ROD.

4.3. Combined FEIS/ROD. Per 23 U.S.C. § 139(n)(2), FTA must, to the maximum extent possible, combine the FEIS and ROD into a single document, unless: (1) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or (2) there is a significant new circumstance or information relevant to environmental concerns that bears on the proposed action or the impacts of the proposed action. For more information on combined FEIS/ROD documents, see SOP No. 10: *Managing Content, Review, and Distribution of Environmental Impact Statements*.

4.4. Legal sufficiency. The ROD must be reviewed for legal sufficiency prior to signature (23 CFR 771.125(b); 23 CFR 771.127(b)). FTA Regional Counsel conducts this review.

4.5. Consider FTA funding source. FTA only has NEPA responsibility for federally-funded projects. Regional staff should confirm that the project is eligible to receive Federal funding and has identified FTA formula or flex funds for the project, has applied for a discretionary grant program (e.g., TIGER), or the project sponsor has stated that it will seek Capital Investment Grant funds for the project prior to ROD signature.

4.6. Date of issuance and signature. The ROD must include the date the finding was issued and the signature of the RA or his/her designee. The Region may complete and sign a ROD no sooner than 30 days after notice of publication of the FEIS in the *Federal Register* or 90 days after publication of a notice for the DEIS, whichever is later (23 CFR 771.127(a)). The ROD signature date must be recorded in the Federal Permitting Dashboard within 10 days of signature, pursuant to USDOT's *Federal Permitting Dashboard Reporting Standard* (Dec. 2018) (internal only).

4.7. Notice and distribution. Although not required unless FTA issues a revised or amended ROD (see 23 CFR 771.127(b)), the Region should request that the project sponsor make the signed ROD available to the public (e.g., posting to the project website).

4.8. Limitation on Claims. The FTA Regional Office should notify FTA's Office of Environmental Programs (TPE-30) when the ROD is signed so it can be included in the next Limitation on Claims notice for the *Federal Register*. The publication of this notice will start the 150-day statute of limitations on challenges to the ROD.

4.9. Amended ROD. Per 23 CFR 771.127(b), there are two cases when FTA may issue an amended ROD: (1) to change the selected alternative or (2) to make substantial changes to the mitigation measures or findings discussed in the ROD. If, after ROD signature, FTA wants to approve an alternative other than the one identified as the preferred alternative and the new preferred alternative was fully evaluated in the DEIS (in the case of a combined FEIS/ROD) or FEIS (in the case of a ROD issued separately from the FEIS), FTA can issue an amended ROD. However, if the new preferred alternative was not fully evaluated, a supplemental EA or EIS may be needed. If FTA amends a ROD, the Region must give notice and distribute the document to the extent practicable to all persons, organizations, and agencies that received a copy of the DEIS (in the case of a combined FEIS/ROD) or the FEIS (in the case of a ROD issued separately from the FEIS).

4.10. Pre-award authority. The ROD allows the project sponsor to incur certain project costs at its own financial risk, as detailed in the annual Apportionment Notice in the *Federal Register*.

5. References

- Air Quality Conformity Regulation, 40 CFR part 93
- CEQ regulations implementing NEPA, 40 CFR parts 1500-1508
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- Section 4(f) regulations, 23 CFR part 774
- Section 404(b)(1) guidelines, 40 CFR part 230
- USDOT Federal Permitting Dashboard Reporting Standard (2018), internal—FTA only

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Limitations on Claims
Date: March 2019
SOP No.: 15
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on publishing a statute of limitations notification in the *Federal Register*, known as a Limitation on Claims (LOC) notice, announcing that FTA has taken a final agency action on a project, thereby limiting legal claims against that project.

2. Applicability/Scope

This guidance applies to the processing of an LOC notice for an FTA environmental decision, such as a final environmental impact statement/record of decision (FEIS/ROD), finding of no significant impact (FONSI), categorical exclusion (CE) determination, or a re-evaluation.

3. Responsibilities

Regional staff is responsible for notifying FTA's Office of Environmental Programs (TPE-30) of any environmental decision appropriate for inclusion in an LOC notice and providing detailed information on the decision for inclusion in the notice. TPE-30 will then consult with the Office of Chief Counsel (TCC), as needed, in determining which decisions to include in the notice.

TPE-30's Office Director and TCC will review and approve the notice. In addition, TPE-30 will notify FTA's Office of Congressional Affairs of the notice, if necessary. TPE's Associate Administrator, or designee, has final approval and signature authority for the notice.

4. Standard Procedures

4.1. Authority for Limitations on Claims notices. Section 139(l) of title 23 of the U.S. Code provides that "a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 150 days after publication of a notice in the *Federal Register* announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval." If no notice is published in the *Federal Register*, then the applicable statutory period for filing claims applies (i.e., usually six years).

4.2. Identifying decision documents for the notice. Regional staff should submit all decision documents to TPE-30 to include in a notice, including combined FEIS/RODs, RODs, amended RODs, FONSIs, amended FONSIs, potentially controversial CEs, and potentially controversial re-evaluations. The Region should ensure that the decision document clearly identifies the final agency actions (e.g., findings for Section 4(f), Section 106, and air quality conformity).

Any decision document that the Region expects may be challenged through litigation should be submitted for inclusion in the notice. The Region should provide some basic background project information to TPE-30 to help in its review and approval process of the notice. If a project has faced a large amount of litigation already, it is often prudent to publish an LOC notice even for what may be viewed as a non-controversial re-evaluation of that project.

For intermodal projects, FTA will typically publish an LOC notice separate from its partner agency (e.g., FHWA) if FTA issues a separate decision document for the project. A single, joint notice may be appropriate in situations where agencies issue a joint decision document. Additionally, FTA may publish an LOC notice on behalf of another Federal agency when that Federal agency's final agency action is related to the FTA proposed action. Early coordination with TPE-30 is necessary in these situations.

4.3. Content for Limitations on Claims notice. An LOC notice should include the transit project name, a brief description of the project, and the findings and determinations made by the Regional Administrator, or designee, including Section 4(f) determinations, Section 106 findings, air quality conformity determinations, and the name of the supporting environmental documentation for these findings and determinations.

4.4. Section 508 compliance. FTA is required to comply with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d) for all electronic documents it posts on its website, making that information accessible to people with disabilities. Therefore, Regional staff must either:

- Ensure that the environmental decision document that the Regional Office sends to TPE-30 is posted on the project sponsor's website, TPE-30 has a link to that website, and Regional staff have requested that the project sponsor retain its web-posting until the project is in operation (FTA's recommended option); or
- Send a Section 508-compliant electronic copy of the environmental decision document to TPE-30 for posting on FTA's public website. Documents should include appendices such as a mitigation table or Section 106 Memorandum of Agreement (all must be 508-compliant).

4.5. Approval and publication process. Prior to publication, an LOC notice is reviewed and approved by TPE-30's Office Director, TCC, and TPE's Associate Administrator. TPE's Associate Administrator has signature authority for the notice, but that authority may be delegated. TCC staff responsible for submitting *Federal Register* notices then submits the notice for publication to the Office of the Federal Register.

- TPE-30 will provide the Regional Office with the official *Federal Register* notice.
- TPE-30 maintains a list of environmental decision documents on FTA's public website. A project remains on this web listing until it is in operation.

5. References

- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139(l)(1) and (2)
- Section 508 Law and Related Policies (see also 29 U.S.C. § 794d)

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Review and File Management of Categorical Exclusions
Date: March 2019
SOP No.: 16
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the review and processing of categorical exclusions (CEs), in compliance with the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) implementing regulations (40 CFR parts 1500-1508) and the FTA environmental impact regulations (23 CFR part 771).

2. Applicability/Scope

This guidance applies to projects that qualify for a CE as detailed and defined under 23 CFR 771.118. A CE is a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. The first type, known as "c-list" CEs (23 CFR 771.118(c)), normally require no more than an adequate description of the project in FTA's online grant management system in terms of documentation. The second type, known as "d-list" CEs (23 CFR 771.118(d)), generally require documentation beyond the project description to verify there are no significant environmental impacts associated with the project. For more information regarding the application of individual CEs, see *Guidance for Implementation of FTA's Categorical Exclusions* (23 C.F.R. 771.118) found on FTA's website.

3. Responsibilities

The FTA Regional Administrator is responsible for making the CE determination, though Regional Administrators may delegate responsibility for some or all CE determinations to FTA Regional staff.

FTA Regional staff reviews the project and proposed CE determination to ensure the CE is appropriate and the project description/documentation is adequate, and to determine whether other environmental laws/requirements apply or unusual circumstances exist. As part of this review, Regional staff consult Regional Counsel when there are questions about the application of the CE or compliance questions concerning other environmental laws.

The Office of Chief Counsel reviews proposed CE determinations for legal sufficiency and that function is usually assigned to the Regional Counsel for that Region.

4. Standard Procedures

4.1. Definition of CEs and determining CEs. CEs are actions that do not individually or cumulatively have significant environmental effects or impacts and are excluded from the requirement to prepare an environmental assessment (EA) or environmental impact statement (EIS) when there are no unusual circumstances (40 CFR 1508.4, 23 CFR 771.118). CEs are not exempt from NEPA; instead, they are the NEPA action.

4.2. Segmentation and CEs. The scope of the action covered by a CE must meet the scope requirements in FTA's environmental regulation to ensure an action is not impermissibly

segmented (23 CFR 771.111(f)). In order to avoid impermissible segmentation a project must demonstrate independent utility, connect logical termini, and not restrict consideration of alternatives. This does not prohibit the *construction* of a transportation facility in phases.

4.3. Processing CEs.

4.3.1. C-list CEs (23 CFR 771.118(c)). The c-list CEs require an adequate description of the project so FTA Regional staff can verify that the CE applies and that other environmental requirements are met; this normally occurs through a review of the grant application. Projects approved as c-list CEs must fit the description and conditions of, or be similar enough to, what is outlined in the specific CE's language. FTA Regional staff should ensure that the description in FTA's online grant management system is sufficient to support the CE determination. There should be enough documentation to determine there are not unusual circumstances that would prohibit the use of the CE. If the project could be approved under more than one of the CEs, Regional staff will identify or verify which CE is most appropriate. In some instances, documentation will be needed to show there are no unusual circumstances that would make the use of the CE inappropriate (e.g., where a project description would lead staff to otherwise believe that an unusual circumstance, such as demolition of a historic property, might be involved).

If at any point the original description or revised description of the project indicates that it does not fit within one of the c-list CEs, FTA must reassess the project as a d-list CE or evaluate it in an EA or EIS, as appropriate.

4.3.2. D-list CEs (23 CFR 771.118(d)). A d-list CE normally requires documentation to verify the application of a CE is appropriate (i.e., the action meets the criteria established in section 771.118(a) and (b)); generally this means documentation beyond what is described in the grant application in FTA's online grant management system. The extent of that documentation will vary depending on the project, but d-list CEs require documentation sufficient to ensure that no significant environmental impact will result and that no unusual circumstance is present. The level of documentation needed for these purposes varies and depends on the type and severity of impacts that may result, varying from a few paragraphs describing the project to multiple pages with graphics. Typically, the documentation would describe the project, its location and existing conditions, and demonstrate there will be no significant impact to the natural or built environment as a result of the project.

4.3.3. Cross-Agency CEs (23 CFR 771.118(e)). Under the Cross-Agency CE, FTA may apply a Federal Highway Administration (FHWA) or Federal Railroad Administration (FRA) CE under 23 CFR 771.117 or 771.116, respectively, to an FTA action if the FHWA or FRA better addresses the project. Per 23 CFR 771.118(e), FTA may consult with FHWA or FRA to ensure proper application of one of their CEs but it is not required for applying a Cross-Agency CE.

4.3.4. CE worksheets/templates. Regional offices may provide project sponsors with worksheets or templates to assist in determining whether a CE is the appropriate class of action for a project. The templates are tools to help demonstrate that FTA considered potential environmental impacts and are generally more appropriate for d-list CEs. In general, the narrative documentation for CEs should be brief and can reference a more detailed technical study on a particular environmental topic, if necessary. This should

include documents useful to decision-makers that (1) focus on issues pertinent to the question of environmental importance; and (2) support the determination that there is no potential for a significant environmental impact.

4.4. Coordination for CEs. Some level of general consultation with other agencies may be appropriate for a CE. For example, when other environmental laws apply to a project, Regional staff may need to consult with other agencies regarding the specific environmental impacts to ensure compliance with the other requirements. Note, it is best to initiate coordination before submitting the grant.

FTA Regional staff determines the need for coordination and records the coordination in the project file (e.g., when it took place and what resulted). Documenting coordination may be as simple as including a short note in the project file or grant application. Other examples of interagency coordination often appropriate with a CE include:

- Consultation with the State Historic Preservation Officer (SHPO), pursuant to Section 106, regarding the eligibility and effects to historic resources within the Area of Potential Effects for projects that have the potential to cause effects on historic properties (note this coordination also supports Section 4(f) compliance for applicable historic resources);
- Consultation with park or wildlife refuge officials, pursuant to Section 4(f), with an opportunity for public involvement for *de minimis* determinations;
- Consultation with the appropriate State environmental agency on the appropriate remediation and construction techniques for a project on a brownfield site;
- Consultation with the U.S. Army Corps of Engineers on the applicability of a Section 404 nationwide permit; or,
- Consultation with other DOT modes when the project may involve the use of funds or approvals of another mode.

4.5. Consider FTA funding source. FTA only has a NEPA responsibility for Federally-funded projects. Regional staff should confirm that the project is eligible to receive Federal funding and has identified FTA formula or flex funds for the project, has applied for a discretionary grant program (e.g., TIGER), or the project sponsor has stated that it will seek Capital Investment Grant funds.

4.6. Issuing a CE determination. When a Regional Office issues a CE determination for a project, it represents FTA's final agency NEPA action. Therefore, if a Section 106, Section 4(f) or other finding/determination is required, it needs to be completed prior to issuance of the CE. Additionally, before FTA may complete NEPA for the project, it must satisfy applicable transportation conformity requirements (40 CFR part 93).

4.7. Pre-award authority. The CE determination by FTA may provide the project sponsor with pre-award authority to incur certain project costs before grant award and at its own financial risk, as detailed in the annual Apportionment Notice in the *Federal Register*, and found on FTA's public website. As a c-list CE may be treated differently from a d-list CE under pre-award authority, FTA recommends reading the latest apportionment notice for guidance.

4.8. Public availability of CEs. CE documentation is not required to be made available to the public but would be released in response to a request under the Freedom of Information Act, and may be made available when complying with other environmental laws that have their own public involvement requirements (e.g., Section 106).

4.9. Limitation on Claims notices. CE determinations are not normally included in FTA's "Limitation on Claims" notices in the *Federal Register*. In the rare instance where the Region anticipates a legal challenge to the CE determination, the Region should notify FTA Headquarters' Office of Environmental Programs (TPE-30). The FTA Regional Office should notify TPE-30 prior to making the CE determination so that it can be included in the next Limitation on Claims notice for the *Federal Register* in these limited cases. The notice will start the 150-day statute of limitations on challenges to the CE determination.

5. References

- CEQ regulations implementing NEPA, 40 CFR 1508.4
- FTA's Environmental Impact and Related Procedures, 23 CFR 771.118 and 23 CFR 771.111(f)
- FTA Guidance on CEs
- Section 4(f) regulations, 23 CFR part 774
- Transportation Conformity regulations, 40 CFR part 93
- Section 106 regulations, 36 CFR part 800

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Re-Evaluations and Supplemental Documents
Date: March 2019
SOP No.: 17
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on re-evaluations and supplemental documents. The purpose of a re-evaluation is to determine whether a completed environmental document or decision requires supplemental analysis.

2. Applicability/Scope

This guidance applies to the re-evaluation and supplementation of National Environmental Policy Act (NEPA) analyses and decisions, as described in 23 CFR 771.129 and 771.130. This document addresses categorical exclusions (CEs); environmental assessments (EAs); environmental impact statements (EISs); findings of no significant impact (FONSIs); records of decision (RODs); combined final environmental impact statement (FEIS)/RODs; stand-alone environmental studies; and supplemental EISs and EAs.

3. Responsibilities

The FTA Regional Administrator, or designee, in coordination with the project sponsor, is responsible for determining the need for a re-evaluation and/or supplemental documentation. This includes informing co-lead agencies of the re-evaluation, determining whether supplemental analysis is necessary, and documenting all decisions. The Regional Administrator has discretion for the timing and scope of a re-evaluation[1] and supplemental document.

Regional staff, working closely with the project sponsor, will identify and review all the project changes (specifically, their environmental implications) and, together with the Regional Counsel, will evaluate the impact of the proposed changes.

The project sponsor has a responsibility to inform the Regional Office of all project changes that could result in new significant environmental effects.

4. Standard Procedures for Re-evaluations

4.1. Definition. A re-evaluation is an independent review by FTA of any proposed change in an action, affected environment, anticipated impact, or mitigation measure. It is a continuation of the project development process and can occur at any point after completion of the project's environmental document. A re-evaluation may be done via consultation or in writing; however, all re-evaluations should be documented in the project file.

4.2. When a re-evaluation is triggered. There are three circumstances that trigger a re-evaluation:

[1] Except when required by 23 CFR 771.129.

4.2.1. Changes to the project (implicit within 23 CFR 771.129). This applies to all completed environmental documents or decisions. Project changes can occur at any time in project development.[2] Possible project changes may include, but are not limited to: changes in project engineering/design and construction (e.g., shifting a project footprint, adjusting visual elements of a facility, or changing the timing of construction); changes to the environmental setting/circumstances (e.g., designation of a new threatened or endangered species, changes in laws and regulations, or availability of new information); or changes to environmental commitments – avoidance, minimization, and/or mitigation (e.g., replacing an identified mitigation activity with a different one or discovering that a mitigation activity is not feasible).

4.2.2. Project sponsor requests award or other project approval (23 CFR 771.129(c)). After the environmental review process is complete, the project sponsor must consult with FTA prior to requesting any grant award or other approval of the project (e.g., moving into engineering/design, acquisition, or construction). Grant awards and amendments sometimes, but not always, signify changes to the project that may require a re-evaluation. Under 23 CFR 771.129(c), the project sponsor must consult with FTA to determine whether the approved environmental document or CE designation remains valid. When FTA reviews a grant application and awards a grant, FTA is affirming the environmental documentation/findings associated with that grant award is valid.

4.2.3. Three-year time period has passed (23 CFR 771.129(a) and (b)). This applies to EISs *only*.

- **DEIS.** This section applies when a project sponsor has not submitted an acceptable FEIS to FTA within three years of the DEIS publication and the project sponsor is actively seeking to move forward with the project. Under this scenario, the project sponsor in concert with FTA must prepare a written re-evaluation. Based on the re-evaluation, Regional staff would decide whether the analysis in the DEIS appropriately reflects the environmental effects and, if it does not, whether to supplement the DEIS or prepare a new DEIS. The FEIS may document this decision.
- **FEIS.** This applies when no major steps have been taken on the project within three years after approval of its FEIS, FEIS supplement, or last major FTA approval (e.g., award of a grant) and the project sponsor is actively seeking to move forward with a project. A written re-evaluation of the FEIS is required. The project sponsor or FTA may draft it; FTA needs to adopt the final document as an agency document. The re-evaluation should consider the entire project and all current environmental requirements to determine whether the existing FEIS remains valid.

4.3. Documenting a re-evaluation. The Regional Office should document the re-evaluation in the project file; the written format is at the Regional Administrator's discretion. Documentation should be commensurate with the project change and associated environmental impacts, potential for controversy, and length of time since the last environmental action. Documentation can be simple, like an email exchange or a memo to the project file, or comprehensive, like a multi-page technical memo complete with attachments.

[2] Changes prior to publication of an EA or DEIS should be included in the analysis and not trigger a re-evaluation.

For the simplest and least environmentally intrusive projects (e.g., CEs), re-evaluations should succinctly verify whether the scope of the project remains essentially the same, address any changes to the project and resulting impacts to natural, cultural, or social resources, and determine whether the prior environmental document remains valid.

For more complex or controversial projects, additional analysis may be required to support a conclusion that there are no new significant impacts and that the prior environmental document remains valid for the requested action or next phase of the project. These additional analyses may be incorporated by reference into the re-evaluation documentation or the supplemental document, if one is appropriate.

Based on the project change and associated impacts, the following additional points should guide the documentation:

- It should explain why the re-evaluation was done. Changes in setting, circumstance, or design should be clearly articulated and contrasted with the original project. The purpose and need of the proposed change should also be clear.
- It should focus on the project changes and whether the changes affect the environmental impacts, as identified in the original environmental document.[3]
- It may include tables, maps, charts, and graphics to communicate the changes.
- It should not include aspects unaffected by the project changes. Other project information/details can be incorporated by reference or briefly summarized if needed.
- It should include a specific FTA determination. This determination may be in a separate document and attached to the re-evaluation or FTA may "concur" (via a concurrence signature line) on a re-evaluation document prepared by the project sponsor.

4.4. Outcomes of a re-evaluation. There are three possible outcomes for a re-evaluation:

- **Decision not to prepare a supplemental document.** The decision not to prepare a supplemental document is a determination that the previous document/finding (CE determination, EA/FONSI, EIS/ROD) is still valid;
- **Preparation of a supplemental EIS**. (See Section 5.2); or
- **Preparation of a supplemental EA.** (See Section 5.3).

4.5. Re-evaluation of a CE. Because CEs are so prevalent, they are subject to the greatest number of re-evaluations. However, their re-evaluations are the least complex and documentation may be minimal. A re-evaluation of a CE should include a brief project description, provide a clear reason for proposed change, identify the proposed changes and potential environmental impacts, and state why the CE designation remains valid. A re-evaluation of a CE that determines the CE designation is no longer valid would result in either a new CE, an EA, or an EIS, depending on the circumstances with the particular project.

[3] Consider both the intensity and type of impacts. That is, would the changes cause impacts that are different in kind or in magnitude from those contemplated in the prior NEPA finding?

4.6. Packaging of re-evaluations. To the extent possible, and to avoid segmentation, Regional staff should consolidate project changes into as few re-evaluations as possible. In packaging re-evaluations, it matters less where project changes are occurring along a project alignment than when the need for the change is known. Additionally, each re-evaluation should consider the cumulative effects of any previous re-evaluation.

4.7. Public circulation of a re-evaluation. A re-evaluation does not require public circulation.[4] It is generally treated as part of the project file. The Regional Office may circulate the re-evaluation or rely upon the project sponsor's public involvement process, if warranted (e.g., for a controversial project), though this is rare.[5]

4.8. Agency consultation. While there is no regulatory requirement for FTA to coordinate with other agencies during a re-evaluation, it is good practice and may expedite project delivery. Depending on the affected environmental resource, Regional staff and the project sponsor should identify the applicable cooperating and participating agencies to the original environmental document to determine who should be consulted during the re-evaluation process. For example, if a re-evaluation involves new or additional impacts to wetlands, then coordination with the U.S. Army Corps of Engineers would be appropriate.

4.9. FTA oversight of mitigation commitments (post-NEPA). Changes to mitigation commitments are like any other project change. They require a re-evaluation to assess their effects (capture the change to the commitment and assess its impact) and should follow the re-evaluation process described above. FTA may need to monitor mitigation commitments, beyond its general oversight of the project, if provided for by the environmental document or an agreement signed by FTA, such as a programmatic agreement, memorandum of understanding, etc. For more information, see Grants A to Z SOP, TPM C.1.6., Environmental Mitigation Monitoring.

4.10. Legal considerations. The courts view a re-evaluation as a legitimate tool for determining whether an existing environmental document needs to be supplemented. A re-evaluation is not a supplemental environmental document (i.e., supplemental EIS or EA). If a supplemental document is required, a re-evaluation cannot be used. Although there is no required format for a re-evaluation, the Region should complete it in accordance with FTA's procedures, it must take a "hard look" at any changed circumstances or new information, and it must be completed prior to a project decision being made. The Regional Counsel should be consulted throughout the process and additional consultation with the Office of Chief Counsel may be warranted in preparing a re-evaluation if the Region anticipates litigation.

4.11. Limitation on Claims notices. FTA provides notice via the *Federal Register* of final environmental actions, including certain re-evaluations. This starts the 150-day period (i.e., the "statute of limitations") during which someone can bring a lawsuit against FTA to challenge the environmental compliance of the project. The action for which FTA provides notice is a FTA determination that neither a supplemental EIS nor a supplemental EA is necessary. The

[4] Note that public involvement requirements of related laws (e.g., Section 4(f), Section 106, etc.) still apply.
[5] For example, a shift in alignment for the Sugar House Streetcar in the Salt Lake City area affected many property owners. The re-evaluation was posted on the project sponsor's website with a notice mailed to property owners.

Limitation on Claims notice lists the supporting documentation. If FTA publishes a Limitation on Claims notice, then the re-evaluation is often in the form of a technical memorandum. The notice does not alter or extend the limitation period for project decisions previously published in the *Federal Register* (i.e., the notice does not open the entire project for legal claims). If a Limitation on Claims notice is done for a re-evaluation, FTA's policy is to provide the referenced document and supporting documents to the public via FTA's or the project sponsor's website. (See SOP No. 15 for more information.)

5. Standard Procedures for Supplemental Documents

5.1. Supplemental documentation. When a re-evaluation indicates supplemental review is warranted due to significant, or potentially significant, new impacts, the Regional Office and project sponsor should prepare a supplemental EIS or EA. Supplemental documents should focus on the impacts of the new information. Impact areas or project elements that are unchanged do not need to be addressed in the supplemental document, but instead can be incorporated by reference. When a supplemental EIS or EA is prepared, the milestone information must be captured on the Federal Permitting Dashboard under the original project or as a new project, as applicable.

- **Supplemental EIS (40 CFR 1502.9(c)(4)).** Regional staff and the project sponsor must prepare, circulate, and file a supplement to an EIS in the same fashion as a draft and FEIS, though scoping is not required. The supplemental EIS should focus on the environmental impacts that have changed because of the project changes.
- **Supplemental EA (23 CFR 771.130(c)).** A supplemental EA should focus solely on the project change. A supplemental EA can supplement a previous EA, FEIS, or other supplemental document. Findings should be included in the project file.

5.2. When a supplemental EIS is triggered (23 CFR 771.130).

- A supplemental EIS is needed when (1) changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.
- A supplemental EIS is not necessary when the changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS.

5.3. When a supplemental EA is triggered (23 CFR 771.130(c)). When the Region is uncertain of the significance of new impacts, it may choose to do a supplemental EA. Either the result will be a determination that the new impacts are not significant and do not warrant a supplemental EIS or new EIS, or that the new impacts are significant and require a supplemental EIS. These findings should be documented in an amended decision document.

5.4. Supplemental EIS vs. initiating a new environmental review process.

- For projects where a DEIS was published prior to the enactment of SAFETEA-LU, and a FEIS has not been published, a new environmental review process should be initiated as opposed to publishing a Supplemental EIS due to the amount of time that has passed.
- Where substantial time has passed since publication of a FEIS, FEIS supplemental analysis, or ROD, a new environmental review process should be initiated rather than continued from an older project. Due to changes to FTA's environmental review process in recent years, the project may be eligible for a lower class of action or may be streamlined in other ways.
- FTA should avoid publishing an environmental document or issuing a decision when the agency is aware that imminent changes to the project warrant supplemental analysis. This will likely save time and reduce confusion.

5.5. Decision documents. The chart below presents the outcomes resulting from Supplemental EISs and EAs depending on the class of action and timing of the supplemental analysis.

Initial Class of Action	**Timing of Supplemental**	**Type of Supplemental Document**	**Next Step/ Decision document**
EIS	Supplemental document required after DEIS, before FEIS	supplemental DEIS	Prepare FEIS/ROD
		supplemental EA	
	Supplemental document required after ROD	supplemental EA	Amend the ROD with language finding no significant impact*
		supplemental DEIS	Prepare supplemental FEIS/amended ROD
	Supplemental document required after FEIS, before ROD (in those rare circumstances where no combined FEIS/ROD)	supplemental DEIS	Prepare supplemental FEIS/ROD
		supplemental EA	Issue a ROD with language finding no significant impact*
EA	Supplemental document after EA is published, before FONSI	supplemental EA	Prepare FONSI*
	Supplemental document after FONSI is published	supplemental EA	Amend FONSI*

** This assumes that FTA finds there are no significant environmental impacts from the changes evaluated in the supplemental EA. Were FTA to find significant environmental impacts through*

the supplemental EA, FTA would need to complete a supplemental DEIS and supplemental FEIS/ROD.

5.6. Content of an amended FONSI or ROD. To maintain transparency of FTA's NEPA determinations, FTA's practice is to prepare amended decision documents that incorporate the supplemental analysis and record all of FTA's determinations for the project in one location. Addendums or supplements to RODs or FONSIs are not a recommended FTA practice because they do not give the public one place to look for findings and mitigation commitments.

- An amended FONSI or ROD should state:
  - It amends the prior FONSI or ROD issued on the project;
  - Decisions/determinations included in the prior FONSI or ROD are unaltered, except where the amended FONSI or ROD expressly alters them based on the limited environmental review contained in the supplemental document; and
  - If an earlier FONSI or ROD was included in a prior Limitation on Claims notice, the previous limitation is unaltered by the amended FONSI or ROD, except regarding the new information.

- Amended FONSIs or RODs should clearly distinguish between new determinations/decisions, including mitigation commitments, and previous findings that remain unaltered by the supplemental environmental analysis. The Amended FONSI or ROD signature date must be recorded in the Federal Permitting Dashboard within 10 days of signature, pursuant to USDOT's *Federal Permitting Dashboard Reporting Standard* (Dec. 2018) (internal only).

5.7. Sample language. The language below should be sufficient for most amended decision documents. The intent here is to tell the story of the environmental review process. If there are multiple supplemental documents or re-evaluations, those should also be included in the amended decision document. Regional staff should modify this sample language when there are unique project circumstances.

The Federal Transit Administration (FTA) issued a [decision document] based on the [original environmental document] in [month/year]. The decisions and findings in this Amended [decision document] are based on and incorporate by reference to the limited supplemental environmental review contained in the [supplemental environmental analysis, month/year] and [other supplemental documents as appropriate]. The decisions and findings made in the [month/year] [decision document] remain in effect, except where this Amended [decision document] expressly alters them, as described in Section [name/number] below. Therefore, the limitation on claims that may be brought against the project remains in effect, as published in the Federal Register on [month, day, year].

Environmental decision documents may be found on FTA's public website.

5.8. Limitation on Claims notices. FTA provides notice of the amended FONSI/ROD via the *Federal Register*. FTA will note the "final agency action" (i.e., amended FONSI or ROD), and will identify any supporting documentation, including the supplemental EIS or EA. The notice does not alter or extend the limitation period for project decisions previously published in the *Federal Register*

(i.e., the amended FONSI/ROD limitation notice does not open the entire project for legal claims). FTA's policy is to provide the referenced document and associated documents to the public on either FTA's or the project sponsor's website. (See SOP No. 15 for more information.)

6. References

- FTA's Environmental Impact and Related Procedures, 23 CFR 771.129 and 771.130
- National Environmental Policy Act, 42 U.S.C. Sections 4321-4347
- CEQ regulations implementing NEPA, 40 CFR Part 1502.9
- FTA's Project Management Oversight regulations, 49 CFR part 633
- FAQs about NEPA Re-evaluations in The Environmental Quarterly (FHWA, 2009)
- FHWA Technical Advisory T6640.8a, Section XI: Reevaluations
- FTA Order 1100.50D, Delegations of Authority
- Joint Guidance FHWA/Caltrans NEPA Consultation/Re-evaluation Guidance (FHWA/Caltrans 2007)
- Re-Evaluations of NEPA Documents (Requested by AASHTO Standing Committee on Environment, 2008)
- USDOT Federal Permitting Dashboard Reporting Standard (2018), internal—FTA only

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Section 4(f) Evaluations
Date: August 2016
SOP No.: 18
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance to clarify FTA roles and responsibilities, recommend timing of Section 4(f) processes in conjunction with the National Environmental Policy Act (NEPA), and improve understanding of the Section 4(f) process.

The regulations at 23 CFR part 774 implement 23 U.S.C. § 138 and 49 U.S.C. § 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as "Section 4(f)."

2. Applicability/Scope

Project applicability. Section 4(f) applies to any Department of Transportation (DOT)-funded project regardless of the NEPA class of action (categorical exclusion [CE], environmental assessment [EA], or environmental impact statement [EIS]), or the timing of the discovery of the Section 4(f) property. A Section 4(f) analysis is required for DOT actions undergoing NEPA analysis and documentation if properties protected by Section 4(f) would be 'used', as defined in 23 CFR 774.17 (see Section 4.3, below); however, a Section 4(f) analysis may also be required for construction activities post NEPA when there are either late discoveries or late designations of properties protected by Section 4(f) (see 23 CFR 774.9(e) and 11(f) as well as the Federal Highway Administration (FHWA) Policy Paper, Question and Answer 26A and B).

Properties protected. Section 4(f) applies to:

- Historic properties that are either listed, or are eligible for listing on, the National Register of Historic Places (NRHP) regardless of ownership, including archaeological sites that are important for preservation in place (Section 4(f) does not apply to archaeological sites that are important for data recovery, whether data recovery is performed or not);
- Significant* publicly owned parks and recreation areas that are also open to the public; and
- Significant* publicly owned wildlife or waterfowl refuges whether they are open to the public or not.

**Significance for parks, recreation areas, and wildlife/waterfowl refuges is determined by the official with jurisdiction. When the official with jurisdiction determines that a park, recreation area, or wildlife and waterfowl refuge is not significant, FTA reviews the determination for reasonableness per 23 CFR 774.11(c). In the absence of a significance determination by the official with jurisdiction, FTA assumes the resource is significant.*

3. Responsibilities

FTA responsibilities. It is solely FTA's responsibility to make Section 4(f) determinations. The FTA Regional Administrator is responsible for making findings under Section 4(f) for projects within that region. FTA regional staff, in consultation with appropriate headquarters staff, is responsible for working with grant applicants to ensure the preparation of legally sufficient Section 4(f) analyses and that the process is properly documented in the environmental project file. FTA regional staff should be familiar with the Section 4(f) regulations at 23 CFR part 774 and the FHWA Section 4(f) Policy Paper.

Where FTA regional staff is considering a constructive use determination, they must consult with headquarters TPE-30 staff prior to publication of a Section 4(f) analysis to ensure consistency across the agency on the constructive use determinations.

Regional Counsel must review all Section 4(f) approvals under §§774.3(a) and 774.3(c) (i.e., use of Section 4(f) properties) for legal sufficiency.

Grant applicants. Grant applicants are responsible for preparing Section 4(f) analyses. Grant applicants can conduct most of the local consultation required for a Section 4(f) analysis, such as coordination with local parks departments. But any coordination and findings that can be used in Section 4(f) associated with Federal laws, such as Section 106 of the National Historic Preservation Act (NHPA), or that requires involvement from other Federal agencies, such as use of Federal lands, should be managed by FTA regional staff. FTA regional staff is responsible for ensuring that all documentation of coordination (meeting minutes, correspondence, etc.) is included in the Administrative Record for the project. Grant applicants may not make any Section 4(f) determinations.

Historic properties are treated differently in the Section 4(f) regulations than non-historic properties and the different agency roles and responsibilities for each type of property are discussed below:

Official(s) with jurisdiction for historic properties:

State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO). The SHPO is an official with jurisdiction for Section 4(f) properties that are eligible for or listed on the NRHP except when a Tribal Historic Preservation Officer (THPO) is an official with jurisdiction (see discussion below). The SHPO has no role in making Section 4(f) determinations, and only serves as an official for consultation.

Tribal Historic Preservation Officer (THPO). A THPO is an official with jurisdiction for Section 4(f) properties located on tribal lands if the tribe has assumed the responsibilities of the SHPO, as provided for in the NHPA. If the historic property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO (See 36 CFR 800.2 and the FHWA Section 4(f) Policy Paper, Question/ Answer 9, Officials with Jurisdiction, Consultation and Decisionmaking to determine when the THPO is considered an official with jurisdiction.). Like the SHPO, the THPO has no role in making Section 4(f) determinations, and only serves as an official for consultation when appropriate, as discussed above.

Advisory Council on Historic Preservation (ACHP). When the ACHP is participating in the Section 106 process as a consulting party, the agency is an official with jurisdiction for Section 4(f) properties that

are eligible for, or listed on, the NRHP. Like the SHPO/THPO, the ACHP has no role in making Section 4(f) determinations, and only serves as an official for consultation when serving as an official with jurisdiction (refer to 23 CFR 774.5, 36 CFR 800.2 and the FHWA Section 4(f) Policy Paper, Question/Answer #9 to determine when ACHP is an official for consultation).

U.S. Department of Interior (DOI). The Section 4(f) regulations afford the DOI the opportunity to review the Section 4(f) analysis where FTA is likely to issue a Section 4(f) approval (i.e., use of a Section 4(f) property, whether historic property or non-historic property). In addition, the National Park Service (NPS), an agency within the DOI, is an official with jurisdiction for Section 4(f) properties that are also National Historic Landmarks.

Official(s) with jurisdiction for non-historic properties:

For parks, recreation areas and wildlife/waterfowl refuges that qualify for protection under Section 4(f), FTA must coordinate with the official(s) of the agency or agencies that own or administer the property in question, and with staff who are empowered to represent the agency on matters related to the property. For parks/recreational areas, this will depend on the ownership of the park (e.g., relevant city or county). For wildlife/waterfowl refuge the official with jurisdiction may be the state department of natural resources, U.S. Fish and Wildlife Service, or other public agency.

For Section 4(f) properties with Federal encumbrances (e.g., easements or other use restrictions), FTA must coordinate with the appropriate Federal agency to ascertain its position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval. For example, when a project would use land of a national forest that qualifies for Section 4(f) protection, FTA must invite the U.S. Department of Agriculture, U.S. Forest Service to review the Section 4(f) evaluation and inform FTA whether other requirements apply.

4. Standard Procedures

Please refer to Attachment 1 for an overview of the Section 4(f) process.

While the following information is provided in a series of steps, there may be circumstances where a step-wise procedure is not followed in order to allow flexibility and efficiency in the process. For example, it is recommended that FTA regional staff discuss potential Section 4(f) 'uses' with the project sponsor/grantee and the official(s) with jurisdiction as early in the process as practicable so that avoidance, minimization, and mitigation measures can be incorporated into the project design, which may avoid the 'use' of Section 4(f) resources or may result in a *de minimis* determination. The process is flexible and should be tailored depending on project size and complexity for maximum efficiency while still meeting regulatory requirements.

4.1. Identify Section 4(f) properties in the vicinity of the project. Per 23 CFR 774.9 and the FHWA Section 4(f) Policy Paper, Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected properties remains a viable option for the project, if possible. Regional FTA staff should double-check information provided by the project sponsor/grantee and their consultants, either through site visits (if feasible), the National Register of Historic Places, state

databases, and other online tools such as NEPA Assist, Google Maps, Google Earth, topographic maps, etc.

The process that FTA routinely follows for Section 106 of the NHPA typically will identify the historic sites that may qualify for Section 4(f) protection (See 36 CFR part 800). Accordingly, that process should be initiated and potentially eligible properties identified early in project planning or development, so that FTA may determine whether Section 4(f) applies and whether feasible and prudent avoidance alternatives may exist (see 23 CFR 774.11(e)).

In identifying Section 4(f) properties other than historic properties, such as parks, recreation areas, and wildlife/waterfowl refuges, staff should be guided by the potential for Section 4(f) uses by the project. This will usually consist of an area directly used by the project and adjacent properties. These properties are often apparent on maps of the proposed project area (online maps, NEPA Assist, Google Earth, topographic map, etc.).

4.2. Identify the official(s) with jurisdiction for the Section 4(f) properties. If there are properties identified that meet the criteria for protection under Section 4(f), FTA regional staff must identify the official(s) with jurisdiction of the resources as defined above. This is necessary for determination of applicability of Section 4(f) per 23 CFR 774.11 as well as for coordination and consultation requirements.

Per the FHWA Section 4(f) Policy Paper regarding Official(s) with Jurisdiction in instances where historic sites are either located within the property boundaries of parks, recreation areas, or wildlife/waterfowl refuges, or when historic sites also function as both a historic site and a public park, recreation area, or wildlife/waterfowl refuge:

> "Some public parks, recreation areas, and wildlife and waterfowl refuges are also historic properties either listed or eligible for listing on the NRHP. In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the historic site there will be more than one official with jurisdiction. For historic sites the SHPO/THPO and ACHP if participating are officials with jurisdiction. Coordination will also be required with the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property, such as commenting on project impacts to the activities, features, or attributes of property and on proposed mitigation measures. For a NHL, the National Park Service is also an official with jurisdiction over that resource."

4.3. Determine whether there is a use of a Section 4(f) property. FTA regional staff must next determine if there is either a direct (permanent or temporary) or constructive "use" as defined in 23 CFR 774.17.

The question of "use"/applicability is not always immediately clear, especially in cases such as historic districts (see FHWA/FTA Policy Paper Q&A 7C) or multiple use properties such as national forests or wildlife management areas (see Policy Paper Q&A 4), etc. In these instances, the Policy Paper is an excellent resource to help determine the applicability of Section 4(f). Note that the determination as to whether there is a use/Section 4(f) applies (which is the sole responsibility of the FTA) relies on consultation with officials with jurisdiction who determine

significance of resources. The determination may also involve review of management plans or other documentation by FTA Regional Office staff to determine whether there would be a 'use' under Section 4(f).

It is also important during this time to determine the use of archaeological resources and if they warrant preservation in place, as determined by consultation with official(s) with jurisdiction. If the archaeological resource should be preserved in place then this determination should be documented and avoidance alternatives or alternatives to incorporate into the project should be developed.

If FTA determines that the project would not "use" properties protected by Section 4(f), there is no need to issue an official "no use" determination. This determination could be documented in the Administrative Record, and generally should be documented in the environmental document where appropriate. For example, there is no need to document every potential constructive use (per 23 CFR 774.15(c)) and there is no need to document a "no use" determination is there was not an actual potential use of a Section 4(f) property by the FTA action (i.e., there is no need to document every 'park' located a half mile from a proposed project and document the fact that there would be no Section 4(f) "use"). In addition, documentation of these determinations will vary. For CEs at 23 CFR 771.118(c), there is no "environmental document", per se, so if there is a determination of "no use", this could be documented in the project record (Please refer to the relevant SOP for documentation requirements for each type of environmental document).

Where there is a constructive use, which is extremely rare for transit projects, the Section 4(f) evaluation must discuss the impact on the protected property and how the impact substantially impairs the features, attributes, or activities that qualify the resource for Section 4(f) protection. Note that an "adverse effect" under Section 106 for a historic resource does not necessarily mean that there is a "constructive use" under Section 4(f). The adverse effect would have to substantially impair a feature, attribute, or activity of the historic resource that qualified it as eligible for listing on the NRHP to be considered a constructive use. For example, a historic resource that is eligible for the NRHP based on its architecture would not have a constructive use solely due to adverse noise impact.

4.4. Determine whether the physical incorporation of Section 4(f) land into the transportation project qualifies as a *de minimis* impact. After considering avoidance, minimization, mitigation, and enhancement measures, and after the required coordination process described in 23 CFR 774.5(b), FTA may determine that a use will result in only a *de minimis* impact to a Section 4(f) resource. *De minimis* is defined in 23 CFR 774.17. Such a finding completes the Section 4(f) process. Documentation of the *de minimis* determination must be included in the project's administrative record and documented in the environmental document, as appropriate.

The definition of *de minimis* impact and the consultation requirements differ between historic sites and parks, recreation, and wildlife/waterfowl refuges. These differences are described in detail in the FTA/FHWA Section 4(f) Policy Paper.

For *de minimis* impact findings for parks, recreation areas, or wildlife/waterfowl refuges, an opportunity for public review and comment concerning the potential effects on the protected features, attributes, or activities of the property must be provided. Per the FHWA Section 4(f) Policy Paper:

> "The public involvement requirements associated with specific NEPA document and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (*See* 23 CFR 774.5(b)(2))."

In general, the public notice and comment process related to *de minimis* impact findings will be accomplished through the State DOT's approved public involvement process (*See* 23 CFR 771.111(h)(1)). However, for those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, the impacts, and public interest. Possible methods of public involvement are many and include newspaper advertisements, public meetings, public hearings, notices posted on bulletin boards (for properties open to the public), project websites, newsletters, and placement of notices or documents at public libraries. All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file. Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments. All comments and responses should be documented, as appropriate, in the project file."

For *de minimis* findings for historic properties, the public notice and comment required by 36 CFR part 800 is sufficient.

Unlike full Section 4(f) evaluations, coordination with DOI is not required for *de minimis* impact findings.

4.5. Determine whether a Section 4(f) exemption applies. Section 774.13 of Title 23, CFR, describes several exemptions from Section 4(f) approval. In such circumstances, FTA regional staff should coordinate with the project sponsor/grantee to ensure that all appropriate supporting documentation is included in the project administrative record and adequately described in the environmental document (please refer to the relevant SOP for each environmental document type for information on adequacy of documentation for that class of action). This documentation should include items such as letters from the official with jurisdiction or descriptions of why the particular exclusion applies.

4.6. Identify whether there are feasible and prudent avoidance alternatives to each use of a Section 4(f) property. Identify whether there are alternatives to the use of a particular Section 4(f) property that would avoid using <u>any</u> Section 4(f) properties (avoidance alternatives). If a feasible and prudent avoidance alternative (defined at 23 CFR 774.17) exists, it must be chosen over alternative that use Section 4(f) properties.

For any potential avoidance alternative that is rejected because it is not feasible and prudent, documentation must clearly identify the factor(s) in the regulation that make it infeasible or imprudent. In this instance, the evaluation only needs to focus on the factor(s) that make the avoidance alternative infeasible and imprudent, and there is no need to discuss all factors listed in the consideration feasibility and prudence listed in part 774.17. For example, if an avoidance alternative is not feasible and prudent because it results in unacceptable safety or operational problems, then information clearly identifying how that alternative would result in unacceptable safety or operational problems must be included in the evaluation, and there is no need to discuss any of the other factors unless they add to the justification that the alternative would be infeasible or imprudent.

4.7. If there are no feasible and prudent avoidance alternatives, (1) identify all possible planning to minimize harm and (2) conduct a least overall harm analysis. Minimization and mitigation should be considered as early in the process as practicable in coordination with the project sponsor/grantee and official(s) with jurisdiction over resources protected by Section 4(f). Regional staff must ensure that the Section 4(f) evaluation describes how the project includes all reasonable measures to minimize harm or mitigate for adverse impacts and effects, according to the requirements found in the definition of 'all possible planning' at 23 CFR 774.17.

If no feasible and prudent alternatives exist that would avoid using Section 4(f) properties, the alternative with the least overall harm must be selected. All seven factors in 23 CFR 774.3(c)(1) must be addressed in the determination of the alternative with least overall harm. The FHWA Section 4(f) Policy Paper, section 3.3.3.2, also addresses the analysis of least overall harm including cases where two or more alternatives are substantially equal in the assessment of least overall harm. FTA regional staff should review these resources for development of the least overall harm analysis and documentation.

4.8. Review by DOI and/or any federal agency with an encumbrance. The draft document must be sent to the DOI and any entities with jurisdiction over a Section 4(f) resource included in the evaluation, when applicable (Refer to "Section 3, Responsibilities" for a discussion of the agencies that must review the Section 4(f) evaluation as well as the FHWA Section 4(f) Policy Paper, Q/A 9 A-G). DOI is given a 45 calendar-day review period, and other agencies with jurisdiction should be afforded an appropriate time period for review. FTA regional staff shall transmit a letter including a notation of the 45-day review period for the document to DOI and the appropriate review period for any other federal agency with an encumbrance. Per 23 CFR 774.5(a), "If comments are not received within 15 days after the comment deadline, [FTA] may assume a lack of objection and proceed with the action." The final evaluation shall include a copy of the response(s) received from the other agency/agencies, or note lack of response.

4.9. Legal sufficiency review. FTA Regional Counsel should be consulted to determine their preference for review of the Draft Section 4(f) evaluation. However, per 23 CFR 774.7(d), "[FTA] shall review all Section 4(f) approvals under §§774.3(a) and 774.3(c) for legal sufficiency."

4.10. Approval of Section 4(f) analysis. Final approval for evaluations that are integrated in an environmental document will generally occur upon FTA approval of the FTA decision document for that environmental review process – in the record of decision (ROD), finding of no significant

impact (FONSI), or categorical exclusion (CE). However, the regulation at 23 CFR 774.7 does allow for flexibility.

- For Section 4(f) evaluations processed as part of an EIS process, the draft Section 4(f) evaluation is usually included in the draft EIS and the final EIS/ROD contains the final Section 4(f) evaluation. The ROD explicitly makes or confirms the Section 4(f) finding. Attachment 1 shows the timing of Section 4(f) Evaluations with FEIS/ROD.
- For Section 4(f) evaluations processed as part of an EA, the draft Section 4(f) evaluation is usually included in the EA and the FONSI includes the final Section 4(f) evaluation. The FONSI explicitly makes or confirms the Section 4(f) finding.
- For Section 4(f) evaluations in CEs, the approval of any Section 4(f) evaluation is concurrent with the approval of the CE.

4.11. Programmatic Section 4(f) evaluations. FTA currently does not have any approved Programmatic Section 4(f) Evaluation processes in place, but will be developing these in the near future, and this SOP will be updated to reflect this as another potential process for establishing compliance with Section 4(f) at that time.

FHWA Section 4(f) Programmatic Evaluations do not apply to FTA.

4.12. Section 4(f) documentation. Attachment 2 includes an annotated outline for the Section 4(f) evaluation.

The Section 4(f) evaluation should be integrated into the environmental document, but may be prepared as a stand-alone document if necessary.

- **Incorporation into the environmental document.**
    - The Section 4(f) evaluation should be evaluated independently in the document and be a separate section, chapter, or appendix entitled "Section 4(f) Evaluation" – i.e., it should not be combined with Section 106, Section 6(f), or other parklands analysis, but should be referenced in those chapters, as appropriate .
    - Section 4(f) evaluations that are included in environmental documents are typically incorporated and reviewed internally with the preliminary version of the environmental document.

- **Separate from the environmental document.** There are circumstances when a Section 4(f) evaluation cannot be included in an environmental document and a separate evaluation is required. For example, a separate Section 4(f) evaluation would be done for a project approved as a CE or may be necessary in the event of discovery of a Section 4(f) resource after completion of an environmental document. In these cases, the evaluation should be a stand-alone document that provides enough information about the purpose and need and alternatives analyzed, as appropriate, so that reference to other documents is not required. A separate Section 4(f) evaluation is required when the project is classified as a CE, per 23 CFR 774.7(f), or after the CE, FONSI, or ROD has been processed under the following conditions, per 23 CFR 774.9(c), except as provided in 23 CFR 774.13:

- A proposed modification of the alignment or design would require the use of a Section 4(f) resource; or
- FTA determines that Section 4(f) applies to the use of a property; or
- A proposed modification of the alignment, design, or measure(s) to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measure to minimize harm.

Preparation of a separate Section 4(f) evaluation after the CE, FONSI, or FEIS will not necessarily require the preparation of a new or supplemental environmental document. The need for a supplemental environmental document is determined through the re-evaluation process (see SOP No. 17 Re-evaluations and Supplementals). In addition, the separate evaluation does not prevent the granting of new approvals, require the withdrawal of previous approvals, or require the suspension of project activities for any activity not affected by the Section 4(f) evaluation.

For full Section 4(f) evaluations processed separate from environmental documents, the Regional FTA Office reviews the preliminary draft for approval as described above. The draft Section 4(f) evaluation is then forwarded to the U.S. DOI and any entities with jurisdiction over a Section 4(f) resource and circulated to the USDA and/or HUD, as appropriate.

4.13. Section 4(f) in tiered environmental documents. When a Tier I EIS is prepared, the detailed information necessary to complete the Section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made on the potential impacts that a proposed action will have on Section 4(f) properties and whether those impacts could have a bearing on the decision to be made.

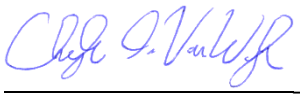
A preliminary determination may be made at this time as to whether there are feasible and prudent alternatives that avoid the use of Section 4(f) properties. This preliminary determination must consider all possible planning to minimize harm to the extent that the level of detail available at the Tier I EIS stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary determination is then incorporated into the Tier I EIS document.

FTA regional staff are responsible for determining whether there is an appropriate level of detail to make a preliminary Section 4(f) determination and how compliance with this regulation can be achieved.

5. References

- Section 4(f) regulations, 23 CFR 774 (see also Preservation of Parklands, 23 U.S.C. § 138 and Policy on Lands, Wildlife and Waterfowl Refuges and Historic Sites, 49 U.S.C. § 303)
- National Historic Preservation Act and Section 106 regulations: 36 CFR part 800
- FTA's Environmental Impact and Related Procedures, 23 CFR part 771
- FHWA Policy Paper (adopted by FTA per FTA November 9, 2012 Memo)

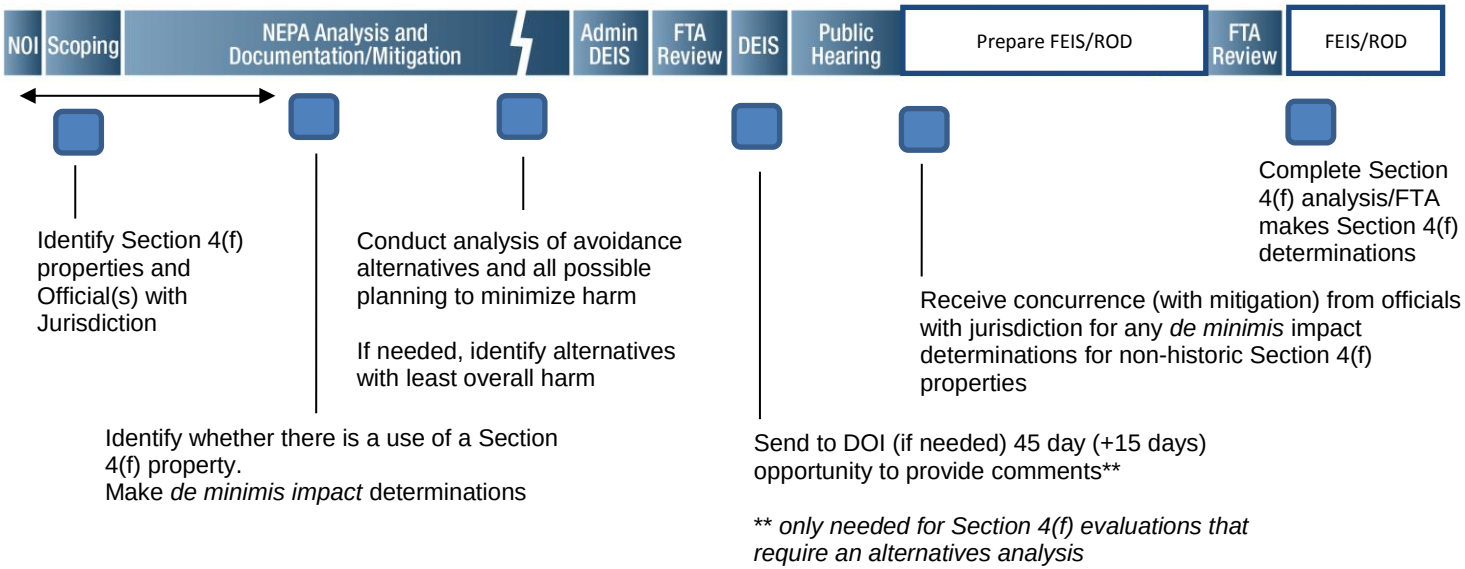
- SOP No. 17, Re-evaluations and Supplementals

APPROVAL: 

Christopher S. Van Wyk
Director, Office of Environmental Programs

DATE: 8/11/2016

Attachment 1 – Section 4(f) Process



Attachment 2 – Section 4(f) annotated outline

[Note: This attachment is a sample annotated outline of how the evaluation could be framed. Notes are included in brackets and bolded smaller font, such as this, throughout this document. Sample language that could be used in the Section 4(f) evaluation is included in *italics*. This outline suggests ways of presenting information, but is not prescriptive. Any format that clearly provides sufficient supporting documentation to demonstrate why there is no feasible and prudent alternative to the use of Section 4(f)-protected properties and summarizes the results of all possible planning to minimize harm to the Section 4(f) property (as required by 23 CFR 774.7) is acceptable. Please also note that not all sections listed below are appropriate for every Section 4(f) evaluation. Only applicable sections should be included in the evaluation (for example, if there is no *de minimis* determination, there is no need for a section discussing *de minimis* and why it is not used on the project.

Please note that, at a minimum, the Section 4(f) evaluation should be its own separate chapter or section of the environmental document if not completed as a separate document. The Section 4(f) evaluation should not be split up to be included in the discussions of the properties protected by Section 4(f). In other words, the Section 4(f) evaluation should not be part of the historic resources chapter/section and the parks and recreation areas chapter/section. The Section 4(f) evaluation should be consolidated and be a separate chapter/section that is a Section 4(f) evaluation of the proposed project.]

Chapter X.0 Section 4(f) Evaluation

[Note: If the Section 4(f) evaluation is included in the environmental document as its own chapter, formatting should be consistent with the rest of the document.]

SAMPLE TEXT: *This chapter provides documentation necessary to support determinations required to comply with the provisions of Section 4(f) of the Department of Transportation Act of 1966, as amended (23 CFR 774; codified in 49 U.S.C. 303 and generally referred to as "Section 4(f)").*

This Section 4(f) evaluation has been prepared in accordance with the joint FHWA/FTA regulations for Section 4(f) compliance codified in 23 CFR 774. **[Note: Describe any additional guidance used in making this determination, such as the Section 4(f) Policy Paper]**

X.1 Introduction

[Note: Very briefly introduce the proposed project in a paragraph or two, and then include a summary of the requirements of Section 4(f) either using the sample text below or similar summary.]

SAMPLE TEXT: *The proposed project described in this chapter may receive Federal funding through the Federal Transit Administration and would have a "use" of property protected by Section 4(f) as defined in 23 CFR 774.17 (see X.1(a) below). Therefore, documentation of compliance with Section 4(f) is required. Section 4(f) protects the following properties of national, state, or local significance:*

- *publicly owned, publicly accessible parklands and recreational lands;*
- *public wildlife/waterfowl refuges, regardless of public access; and*
- *historic sites, regardless of public or private ownership.*

If parks, recreational areas, or refuges are determined not to be properties of national, state, or local significance by the official(s) with jurisdiction, and after review by FTA for reasonableness, then Section 4(f) protection generally does not apply. Absent a determination from the official with jurisdiction regarding the significance of these properties, FTA assumes that they are significant properties and applies the requirements of Section 4(f). Historic sites listed on, or eligible for listing on, the National Register of Historic Places (NRHP) are significant properties for Section 4(f) purposes.

Section 4(f) specifies that FTA may only approve a transportation project that requires the use land from applicable properties as described above if:

- *There is no prudent and feasible alternative to the use of that land and all possible planning to minimize harm due to the use has been included as part of the proposed project, or*
- *The Administration determines that the use of the property, including any measure(s) to minimize harm, will have a* de minimis *impact on the property, as defined in 23 CFR 774.17.*

X.1(a) Section 4(f) "Use" Definitions

SAMPLE TEXT: *As defined in 23 CFR 774.17, the "use" of a protected Section 4(f) property occurs when any of the following conditions are met:*

Direct Use – A direct use of a Section 4(f) property occurs when property is permanently incorporated into a proposed transportation project. This may occur as a result of partial or full acquisition of a fee simple interest, permanent easement, or temporary easement that exceeds regulatory limits.

Temporary Use – A temporary use of a Section 4(f) property occurs when there is a temporary occupancy of property that is considered adverse in terms of the preservation purposes of the Section 4(f) statute. A temporary occupancy of property does not constitute a use of a Section 4(f) resource when all of the following conditions are satisfied:

- *Duration is less than the time needed for construction of the project and there is no change in ownership of the land;*
- *The nature and magnitude of the changes to the Section 4(f) property are minimal;*
- *There are no anticipated permanent adverse physical impacts, nor is there interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis;*
- *The land being used will be fully returned to a condition at least as good as that which existed prior to the project; and*
- *There is a documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.*

Constructive Use – A constructive use of a Section 4(f) property occurs when a transportation project does not incorporate land from the resource, but the proximity of the project results in impacts so severe that the protected activities, features, or attributes that qualify the resource for protection under Section 4(f) are substantially impaired (23 CFR 774.15)(emphasis added).
[Note: Constructive uses are very rare. Adverse Effects under Section 106 do not necessarily constitute a constructive use of a Section 4(f) property. In order for there to be a constructive use, the activity, feature, or attribute that qualifies the property for Section 4(f) protection has to be substantially impaired.]

X.1(b) *De minimis* impacts

SAMPLE TEXT: *The requirements of Section 4(f) are satisfied with respect to a Section 4(f) resource if it is determined by the FTA that a transportation project would have only a "*de minimis *impact" on the Section 4(f) resource. The provision allows avoidance, minimization, mitigation, and enhancement measures to be considered in making the* de minimis *determination. The official(s) with jurisdiction over the resource must be notified of the Agency's determination. 23 CFR 774.17 defines a* de minimis *impact as follows:*

- *For parks, recreation areas, and wildlife/waterfowl refuges, a* de minimis *impact is one that would not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f), and the official with jurisdiction has concurred with this determination after there has been a chance for public review and comment* **[Note: For parks, recreation areas, and wildlife/waterfowl refuges, public notice and an opportunity for public review and comment concerning the effects on the protected features, attributes, or activities of the property must be provided. After this public review and comment, written concurrence on FTA's de minimis determination is required from the official with jurisdiction.]***;*
- *For historic sites,* de minimis *impact means that the FTA has determined, in accordance with 36 CFR part 800, that either no historic property is affected by the project, or the project would have "no adverse effect" on the property in question. The official with jurisdiction must be notified that the FTA intends to make a* de minimis *finding based on their concurrence with the "no adverse effect" determination under 36 CFR 800. This is usually done in the effect determination letter send to the official with jurisdiction for their concurrence.*

X.2 Description of the Project

[Note: Enter project description here, including description of the Preferred Alternative (if known) and a very brief explanation of Purpose and Need. If the Section 4(f) evaluation is included as a chapter in the environmental document, refer to relevant sections for more detail. If the Section 4(f) evaluation is prepared as a separate document, more detail will be needed here.]

Briefly describe the process by which alternatives were developed, evaluated, and refined to become the preferred alternative (if already determined) under consideration in the environmental document. You may cite the Alternatives section of the document for more detailed description of the alternatives if the Section 4(f) evaluation is included as a chapter in the environmental document. If the Section 4(f) evaluation is prepared as a separate document, more detail will be needed here.]

X.3 Description of Section 4(f) Properties

[Note: Identify historic properties, parklands, and/or other Section 4(f) properties that are within the APE. Describe and graphically represent the APE. Identify these properties as publicly or privately owned, as appropriate. You may briefly summarize the properties here, along with significance of the properties, and reference the relevant sections of the environmental document if the Section 4(f) evaluation is not prepared as a separate document. Include tables, maps, and graphics as necessary or refer to relevant sections of environmental document where these can be found. Include "use" determinations. Generally describe agency consultation and coordination and current document status.]

SAMPLE TEXT: *The following sections describe use of Section 4(f) properties. An assessment has been made as to whether any permanent or temporary occupancy of a property would occur and whether the proximity of the Project would cause any effects (such as access disruption, noise, vibration or aesthetic) that would substantially impair the features or attributes that qualify the resource for protection under Section 4(f) and, therefore, constitute a use.*

X.4 Use of Section 4(f) Properties

[Note: Please review 774.11 Applicability and 774.13 Exceptions. These sections review the applicability to various properties and when exceptions might apply. Include some introductory language here that includes a general explanation of any exceptions or applicability provisions that potentially apply to the project, and a statement that the applicability of the provision or exception to particular properties will be discussed in the section with detailed information on each property below.]

X.4 (a) Historic Sites

[Note: This section discusses the historic sites with potential Section 4(f) use. Suggest a table listing each historic Section 4(f) property and use determinations for each property; identification of Section 106 determinations for each historic resource; quantified impacts as appropriate; identification of any de minimis impact determinations and reference to the de minimis section of the evaluation. The following subheadings are suggested as ways to address this information, but are not required or exclusive. Please feel free to present the relevant information in any way that makes it clear to the reader:]

Sample Table [Note: This is only a suggestion. Any table that clearly illustrates the alternatives and information to the reader is acceptable]:

Alternative	Section 4(f) Property Name	On/Adjacent to Alignment	Section 106 Effect Determination	Use (None, Direct, Temporary, or Constructive)	*De minimis* (Yes/No)
Alt. A					
(insert as needed)					
Alt. B					
Alt. C					

[Note: Include discussion of the actual use of the Section 4(f) property, including direct, temporary or constructive use determinations. For direct uses, describe the use for each alternative evaluated; for temporary uses, describe why the temporary use does not meet the exemption for temporary occupancy at 774.13(d); for constructive uses, which are extremely rare, the Section 4(f) evaluation must discuss the impact on the protected property and how the impacts substantially impair the features, attributes, or activities that qualify the resource for Section 4(f) protection.]

X.4 (b) Parkland, Recreational Areas, and/or Wildlife/Waterfowl Refuges

[Note: Similar to the Historic Sites section, this section discusses parks, recreational areas, and/or wildlife or waterfowl refuges with potential Section 4(f) use. Describe the properties in detail, including a description of the coordination required for determining significance of the park, recreation area, and/or wildlife or waterfowl refuge per 774.11, and the use determinations for each property (direct, temporary, or constructive).

X.5 Alternatives Analysis

[Note: Discuss feasible and prudent avoidance alternatives. Per the Policy Paper, "Any screening of alternatives that may have occurred during the transportation planning phase may be considered as well. It may be necessary, however, to look for additional alternatives if the planning studies and environmental review process did not identify Section 4(f) properties and take Section 4(f) into account (3.3.3.1)." If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process. In addition, it is often necessary to develop and analyze new alternatives or new variations of alternatives rejected for non-Section 4(f) reasons during the earlier phases. The information in this section could instead be included in the previous section directly following the description of the use of each resource.]

Sample Table #2 [Note: another option for a potential table]:

	Alternative	Description	Area of Parkland Taken	Parkland Access Effects	Effects to Historic Resource A	Effects to Historic Resource B	Effects to Historic Resource C
Alternatives with minimum Section 4(f) Impacts (considered but rejected)	A	No Build	None	None	None		
	B	Rehabilitation	None	None	None		
	B Modified	Rehabilitation with modifications	Minor	Vehicular Access Eliminated	Adverse Effects		
	C	Tunnel	None	Vehicular Access Eliminated	Adverse Effect		
	D	New Alignment	None	None	Adverse Effect		
Alternatives considered for further evaluation	E	[Describe]	10.18 Acres	Modified, but Maintained	Adverse Effect		
	F	[Describe]	9.02 Acres	Modified, but Maintained	Adverse Effect		
	G	[Describe]	10.70 Acres	Modified, but Maintained	Adverse Effect		
	G1	[Describe]	9.02 Acres	Modified, but Maintained	Adverse Effect		
	G2	[Describe]	15.37 Acres	Modified, but Maintained	Adverse Effect		

SAMPLE TEXT: *The first three rejected alternatives do not meet the project purpose and need. All other alternatives do meet the project purpose and need, but the rejected alternatives have unacceptably high socioeconomic impacts. Additionally, alternative D has life-cycle costs of extraordinary magnitude compared to the alternatives considered for further evaluation.*

X.6 Measures to Minimize Harm

[Note: Include information detailing measures to minimize harm to Section 4(f) properties].

X.7 *De minimis* Impacts

[Note: Describe each de minimis impact determination, if any, and its status. Document all minimization or enhancement measures. Describe and reference all relevant correspondence (included in an appendix) from officials with jurisdiction/FTA.]

X.8 Coordination Activities

[Note: Describe results of coordination with official(s) with jurisdiction over the Section 4(f) property and with any Federal agencies with jurisdiction over Section 4(f) properties related to this project.]

X.9 Least Overall Harm

[Note: This section will only be included when there are several alternatives that are feasible and prudent that would each use Section 4(f) property but there is no feasible and prudent alternative that avoids the use of all Section 4(f)-protected properties. Often, there is a 'Preferred Alternative' that uses Section 4(f) property with no other feasible and prudent alternatives to avoid the use. In this case, there is no need for the overall least harm discussion.]

Sample Text: *Per 23 CFR 774.3(c)(1), in situations where all feasible and prudent alternatives use Section 4(f) properties, the Administration may approve only the alternative that causes the least overall harm in light of the statute's preservation purpose. The Administration determines the least overall harm by balancing the following factors:*

- *The ability to minimize and mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);*
- *The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;*
- *The relative significance of each Section 4(f) property;*
- *The views of the official(s) with jurisdiction over each Section 4(f) property;*
- *The degree to which each alternative meets the Purpose and Need for the Project;*
- *After reasonable mitigation, the magnitude of any adverse impacts to properties not protected by Section 4(f); and*
- *Substantial differences in costs among the alternatives (23 CFR 774.3(c)(i)).*

[Note: Include information addressing the balancing of the above factors and how the determination of least overall harm was made.]

Sample Text: *Per 23 CFR 774.3(c)(2), the alternative selected must include all possible planning, as defined in 774.17, to minimize harm to Section 4(f) properties.* **[Note: Include information on all possible planning to minimize harm. There may have been further refinements/revisions after narrowing down alternatives in the least overall harm analysis, in which case you may detail these refinements here or may refer back to relevant section above for minimization discussion]**

Sample table: **[Note: This is only a suggestion. Any table that clearly illustrates the alternatives and information to the reader is acceptable]:**

Alternative	Displacements		Cost ($M)	Stream Impacts (linear feet or crossings)	Wetland Impacts (acres or number)	Environmental Justice Communities	Uses of Section 4(f) Properties	Protected Species Habitat (acres/linear feet of streams)
	Commercial	Residential						
Alt. A								
Alt. B								
Alt. C								

X.10 Determination of Section 4(f) Use

Considering the foregoing discussion of the Project's potential use of Section 4(f) properties, avoidance alternatives, and measures to minimize harm, there would be a use of [XX] Section 4(f) properties for the Build Alternative; there would be [XX] *de minimis* impacts; there would be an additional [XX] constructive uses; and there would be [XX] temporary uses (Tables [XXX]).

Based on the above considerations, there is no feasible and prudent avoidance alternative to the use of land from [identify the properties] and the [name the alternative] causes the least overall harm given the statute's preservation purpose. The proposed action includes all possible planning to minimize harm resulting from the use of [name the properties]

Appendices

[Note: Include Appendices with relevant information like letters, comments, etc. – either in the appendix of the EA or EIS or appendix to the separate Section 4(f) evaluation, depending on how this is prepared.]

Title: Consideration of Contaminated Properties including Brownfields
Date: August 2016
SOP No: 19
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on assessment and acquisition considerations for potentially contaminated properties, including brownfields, and contaminated properties, as part of the environmental review process.

2. Applicability/Scope

This guidance applies to property being considered for acquisition for FTA-funded projects, with an emphasis on property that is or may be contaminated, and is limited to the property considerations taking place during the environmental review process conducted pursuant to the National Environmental Policy Act (NEPA). For property appraisal and acquisition guidance, see FTA's circular on grant management requirements (latest version 5010.1D).

3. Responsibilities

FTA Regional staff, with assistance from FTA Headquarters and FTA Regional Counsel, as appropriate, must ensure that the condition of the property being considered for acquisition is as thoroughly assessed as possible prior to approval of the final environmental document. FTA Regional staff should coordinate with real estate staff in FTA's Office of Program Management (TPM) to ensure that grantees follow the appropriate appraisal process.

4. Background Information

4.1. Definitions.

- **Brownfield:** Real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.[1]
- **Contaminants:** Any element, substance, compound, or mixture that, after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, will or may reasonably be anticipated to cause illness, death, or deformation in any organism.
- **Environmental Site Assessment (ESA):** The assessment or evaluation of a property to identify potential environmental contamination and assess potential liability for any contamination present at the property.
- **Hazardous Substance:** A broad term that includes all substances that can be harmful to people or the environment; toxic substances, hazardous materials and other similar terms are subsets of hazardous substances.

[1] Note that this is a descriptive definition. There is not an official "list" of brownfields maintained by the Federal government.

- **Phase I Environmental Site Assessment:** A standard research study/record search intended to gather sufficient information to assess the environmental condition of the property and identify actual or potential areas where contaminants may have been released to the environment.
- **Phase II Environmental Site Assessment:** An intrusive study where actual physical environmental samples are collected and analyzed to characterize the type, distribution, and extent of contaminants in the environment. Normally completed if recommended based on Phase I Environmental Site Assessment.
- **Phase III Environmental Site Assessment:** This Phase refers to the full characterization of contamination, and the design and implementation of remediation.
- **Real Property:** Land, including affixed improvements, structures, and appurtenances. It does not normally include movable machinery and equipment.
- **Remediation:** Any action, developed in consultation with appropriate regulatory agencies in accordance with Federal, State and local law, to reduce, remove, or contain contamination.

4.2. FTA policy on brownfields.

FTA supports the use of brownfields in transportation projects as part of efforts to improve communities through FTA transportation investments. FTA's policy allows for the use of brownfields for FTA-funded projects if:

- The use of such sites is consistent with the purpose and need of the transit project;
- The costs of remediation are expected to be reasonable in comparison with the overall cost and public benefit of the project; and
- Liability concerns are minimized by following proper due diligence for all potential real estate acquisitions.

The legal responsibility for hazardous material cleanup and disposal rests with parties within the property title chain and with parties responsible for the placement of the material on the property. Project sponsors must attempt to identify and seek legal recourse from those potentially responsible parties or substantiate the basis for not seeking reimbursement.

In light of the policy, FTA encourages project sponsors to consider using brownfield sites when identifying project sites despite potential inhibiting factors (e.g., liability concerns, financial barriers, and cleanup timelines). Transit facilities are particularly suitable for reusing brownfield sites because transit facilities:

- Tend to be located in urban areas where most brownfields are found;
- Are not designed for continuous human occupancy;
- May enhance economic redevelopment potential of an area; and,
- May fall within a less restrictive land use category for purposes of site remediation.

While encouraging the use of brownfields for projects, FTA should also encourage proper due diligence prior to selecting and purchasing properties through complete assessment of potential contamination during the environmental review process. To encourage the complete assessment of contamination prior to project decision-making, FTA generally will not participate in the remediation of contamination discovered during construction.

5. Standard Procedures

5.1. Environmental review process.

Construction of a transit project on a brownfield may cause adverse impacts primarily through the exposure of existing hazardous substances or contaminants and their potential release into the environment. For example, the construction may result in a contaminant being carried by wind or trucks into the surrounding neighborhood or stormwater runoff carrying contaminated sediment into the neighborhood or into larger bodies of water. If there are soil contamination issues on a site, even if the contaminants may not be exposed or disturbed during construction, the site may need to be remediated because of the potential for that contaminant to migrate into the groundwater table and to downstream properties or water bodies. Therefore, the contaminant and concentration of contamination, including its nature and associated short-term and long-term remediation, must be determined and considered during the environmental review process.

If potential impacts from the hazardous substances are identified, FTA Regional staff may suggest that the transit agency consider alternative sites during the environmental review, notwithstanding the FTA policy, if the cost of the required remediation would be excessively high, especially as compared to the initial projected cost for the transit project. Where cost of remediation cannot be accurately determined prior to purchase, the transit agency will need to consider the risk of acquiring the site.

5.1.1. Due diligence/site assessments.

The first step during the environmental review process is to conduct a Phase I ESA, in accordance with EPA's All Appropriate Inquiries Rule(40 CFR part 312), on any property considered for the project. The Phase I ESA identifies the potential presence of contaminants on a property and provides potential defenses to liability if the project sponsor acquires the property. A Phase I ESA will evaluate prior uses and ownership of a property in order to assess conditions at the property that may be indicative of releases or threatened releases of hazardous substances at, on, in, or to the property, known as recognized environmental concerns (REC). The Phase I ESA consists of a thorough historical records search and a site visit conducted by an ESA professional. If the current property owner refuses to grant right-of-entry to the ESA professional and state law doesn't allow for limited right-of-entry, then the property can be visually inspected offsite or from overhead. If the property is so large and covered that it cannot be visually inspected from offsite or from overhead, an initial site assessment consisting of all elements of the Phase I ESA that do not require right-of-entry would be conducted.

If a property is suspected to have contaminants through the identification of RECs in the Phase I ESA, and the project sponsor wants to continue considering purchasing the property for the project, then a Phase II ESA must be conducted. A Phase II ESA, which often consists of soil and/or groundwater sampling, will confirm the presence and extent of contamination on the property as much as possible. This will then allow for development of a remediation plan and cost estimate of the remediation necessary for the proposed use of the site. The costs associated with the remediation should be provided to the appraiser to determine the impact on the fair market value. If the current property owner refuses to grant right-of-entry to the ESA professional and state law does not allow for limited right-of-entry, commitment to remediate to the level required by State law for the intended use of the site

must be incorporated into the NEPA decision document for the project, and the findings of the Phase II ESA investigation may require a re-evaluation or supplemental environmental review. In instances such as those, where the transit agency has chosen to take on the risk of acquiring property where the type and degree of contamination is uncertain, some transit agencies have succeeded in negotiating purchase and sale agreements that allow for the termination of the sale based on the outcome of the Phase II ESA.

5.1.2. ESA timing.
The Phase I ESAs should be completed on a per parcel basis during the draft environmental impact statement (DEIS) development process, with the results presented for parcels with potential contamination in the DEIS so that the community, the responsible State agency, and EPA are informed and have the opportunity to comment on the results. The Phase II ESAs, if necessary, and the corresponding consultation with the State agency on remediation are conducted during the Final EIS (FEIS)/Record of Decision (ROD) development process with the remediation commitments for the preferred alternative appearing in the FEIS/ROD.

For projects requiring an environmental assessment (EA), the EA would present the results of the Phase I ESAs on a per parcel basis for parcels with potential contamination (and Phase II ESAs, if necessary), and the finding of no significant impact (FONSI) would commit to the appropriate remediation. For a categorical exclusion (CE), the CE documentation should include the results of any ESAs conducted and indicate that the remediation is standard, such as the removal of leaking underground storage tanks (LUSTs) at a former gas station. If the ESA indicates that the contaminants present may require significant remediation it may be necessary to consider elevating the NEPA class of action. When possible, appropriate ESAs should be completed before the appraisal of property so that the results can be communicated to the appraiser.

5.1.3. Mitigation (remediation) commitments in environmental decision documents.
After determining the presence and nature of any contamination, the next step is to determine the appropriate remediation. Remediation planning involves:

- Consideration of the recommendations within the ESA report(s);
- Consultation with the responsible State agency and possibly EPA; and,
- Consideration of comments by the affected community, if appropriate.

EPA's State Voluntary Cleanup Programs provides useful information on the remediation expectations in each participating State. For a transit use of a brownfield, some States allow remediation that results in a higher residual level of contamination because the human exposure on the site is short-term and the chance of coming into contact with contaminated media is minimal. For example, a transit rider at a transit center built on a former brownfield spends little time there waiting for the bus to arrive. Some elements of transit projects, such as park-and-ride lots and bus storage lots, place an impermeable surface of pavement over the contaminated property that would prevent human contact with the contamination and also may prevent infiltration by rainwater that might carry the contamination offsite in a groundwater plume.

Some forms of contamination, such as LUSTs at former gasoline stations, are so common that firms with extensive experience in remediating such sites now exist. If the transit project requires the demolition of an older building that contains asbestos insulation or lead-based paints, companies that specialize in removal of these contaminants prior to demolition can usually be found.

Construction measures (commonly referred to as "best management practices") may include strict control of dust and stormwater, such as the use of covered trucks to haul contaminated soil to a State-approved disposal site, washing down the loaded truck before it leaves the project site, and a more robust than usual stormwater management system to prevent stormwater runoff from carrying contamination offsite.

5.2. Real estate acquisition and cost considerations during environmental review and beyond.

5.2.1. Costs.

The potential costs associated with locating a transit project on a brownfield include the cost of property acquisition, the cost of remediation, the potential cost of litigation against responsible parties, and the long-term liability costs. Acquisition costs are governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act) and implementing regulation 49 CFR Part 24, but the transaction may be complicated by appraisals that consider the fair market value of the property as if it were clean, the cost of remediation, and State law dictating which of the parties involved in the transaction, if either, are legally responsible for the cleanup. During the environmental review process, the project sponsor will have considered the estimated cost of appropriate remediation, as well as having considered and taken action regarding the short and long-term liabilities associated with locating the project on the brownfield, if applicable. Potential liability costs to the transit agency are minimized or eliminated by compliance with EPA's All Appropriate Inquiries Rule (40 CFR part 312).

Project sponsors that wish to use FTA funds for remediation must attempt to identify and seek legal recourse from those parties potentially responsible for the contamination or substantiate the basis for not seeking reimbursement. The reality is that many brownfields are abandoned, tax-delinquent properties, and the potentially responsible parties (i.e., the corporations) have dissolved and no longer exist. FTA will not participate in paying for remediation that is the legal responsibility of another party, unless:

- The brownfield site was previously utilized for transportation use and the transit agency is legally responsible for all cleanup activity; or
- Seeking and obtaining compensation from potentially responsible parties would involve excessive litigation and project delay, the cost of which would likely exceed the remediation cost, and which would be contrary to the public interest.

In addition, FTA generally will not participate in the remediation of contamination discovered during construction, except where it has been demonstrated that appropriate environmental studies were performed, the results communicated to the appraiser prior to

the appraisal, and the recommendations followed. The transit agency must also have met one of the two exceptions above.[2]

Note that if the transit project requires demolition of a building containing asbestos or lead paint, the remediation cost would be a project responsibility of the transit agency because the cleanup is necessitated by the demolition. If the building was not being demolished for the project, the cleanup would not be required. Information on any such contamination should be provided to the appraiser as soon as possible, and the appraiser may take the building condition into consideration in the determination of market value.

5.2.2. Acquisition.

FTA's circular on grant management requirements (latest version 5010.1D) describes the process that a project sponsor must follow if it wants to acquire property for an FTA-assisted project that is contaminated with hazardous substances. The project sponsor needs to document these efforts to demonstrate that they made a good faith effort to identify those parties that are legally responsible to pay for cleanup (if any) under State law. If the project sponsor is not able to identify potentially responsible parties to pay for the cleanup or provides acceptable justification for not seeking reimbursement, then the project sponsor must seek to ensure that the appraised value reflects appropriate remediation (i.e., remediation for the intended use and no more) costs to the extent allowed by State law. All documentation supporting remediation cost estimates should be submitted to FTA real estate staff and the appraiser, including all ESAs that were conducted as a part of the environmental review process.

6. References

- Brownfields (EPA website)
- The Revitalization Handbook (EPA)
- Brownfields: All Appropriate Inquiries (EPA website)
- EPA's All Appropriate Inquires Rule, 40 CFR part 312
- State Voluntary Cleanup Programs (EPA website)
- Grant Management Requirements, FTA Circular 5010.1D
- Hazardous Materials and Brownfields (FTA website)

APPROVAL: _____

Christopher S. Van Wyk
Director, Office of Environmental Programs

DATE: 8/11/2016

[2] State law sometimes prohibits an appraiser from considering certain aspects of contamination when doing the appraisal. Further, in some cases, there may be little information on the potential contamination at the time of the appraiser available through no fault of the project sponsor. The purpose of this policy is to ensure that a transit agency does any due diligence it can on potential contamination and ensure that is communicated to the appraiser in a timely fashion so that if State law allows it, that can be considered to the extent possible in the appraisal.

Title: Agency Roles and Government-to-Government Coordination
Date: March 2019
SOP No.: 20
Issued by the Office of Planning and Environment (TPE)

1. Purpose

The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) (40 CFR parts 1500-1508) and FTA's environmental regulations (23 CFR part 771) and guidance emphasize the importance of early and effective coordination with Federal, State, and local agencies in the preparation of environmental impact statements (EISs). This SOP discusses the roles and responsibilities of various agencies in the environmental review process, primarily for EISs.

2. Applicability/Scope

The environmental review process for EISs includes three types of formal agency roles: lead agency, cooperating agency, and participating agency. This document addresses factors for determining how FTA participates in the environmental review process (i.e., as a lead, co-lead, cooperating, or participating agency), and how FTA Regional staff, in coordination with project sponsors, identify Federal, State, or local agencies to participate in the environmental review process as a co-lead, cooperating, or participating agencies. Throughout the SOPs, agency roles are discussed further as they relate to the specific milestone or document type.

For EAs, depending on impacts, early and effective coordination with other entities can also be important.

3. Responsibilities

FTA Regional staff should work closely with the project sponsor to define roles and responsibilities for agency coordination at the beginning of the environmental review process. It is recommended that FTA Regional staff conduct initial coordination with other Federal agencies and certain State agencies, such as the State Historic Preservation Office, to help ensure FTA involvement and engagement in the process. Follow-up coordination with Federal agencies on technical matters, such as to fulfill a permit or process, and other coordination with State and local agencies may be handled by the project sponsor.

FTA Regional staff are responsible for communications with Federally-recognized Indian tribes under government-to-government consultation.

4. Standard Procedures

4.1. Define FTA's role in the process. After determining that a project is eligible for and will likely receive FTA funding, the FTA Regional office determines FTA's role in the environmental review process. This should be done in coordination with the project sponsor and any other co-lead agencies, and may include discussions with other

Federal, State, and local agencies.[1] For more information on lead, cooperating, and participating agencies, review the SAFETEA-LU Environmental Review Process Final Guidance (2006).

- **Lead agency.** For projects that involve FTA funding only, FTA is the Federal lead agency for the project. The project sponsor that will be the direct recipient of FTA funding will be a joint lead agency with FTA. For projects that involve several Federal funding sources, FTA will determine its role in coordination with the other Federal agencies providing funding.

  A project sponsor may request that the Secretary of DOT designate an operating administration or secretarial office within DOT to serve as the Federal lead agency for the project. This process is described in 23 U.S.C. § 139(e)(4), but FTA recommends project sponsors contact FTA prior to requesting the Secretary's determination because FTA may be able to make the determination.

- **Joint lead Federal agency.** For projects that require both FTA and another Federal agency to take a Federal action, FTA and the other agency may choose to serve as joint lead Federal agencies or, preferably , one agency may choose to serve as a cooperating agency (see below). Often a project with joint lead Federal agencies is a multimodal project and the other Federal agency involved is another Department of Transportation (DOT) modal administration. This approach is not normally encouraged because it can complicate decisionmaking related to the environmental review process, but if it is pursued, the roles and responsibilities of the agencies should be clearly defined and documented in order to facilitate decisionmaking. FTA's decision on its role in the environmental review process depends on the relative magnitude of the transit elements of the multimodal project and the timing of FTA funding for the project.

- **Cooperating agency.** For projects that have multiple Federal funding sources or approvals, and for which FTA either has special expertise or expects to fund/approve a transit component, FTA may participate in the review process as a cooperating or participating agency (note these roles apply to EIS projects, specifically). FTA should expect to serve in these roles when the FTA action is minimal or, in some cases, undetermined. Note, cooperating agencies are also considered participating agencies so references to participating agencies in 23 U.S.C. § 139 include cooperating agencies.

  Cooperating agencies have a higher degree of authority, responsibility, and involvement in the environmental review process. The two main advantages to participating in the environmental review process as a cooperating agency

[1] If, at the project outset, it appears that the project will need Federal permits or approvals, FTA/project sponsor should coordinate with the Federal agency with jurisdiction by law over those permits or approvals when discussing agency roles. This will help set the foundation for a single NEPA/environmental document (23 U.S.C. § 139(d)(8)), to the maximum extent practicable.

instead of a participating agency are: (1) a non-DOT cooperating agency may adopt without recirculating the EIS of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied[2] (40 CFR 1506.3); and (2) lead agencies may share the administrative draft environmental document for review and comment with all or select cooperating agencies prior to publishing the documents for public review and comment.

- **Participating agency.** If the lead agency expects FTA will have an interest in the project, FTA will likely be invited to participate in the environmental review process. If FTA is invited to participate pursuant to 23 U.S.C. § 139 or Title 41 of the FAST Act and the FTA Regional office determines FTA does not have an interest in the project, FTA must decline the invitation in writing and specify the reasons found in the applicable statutory provision.

4.2. Identifying cooperating and participating agencies. The SAFETEA-LU Environmental Review Process Final Guidance (2006) provides detailed guidance on whom and how to invite agencies to participate in FTA's environmental review process as cooperating and participating agencies. However, there are aspects not covered by the SAFETEA-LU Guidance, noted below, due to recent reauthorization.

- **Lead agency roles.**

  - The lead agencies must identify participating agencies no later than 45 days after publication of the notice of intent (NOI) (23 U.S.C. § 139(d)(2));
  - The lead agencies must establish the project coordination plan no later than 90 days after EIS NOI publication (23 U.S.C. § 139(g)(1)(A)), and seek concurrence from all participating agencies on the schedule included in the coordination plan (23 U.S.C. § 139(g)(1)(B));
  - The lead agencies must develop the environmental checklist discussed at 23 U.S.C. § 139(e)(5) in consultation with the participating agencies and when the lead agencies determine that a checklist would be appropriate;
  - The lead agencies must consider and respond to comments from participating agencies on matters within those agencies' special expertise or jurisdiction (23 U.S.C. § 139(c));
  - FTA or the Secretary of DOT must respond in writing to EIS "review of application"/project notification requests within 45 days of receipt (23 U.S.C. § 139(e)(3)); and
  - FTA must identify the participating agencies not participating in the development of the purpose and need and range of alternatives on the Federal Infrastructure Permitting Dashboard (23 U.S.C. § 139(o)(1)(A)(ii)). FTA policy is to request written notice from the participating agency stating it will not participate in the development of the purpose and need and range of alternatives in order for FTA to include the agency on the Dashboard under the 23 U.S.C. § 139(o) provision.

[2] Adoption of environmental documents within DOT is governed by the process set out in 49 U.S.C. § 304a.

- **Participating (including cooperating) agency roles.**

    - Participating agencies must provide comments within their special expertise/jurisdiction and use the environmental review process to address any environmental issues of concern to their agency (23 U.S.C. § 139(d)(9));
    - Participating agency concurrence is required on the project schedule to be included in the coordination plan (23 U.S.C. § 139(g)(1));[3] and
    - Participating agencies must comply with the schedule within the coordination plan even if they decline to participate in the development of the purpose and need and the range of alternatives (23 U.S.C. § 139(f)(4)(A)).

4.3. Communicating responsibilities to cooperating and participating agencies. Once FTA and the project sponsor have invited the cooperating and participating agencies using the standard invitation letter template (Attachment B to the SAFETEA-LU Environmental Review Process Final Guidance (2006)), discussions regarding roles and responsibilities will occur. FTA and the project sponsor may choose to draft the roles and responsibilities and present them, along with the draft project schedule, in the coordination plan and request review and comment, and/or FTA and the project sponsor may hold an agency coordination meeting (in person or via tele-conference) to discuss roles and responsibilities. Ultimately, the lead agency(s) will memorialize the roles and responsibilities of the lead agencies, cooperating and participating agencies, tribes, and the public in the EIS coordination plan.

In addition to the responsibilities of being a participating agency, cooperating agencies (Federal agencies required to make an approval or take an action for a project) may be given additional responsibilities for reviewing or preparing sections of the EIS. FTA and the project sponsor would outline these responsibilities in the coordination plan.

4.4. Government-to-government consultation. The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions.[4] As part of the project development and environmental review process, FTA Regional staff shall make a reasonable and good faith effort to identify Indian tribes that may have an interest in a project. Out of deference to Federally-recognized Indian tribes, FTA Regional staff should not contact these governments using the generic participating agency template letters and instead draft correspondence recognizing their sovereignty and potential interests. Correspondence must come from FTA staff. If other communication arrangements are made for the course of the project, FTA Regional staff should include it in the coordination plan.

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[3] FTA will assume concurrence of participating agencies if no objections are received within 30 days of distribution of the schedule.

[4] Executive Order 13175: Consultation and Coordination with Indian Tribes; Presidential Memorandum on Tribal Consultation (November 5, 2009).

4.5. Documenting agency coordination. All agency coordination, whether conducted by FTA or the project sponsor, should be documented and saved in the project file. Any correspondence containing decisions, determinations, findings, or agreements should be appended to the EIS.

5. References

- Efficient environmental reviews for project decisionmaking, 23 U.S.C. § 139
- CEQ regulations implementing NEPA, 40 CFR Sections 1501.7 and 1508.25
- SAFETEA-LU Environmental Review Process Final Guidance (2006)
- Executive Order 13175: Consultation and Coordination with Indian Tribes
- Presidential Memorandum on Tribal Consultation (2009)

APPROVAL: _____

Megan W. Blum
Director, Office of Environmental Programs

DATE: 3/29/2019

Title: Section 106 Process
Date: June 28, 2019
SOP No.: 21
Issued by the Office of Planning and Environment (TPE)

1. Purpose

Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108) and its implementing regulations (36 CFR part 800) require Federal agencies to consider the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings prior to the expenditure of any Federal funds or prior to the issuance of any license. This SOP clarifies FTA's roles, responsibilities, and consultation procedures in the Section 106 process.

2. Applicability/Scope

FTA actions that trigger National Environmental Policy Act (NEPA) review are also subject to the Section 106 process, unless the project meets a Section 106 exemption or the project has no potential to cause effects to historic properties. Section 106 is required when a project involves the use of Federal financial assistance and/or when a Federal permit, license, or approval is needed.

The Section 106 process applies when FTA determines a project or activity is an *undertaking* that has the potential to cause effects to historic properties. An undertaking can occur on all FTA projects regardless of the NEPA class of action determination (i.e., categorical exclusion—CE, environmental assessment—EA, or environmental impact statement—EIS). FTA's legal obligation is to ensure that full consideration is given to the effect on the historic properties of the *undertaking* being funded, in whole or in part, by FTA, and to complete the Section 106 process prior to making a CE determination, issuing a finding of no significant impact (FONSI), a combined final EIS (FEIS)/record of decision (ROD), or ROD.

3. Responsibilities

The FTA Regional Administrator is legally responsible for making Section 106 findings and determinations; and, signing agreement documents, when applicable (36 CFR § 800.2(a)). FTA does not delegate these responsibilities to project sponsors.

FTA Regional staff is responsible for fulfilling the requirements of the Section 106 process, including conducting government-to-government consultation with federally-recognized Indian tribes (tribes). FTA Regional staff provide direction to project sponsors regarding the preparation of information, analyses, and recommendations of historic property identification and effects in order to assist FTA in making findings and determinations. FTA Regional staff should work with the project sponsor to ensure that professionals preparing Section 106 supporting materials meet ACHP requirements for professionals.[1] FTA Regional staff, in coordination with project sponsors, will ensure the requirements of the Section 106 consultation process are conducted and that documentation is included as part of the environmental project file and adequately summarized in the NEPA document. Lastly, the FTA Regional

[1] Professional qualification standards usually referenced are a combination of the Secretary of the Interior's Professional Qualification Standards as defined and officially adopted in 1983 (48 FR 44716; 54 U.S.C. § 306131, 36 CFR § 800.2(a)(1) and (3)) and the Secretary of the Interior's Historic Preservation Professional Qualification Standards as expanded and revised in 1997 (62 FR 33708), but not formally adopted.

staff should coordinate with the FTA Federal Preservation Officer (FPO) when it becomes apparent or seems likely that there may be ACHP involvement on a project (e.g., potential adverse effect or likely need for an agreement document pursuant to Section 106).

The Office of Chief Counsel is responsible for reviewing Section 106 agreement documents (e.g., Memorandum of Agreement, Programmatic Agreement) for legal sufficiency, which is usually assigned to the FTA Regional Counsel.

The FTA FPO is based out of the Office of Environmental Programs. The FPO is responsible for coordinating the Section 106 activities of the agency (54 U.S.C. § 306104) and provides technical assistance to the FTA Regional offices. The FTA FPO should be included on all projects with (or likely) ACHP involvement.

4. Standard Procedures

4.1. Initiate Section 106 Process

4.1.1. Establish the undertaking. An *undertaking* is any project, activity, or program funded in whole or in part by FTA (36 CFR § 800.16(y)). FTA Regional staff is responsible for determining whether the undertaking is a type of activity that has the potential to affect historic properties**.** This determination should be based on the type of project or activity (e.g., ground disturbance, demolition, modification of buildings or structures) and not whether historic properties are present in the project area or part of the project activity (36 CFR § 800.3(a))**.** If the undertaking is a type of activity that does not have the potential to affect historic properties, FTA has no further obligations under Section 106 (36 CFR § 800.3(a)(1)). FTA Regional staff should document the determination that the undertaking has "no potential to cause effects" with a memo to the project file or via FTA's online grant management system.

Examples of projects or activities using FTA funds (undertakings) that have "no potential to cause effects" and thus do not require further Section 106 review include:

- Planning studies or activities, training, administrative functions;
- Procurement of replacement vehicles;
- Maintenance of vehicles (e.g., bus, van, light rail vehicles);
- Purchase of equipment or materials that do not lead to, or are part of, a construction activity.

If the undertaking has the potential to cause effects on historic properties, FTA Regional staff should consider whether a program alternative, as listed below, may be applicable to the undertaking. ACHP maintains the catalog of program alternatives.[2]

- Program Comment to Avoid Duplicative Reviews for Wireless Communications Facilities Construction and Modification (80 FR 58744);
- Program Comment for Actions Affecting Post-1945 Concrete and Steel Bridges (77 FR 68790);
- Program Comment for Positive Train Control (79 FR 30861);
- Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way (83 FR 42920).

If the undertaking has the potential to cause effects to historic properties, FTA should formally initiate the Section 106 review process with the SHPO/THPO, and coordinate with other reviews (36 CFR §

[2] https://www.achp.gov/program_alternatives.

800.3(b)) or provide the SHPO/THPO notification pursuant to a Section 106 program alternative, when required. Depending on the nature and complexity of the undertaking, FTA Regional staff may combine or conduct the Section 106 steps, described in this section, concurrently. For example, the initiation/notification, description of the undertaking, Area of Potential Effect (APE), and identification of historic properties may be included in one consultation letter (with supporting documentation) to the SHPO/THPO and other consulting parties, as appropriate, but other combinations may be pursued, as well.

If the State has a statewide Programmatic Agreement (PA) that contains procedures and stipulations for complying with the Section 106 process, that PA would supersede this SOP.

4.1.2. Notify State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) - Section 106 Initiation Letter. Section 106 requires FTA to identify and initiate consultation with the appropriate SHPO and/or THPO (36 § CFR 800.3(c)). For most undertakings, the SHPO for the State in which the undertaking is located in will be a consulting party. If an undertaking involves more than one State, the SHPOs may agree to designate a lead SHPO (36 CFR § 800.3(c)(2)). The THPO is the official representative for consultation (instead of the SHPO) if the undertaking is located on tribal lands and the tribe has assumed the responsibilities of the SHPO for Section 106 (36 CFR § 800.2(c)(2)(i)(A)). If the undertaking is located on tribal lands or effects of the undertaking may occur on tribal lands, but the tribe has not assumed Section 106 responsibilities, the SHPO will be a consulting party, but the tribe may also designate a representative who will have the same rights of consultation and concurrence as the SHPO (36 CFR § 800.2(c)(2)(i)(B); 800.3(d)).

FTA Regional staff should notify the appropriate SHPO and/or THPO as soon as a determination has been made by FTA that an undertaking has the potential to effect historic properties. This can be accomplished by sending the SHPO/THPO(s) a letter initiating Section 106 consultation on FTA letterhead. The content of the letter may include: a description of the undertaking, the proposed APE (described in Section 4.2.1), a request for input on consulting parties and the APE, next steps, and the FTA project contact person. Project maps should be part of the initiation letter.

4.1.3. Identify additional consulting parties. Throughout the Section 106 review process, FTA Regional staff must consult with States, tribes, local governments and individuals who may have specialized expertise or an interest in the area affected by the undertaking (36 CFR § 800.2(a)(4)) in order to seek their input when making findings and determinations. In addition to the SHPO and THPOs, other potential consulting parties may include: representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur; individuals and organizations with demonstrated interest in the undertaking (e.g., they are the property owner for one of the historic properties affected); and, the project sponsor (36 CFR § 800.2(c)(3) - (5), 800.3(f)). On occasion, an individual or organization may request in writing to be a consulting party. FTA, after consulting with the SHPO/THPO, determines whether the requester should be given consulting party status (36 CFR § 800.3(f)(3)).

FTA must also make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian Organizations (NHOs) that might attach religious and cultural significance to historic properties and invite them to participate as consulting parties (36 CFR § 800.2(c)(2)(ii)(D), 800.3(f)(2)). (See Section 4.2.1 for further information on tribal consultation).

4.1.4. Plan to involve the public. FTA must provide the public with an opportunity to comment on the undertaking and its effect on historic properties (36 CFR § 800.2(d), § 800.3(e)). FTA Regional staff

should provide input to the project sponsor on the type and level of public involvement required based on the nature and complexity of the undertaking, its effects, and the likely interest of the public in those effects (36 CFR § 800.2(d)(1)). The plan should identify points in the consultation process where public notification is needed and mechanisms for soliciting public comments. The NEPA process can be used to satisfy Section 106 if it provides adequate opportunities for public involvement. For example, the public notice and outreach for the Section 106 process can be combined with the public involvement plan established for an EA or an EIS. For a CE, FTA Regional staff, in coordination with the project sponsor, will need to make other arrangements to provide the public with sufficient time and information to gather meaningful comments (e.g., posting Section 106 related information on the project sponsor 's website for 30 days) because there is not a NEPA public involvement requirement for CEs. FTA, in coordination with the project sponsor, can use web sites, newspapers, or electronic newsletters and other methods to inform the public of the undertaking and to solicit input, regardless of the NEPA class of action.

4.2. Identify historic properties.

Historic properties mean districts, sites, buildings, structures, or objects that are included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). This includes prehistoric archeological sites and associated artifacts, records, and remains, as well as properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations (36 CFR § 800.16 (l)(1)). FTA Regional staff must make a reasonable and good faith effort to identify historic properties (36 CFR § 800.4(b)(1)).

4.2.1. Determine the scope of identification efforts.

- **Define the Area of Potential Effects (APE).** FTA Regional staff is responsible for defining the APE in consultation with the SHPO/THPO (36 § CFR 800.4(a)(1)). SHPO/THPO concurrence on the APE is not required, but their input should be considered when determining the final APE. The APE does not need to be one contiguous area, and different APEs can be defined for different types of effects, direct and indirect (36 CFR § 800.16(d)). Direct effects occur as a result of the proposed undertaking, e.g., physical intrusion, changes in the view of or from a property, noise or vibration impacts. If the effect comes from the undertaking at the same time and place with no intervening cause, it is considered direct regardless of its specific type (e.g., visual, physical, auditory, etc.). Indirect effects to historic properties are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable.[3] The APE needs to be sufficient to account for both direct and indirect effects and can be refined as the undertaking or analysis progresses. FTA Regional staff should seek SHPO/THPO input on the adequacy of the APE via email or a letter.

- **Review existing documentation and seek information from other parties**. Prior to any cultural survey or field work, FTA Regional staff and/or project sponsors should review available records of historic properties and information about possible historic properties. SHPO/THPO staff can be the best source of advice for locating relevant information. FTA Regional staff and/or project sponsors may also seek information from organizations or individuals that may have knowledge of historic properties regardless of whether they are a consulting party (36 CFR § 800.4(a)(2) - (3)).

[3] https://www.achp.gov/news/court-rules-definitions-informs-agencies-determining-effects

- **Consult Indian Tribes and Native Hawaiian organizations**. Indian tribes and Native Hawaiian organizations should be identified and consulted for information about properties that may have religious or cultural significance (36 CFR § 800.4(a)(4)). Identifying federally-recognized tribes can be achieved through various means, such as by consulting with the SHPO/THPO, reviewing Federal agency databases or resource documents (e.g., ACHP's Office of Native American Affairs,[4] Bureau of Indian Affairs' Tribal Directory Dataset,[5] U.S. Department of Housing & Urban Development's Tribal Directory Assessment Tool—TDAT[6]), and the tribe's website. Consultation between FTA and Indian tribes is considered a government-to-government relationship as set forth in the Constitution of the United States, treaties, statutes, and court decisions (36 CFR § 800.2(c)(2)(ii)(B)-(C)). Any outreach and/or consultation with Indian tribes must be conducted by FTA Regional staff as the lead Federal agency (36 CFR § 800.2(c)(2)(ii)(B)-(C)). Initial communication (i.e., letter) with tribes should be made by the Regional Administrator in a sensitive manner respectful of tribal sovereignty and addressed to the tribal leader. Additional guidance regarding tribal consultation is provided in SOP No. 20 *Agency Roles and Government-to-Government Coordination* and on ACHP's website.[7] Section 106 only requires consultation with federally-recognized tribes, but some States (e.g., California) have State laws that also require consultation with non-federally recognized tribes for compliance with State regulation. FTA may consult with non-federally-recognized tribes as consulting parties on a case-by-case basis.

4.2.2. Identify properties listed in or eligible for the NRHP. Based on the information gathered from existing records and input from other parties, FTA Regional staff identify those properties already listed in the NRHP, or formally determined eligible for listing, and evaluate other potential historic properties (e.g., "historic-age" properties) for eligibility within the APE (36 CFR § 800.4(b)). Previously-evaluated properties should be reviewed because their eligibility status may change due to the passage of time, changing perceptions of historic significance, or incomplete prior evaluations (36 CFR § 800.4(c)(1)). The NRHP eligibility evaluation should be conducted for any properties that are of "historic-age" (generally 50 years of age[8]). If a portion of a historic district is within the APE, FTA Regional staff would need to determine the scope of the survey and documentation for the affected district; FTA's Office of Environmental Programs is available to assist the Regional Office with those unique situations. Resources of exceptional significance do not need to be over 50 years of age and may also be present in the APE.

Guidance on how to apply the National Register criteria for evaluation can be found on the National Park Service website.[9] Properties should be identified in a historic architectural survey report or a cultural resources report as either listed in the NRHP or eligible for listing in the NRHP, and the Criteria of Eligibility should be noted for each property. The identification and evaluation of historic resources must be done by professionals meeting the qualifications identified in Footnote 1 of this SOP, in

[4] https://www.achp.gov/about/offices/onaa.
[5] https://www.bia.gov/tribal-leaders-directory.
[6] https://egis.hud.gov/TDAT/.
[7] https://www.achp.gov/.
[8] The National Register's standards for evaluating the significance of properties specify the 50 years of age as a general criterion, however, a project may take several years to implement so it may be appropriate to adjust the 50-year timeframe in certain circumstances. For example, it may be appropriate to subtract "50" from the construction year or the opening year to account for the project's "historic-age" year. FTA Regional staff can contact the Office of Environmental Programs to discuss specific projects.
[9] https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm.

accordance with each States' SHPO/THPO published procedures, if applicable, and with input from consulting parties, including Indian tribes and Native Hawaiian organizations.

FTA Regional staff should review the documentation and reports prepared by the project sponsors or their consultants to ensure the methodology, preliminary determinations of eligibility, and application of the NRHP criteria are reasonable. The documentation should include: a) description of the undertaking, specifying FTA involvement; b) a map of the APE; c) description of steps taken to identify historic properties; d) the results of the survey, including properties that are listed or have been previously determined eligible and newly identified properties that FTA deems eligible; e) an explanation of loss of integrity for any resources that may have been previously listed or determined eligible; and f) survey forms and documentation required by the SHPO's office. For recommended eligible properties, FTA Regional staff needs to identify the NRHP criterion or criteria that each property is eligible under and specify the resources that are contributing and non-contributing resources in historic districts.

FTA must provide the documentation to the SHPO/THPO, and request concurrence with FTA's determinations of eligibility (36 CFR § 800.11). The documentation must also be provided to consulting parties (same level of information for all consulting parties), and they should be asked to provide their input to FTA and to the SHPO/THPO. The SHPO/THPO has 30 calendar days (from receipt) to respond to FTA's request for concurrence on FTA's eligibility determinations; if the SHPO/THPO does not respond, FTA's duties to consult are fulfilled. If there is a disagreement about eligibility, FTA can request a formal determination of eligibility from the Keeper of the National Register (36 CFR § 800.4(c)(2)).

4.2.3. Determine if any historic properties are affected.

- ***No Historic Properties Affected***. If there are no historic properties in the APE or there are historic properties present but they would not be affected by the undertaking, FTA may make a finding of "no historic properties affected" and conclude the Section 106 process after completing the following:
  - Provide documentation of the "no historic properties affected" finding to the SHPO/THPO. Documentation needs to include: a description of the undertaking; the APE, including maps; the steps taken to identify historic properties; and the basis for determining that no historic properties are present or affected (36 CFR § 800.11(d)).
  - Notify all consulting parties of the finding.
  - Make the documentation available for public inspection prior to approving the undertaking (i.e., when making the Section 106 determination in the environmental decision document) (36 CFR § 800.4(d)(1)).

  If there are no objections from SHPO/THPO (or ACHP, if participating) within 30 days of receiving an adequate documented finding, FTA has no further obligations under Section 106 (36 CFR § 800.4(d)(1)). There is no requirement to notify ACHP of a "no historic properties affected" finding unless ACHP was previously invited and agreed to participate in the Section 106 process.

- **Objection to a Finding of No Historic Properties Affected**. If the SHPO/THPO objects within 30 days of receipt of FTA's documented finding, FTA must either consult to resolve the disagreement or request the ACHP's review (36 CFR § 800.4(d)(1)(ii)). FTA Regional staff should consult with the FTA FPO for further guidance if disagreement with SHPO/THPO cannot be resolved.

- **Properties Affected.** If there are historic properties that would be affected in the APE, follow the steps in Sec. 4.3—Assess Adverse Effects.

4.3. Assess Adverse Effects. FTA Regional staff is responsible for making effect determinations on the historic properties identified within the APE based on the adverse effect criteria found at 36 CFR § 800.5(a) and in considering the views concerning such effects provided by consulting parties and the public. Adverse effects occur if the undertaking directly or indirectly alters characteristics that qualify the property for inclusion in the NRHP (36 CFR § 800.5(a)(1)) in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Examples of adverse effects on historic properties include:

- Physically destroys or damages the property;
- Alters the property in a way that is inconsistent with the Secretary of the Interior's Standards for Treatment of Historic Properties (see 36 CFR part 68);
- Removes the property from its historic location;
- Changes the character of the property's use, or of physical features within the property's setting, that contribute to its historic significance;
- Introduces an atmospheric, audible, or visual feature to the area that would diminish the integrity of the property's significant historic features; or,
- Neglects a property which would cause its deterioration or the transfer, sale, or lease of a property out of Federal ownership or control without adequate protection to ensure the long-term preservation of the property's historic significance (36 CFR § 800.5(a)(2)).

4.3.1. No Adverse Effect. If the undertaking does not meet the criteria for adverse effect, FTA can make a finding of "no adverse effect" (36 CFR § 800.5(d)(1)). FTA Regional staff must provide documentation of the proposed finding to the SHPO/THPO and other consulting parties and provide a 30-day review period (36 CFR § 800.5(c)). The documentation should include: a) description of the undertaking, specifying FTA involvement, APE, photographs, maps and drawings, as necessary; b) description of steps taken to identify historic properties; c) description of the affected historic properties, including the characteristics qualifying them for the NRHP; d) description of the undertaking's effects on historic properties; e) explanation of why the adverse effect criteria were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and f) copies or summaries of any views provided by consulting parties and the public. FTA Regional staff should include consideration of Indian Tribes or Native Hawaiian interests, and whether this is applicable.

If the SHPO/THPO agrees with a finding of "no adverse effect" in writing or does not respond, and there is no objection from a consulting party or ACHP, if participating, within 30-days from receipt of FTA's finding and supporting documentation, FTA may proceed with the undertaking (36 CFR § 800.5(c)(1)).

If the SHPO/THPO or any consulting party notifies FTA within the 30-day review period that it disagrees with the finding, FTA Regional staff must either continue consultation to resolve any disagreement, or request ACHP to review the finding (36 CFR § 800.5(c)(2)). If FTA requests the ACHP's review a finding, FTA must concurrently notify all consulting parties of this request (36 CFR § 800.5(c)(2)(i)). FTA Regional staff should notify FTA FPO prior to requesting ACHP's review of a finding of "no adverse effect" and copy the FPO on any correspondence to the ACHP.

4.3.2. Adverse Effect. If the undertaking may have an "adverse effect" on historic properties, FTA Regional staff should consult with SHPO/THPO and other consulting parties to identify alternatives or modifications to the undertaking or impose conditions (e.g., design in keeping with the Secretary of Interior's Standards for Treatment of Historic Properties) that could avoid adverse effects. If the undertaking can be modified or conditions can be imposed to avoid adverse effects, FTA may make a new finding of "no adverse effect" (36 CFR § 800.5(b)). If adverse effects cannot be avoided, FTA Regional staff must proceed to resolving adverse effects, pursuant to 36 CFR § 800.6 (see Sec. 4.4 below). Documentation to support an adverse effect finding would be similar to documentation for a no adverse effect, as described in Section 4.3.1.

4.4. Resolve Adverse Effects.

4.4.1. Continue consultation. If FTA finds the undertaking will have adverse effect on one or more historic properties, consultation must continue between FTA, the project sponsor, SHPO/THPO, and the consulting parties to resolve those effects. Consultation may include developing and evaluating alternatives or design modifications to the undertaking to avoid or minimize adverse effects. Consultation does not require face-to-face meeting(s); electronic/email exchanges of documents or teleconferences are acceptable methods to consult. As applicable, FTA, SHPO/THPO, and ACHP (if participating) may invite others to become consulting parties at this phase (36 CFR § 800.6(a)(2)). FTA Regional staff must provide the consulting parties with all relevant documentation related to the adverse effect finding and provide the public with an opportunity to express their views on resolving adverse effects of the undertaking (36 CFR § 800.6(a)(3)-(4)). (See Sec. 4.1 pertaining to the plan to involve the public in the Section 106 process).

4.4.2. Notify the ACHP of Adverse Effects and Invite ACHP participation. FTA Regional staff must notify the ACHP of its adverse effect finding in writing electronically[10] and provide the following information in the formal notification letter: a) description of the undertaking and APE; b) identification of historic properties; c) description of the undertaking's effects on historic properties and explanation for adverse effect determination; and d) an invitation to ACHP to participate in the process. The ACHP will inform FTA of its decision within 15 days of receiving FTA's request to participate in Section 106 consultation (36 CFR § 800.6(a)(1)). The FTA FPO should be copied on all correspondence with the ACHP.

If the undertaking may have an adverse effect on a National Historic Landmark, FTA must invite (in addition to the ACHP) the Secretary of the Interior to participate in consultation (36 CFR § 800.6(a)(1)(i)(B), 800.10(b) - (c)). The FTA FPO should be copied on such invitations.

4.4.3. Develop a Memoranda of Agreement (MOA) or Programmatic Agreement (PA).[11] An MOA is used on projects where an adverse effect has been identified and a specific resolution to those effects has been agreed upon. A PA is generally used for a program of undertakings or a complex project where the effects of an undertaking are unknown during the environmental review phase. To resolve adverse effects, FTA Regional staff will negotiate terms and conditions that will be implemented in a MOA or PA with SHPO/THPO and other consulting parties (and ACHP, if participating) (36 CFR § 800.14(b)).

[10] https://www.achp.gov/digital-library-section-106-landing/achp-electronic-section-106-documentation-submittal-system

[11] See ACHP's guidance on Section 106 agreement documents for more information: https://www.achp.gov/initiatives/guidance-agreement-documents.

4.4.4. Execute the MOA or PA. Once the terms and conditions of an MOA or PA have been negotiated, signatories and consulting parties (discussed below) can execute the MOA or PA. An executed and implemented MOA or PA is evidence of FTA's compliance with Section 106 (36 CFR § 800.6(c)).

As the signatories of the agreement documents, FTA, SHPO/THPO, and ACHP, if participating, have sole authority to execute, amend, or terminate the agreement, and can execute the MOA or PA to resolve adverse effects without the need for other signatories (36 CFR § 800.6(c)(1)). FTA may invite additional parties (e.g., project sponsor) to be signatories to the MOA or PA (36 CFR § 800.6(c)(2)) and FTA may invite consulting parties to concur in the MOA or PA. Concurring parties do not have the same right to seek amendment or termination of the MOA or PA as signatories (36 CFR § 800.6(c)(3)). Rather, concurring parties signature on the agreement document expresses agreement with or support for the outcome of the Section 106 process. FTA Regional staff, in coordination with project sponsor, is responsible for ensuring that the undertaking is carried out in accordance with the executed MOA or PA.

4.4.5. Distribution and filing the executed MOA or PA. FTA must provide all consulting parties with a copy of the executed MOA or PA (36 CFR § 800.6(c)(9)). FTA must submit a copy of the executed MOA or PA to ACHP prior to approving the undertaking (i.e., issuing the environmental decision document) (36 CFR § 800.6(b)(1)(iv)). Filing the executed agreements with ACHP concludes the Section 106 process.

4.5. Failure to Resolve Adverse Effects. After consultation and extensive efforts have been made to resolve the adverse effect, FTA, SHPO/THPO, and/or the ACHP may determine that further consultation will not be productive and terminate consultation. If FTA terminates consultation, the FTA Administrator must notify the other consulting parties and provide a reason(s) for termination (36 CFR § 800.7(a)(1)). Terminating consultation should be considered as a last resort after all options, including seeking ACHP assistance, have failed. FTA Regional staff should consult with the FTA FPO prior to terminating consultation.

4.6. Post-Review Discoveries. For undertakings that result in an MOA or PA, the agreement document should include provisions for subsequent (i.e., Post-Review) discovery, including the notification process for any discovery or identification of additional potential historic properties during construction. For undertakings in which potential historic resources are discovered during construction without a defined process to treat or resolve unanticipated discoveries of resources, FTA Regional staff must follow procedures as outlined in 36 CFR § 800.13(b)(3). FTA Regional staff and/or the project sponsor (as delegated) must notify the SHPO/THPO, applicable Indian tribes or Native Hawaiian organizations, and ACHP within 48 hours of the discovery (36 CFR § 800.13(b)(3)). FTA may not have all the necessary information about the resources and potential effects within 48 hours, however, the notification must still occur within 48 hours along with preliminary information about the discovery and next steps (e.g., continued consultation). The Regional staff should coordinate with the FTA FPO if an unanticipated discovery occurs, and when ACHP needs to be notified of the discovery.

5. <u>Permitting Dashboard</u>. FTA Regional staff is responsible for entering Section 106 consultation dates onto the Federal Permitting Dashboard[12] for undertakings involved with either an FTA EA or EIS. Section 106 is an "action" under the EA or EIS and the corresponding consultation dates are "milestone" dates.

6. <u>Other Statutes</u>

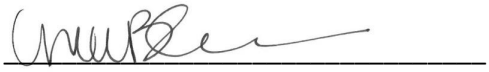
[12] https://www.permits.performance.gov/.

6.1. Section 4(f) Requirements (49 U.S.C. § 303; 23 U.S.C. § 138; 23 CFR part 774). The identification of historic properties under Section 106 also identifies historic sites that may qualify for Section 4(f) protection. The outcome of the Section 106 review process, FTA's determination of effect, is used to support the Section 4(f) analysis or evaluation and FTA's Section 4(f) finding. If FTA intends to make a *de minimis* impact finding to a historic property, the Section 4(f) regulations at 23 CFR 774.5(b)(2) require that the SHPO and/or THPO (the official with jurisdiction) be notified of FTA's intention based on their concurrence with a finding of "no adverse effect" or "no historic properties affected" in accordance with 36 CFR part 800. This is usually done in the effect determination letter sent to the official with jurisdiction for their concurrence as described in Sec. 4.3. For more information concerning Section 4(f), see SOP No. 18 – *Section 4(f) Evaluations*.

6.2. Cultural Resources-Related Statutes. At the time of initiating the Section 106 process, FTA Regional staff should consider the requirements of other statutes, such as Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001, *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. § 1996), the Archeological Resources Protection Act (16 U.S.C. § 470aa-470mm), and agency-specific or State requirements that may apply to the undertaking and may require coordination during the Section 106 process. FTA Regional staff should consult with the Office of Environmental Programs to determine whether other cultural resource requirements apply to the undertaking.

7. References

- Section 106 Regulations, 36 CFR part 800- Protection of Historic Properties
- Section 106 Program Alternatives
- National Park Service Bulletin 15: How to Apply the Criteria for Evaluation
- ACHP's Guidance on Meeting the "Reasonable and Good Faith" Identification Standards
- ACHP Guidance on Agreement Documents
- NEPA and NHPA: A Handbook for Integrating NEPA and Section 106
- Section 4(f) Regulations, 23 CFR part 774; Preservation of Parklands, 23 U.S.C. § 138; Policy on Lands, Wildlife and Waterfowl Refuges and Historic Sites, 49 U.S.C. § 303)
- American Indian Religious Freedom Act, 42 U.S.C. § 1996
- Native American Graves Protection Act and Repatriation Act, 25 U.S.C. § 3001 et seq.
- Archeological Resources Protection Act, 16 U.S.C. § 470aa-470mm

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 6/28/2019

Title: Water Resources
Date: September 30, 2019
SOP No.: 22
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the analysis required for projects or actions affecting water resources to comply with the Clean Water Act (33 U.S.C. § 1344), Rivers and Harbors Act of 1899 (33 U.S.C. § 401 *et seq*.), Executive Order 11990—*Protection of Wetlands*, U.S. Department of Transportation (DOT) Order 5660.1A—*Preservation of the Nation's Wetlands*, Executive Order 11988—*Floodplain Management*, DOT Order 5650.2—*Floodplain Management and Protection*, Coastal Zone Management Act of 1972 (16 U.S.C. § 1451 *et seq*.), Coastal Resources Barrier Act of 1982 (16 U.S.C. § 3501 *et seq*.), Wild and Scenic Rivers Act of 1968 (16 U.S.C. § 1271-1287), and Safe Water Drinking Act (42 U.S.C. § 300f *et seq.*), as appropriate. This standard operating procedure also addresses the need for permits or authorizations associated with these Federal environmental requirements.

2. Applicability/Scope

The National Environmental Policy Act (NEPA) requires analysis and consideration of the effects of a proposed project on environmental resources, including water resources, such as coastal zones, floodplains, wild and scenic rivers, navigable waterways, wetlands and other waters of the U.S., as applicable. Consideration of impacts to water resources applies to any Federal Transit Administration (FTA)-funded project, regardless of class of action (i.e., categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS)).

3. Responsibilities

FTA Regional staff, in coordination with the project sponsor, is responsible for ensuring the environmental documents include identification of potential impacts to water resources and their proper analysis. FTA Regional staff is also responsible for ensuring the Federal and/or State permitting agencies agree that the analysis will support a future permit application, and for tracking applicable permit application activities to ensure the project sponsor obtains the necessary permits or authorizations prior to project construction.

4. Standard Procedures

4.1. Clean Water Act (CWA). The CWA applies to "waters of the United States," which includes jurisdictional wetlands and navigable waters.

4.1.1. **Definitions.**

- **Waters of the United States** (WOTUS), for purposes of the Clean Water Act means:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
    a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
    b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    c. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of this section[1]. (See 40 CFR § 230.3(s)).

- **Wetlands** are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas" (40 CFR § 230.3, 33 CFR § 328.3). The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) use the "1987 Corps Wetland Delineation Manual" and its Regional Supplements (Corps Manual)[2] to define wetlands for the CWA Section 404 permit program.
- **Navigable waters** are those waters that are subject to the ebb and flow of the tide and/or are used, have been used in the past, or may be susceptible to use to transport interstate or foreign commerce (33 CFR § 329.4).

4.1.2. **Identification of WOTUS.** FTA Regional staff, in coordination with project sponsor, is responsible for ensuring that any WOTUS, including wetlands, present in the project area are identified. Identification methods may include reviewing the U.S. Fish and Wildlife Service (USFWS) National Wetland Inventory[3] or the U.S. Geological Survey topographic maps,[4] conducting a site visit, or

[1] https://www.epa.gov/cwa-404/definition-waters-united-states-under-clean-water-act
[2] https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/
[3] https://www.fws.gov/wetlands/
[4] https://www.usgs.gov/core-science-systems/national-geospatial-program/topographic-maps

conducting a jurisdictional delineation using the Corps Manual and then requesting a jurisdictional determination from the USACE (when appropriate).

4.1.3. **Agency Coordination.** FTA Regional staff (or the project sponsor, as determined between parties) should coordinate with other agencies with jurisdiction over water resources early in the environmental review process to consider locations and ways to avoid or minimize impacts to wetlands or waterways. Coordination with the following agencies should occur early or during NEPA scoping if the proposed project may impact wetlands or other WOTUS, as applicable.

- USACE. The USACE is responsible for issuing the CWA Section 404 permit, Section 10 permit, and Section 408 review and authorization (33 U.S.C. § 1344; 33 CFR § 320 *et seq*.). USACE makes the jurisdictional determination based on the jurisdictional delineation submitted by the project sponsor and may confer with EPA on this determination.
- EPA. Under Section 404(b) of the CWA (40 CFR part 230), EPA may veto a Section 404 permit issued by USACE. For projects on tribal lands, EPA issues Section 401 certifications for Section 404 permits unless the tribe has an EPA-certified water quality program.
- USFWS. This consultation focuses on how a project would affect aquatic habitats for protected species under the Endangered Species Act (ESA).
- The National Marine Fisheries Service (NMFS). Coordinate with NMFS when the proposed project would affect tidal wetlands, estuaries, or marine ecosystems under ESA.
- The Natural Resource Conservation Service (NRCS). Coordinate with NRCS if there are possible impacts to agricultural wetlands. NRCS's "The Food Security Act Manual"[5] is used to delineate agricultural wetlands whereas delineation of non-agricultural wetlands follows the Corps Manual.

FTA Regional staff should also ask the project sponsor to check for possible State and local permit requirements.

4.1.4 **CWA Section 404 Permit-Impacts to Waters of the U.S**.[6] A Section 404 permit, which is regulated by the USACE, is required for any discharge of dredged or fill materials into WOTUS, including wetlands (33 U.S.C § 1344; 33 CFR parts 320-330). The type of authorization or permit would depend on the degree of impacts. Coordination with the USACE during the environmental review process will help to determine which Section 404 authorization or permit would be required for the proposed project.

- General Permits: There are three types of general permits: Nationwide Permits (NWPs), Regional General Permits (RGPs) and Programmatic General Permits (PGPs).[7] General Permits, including NWPs, would be issued for projects with minimal impacts and if the conditions of the permit are met. The most common general permits are NWPs. NWPs are

[5] https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/?&cid=stelprdb1045954
[6] The information presented in this SOP is high-level. For more information on the Section 404 permitting process, please visit https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/
[7] https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/

issued for five-year periods and thereafter must be renewed by the USACE. The conditions vary from permit to permit. Some NWPs and RGPs require individual water quality certification (see Section 4.1.5 for further information) and authorization under many NWPs is contingent upon the project sponsor's submittal of a preconstruction notification (PCN) to the USACE. The USACE website[8] maintains a list of 52 NWPs that are currently in effect. FTA Regional staff should contact the local USACE Regulatory District or Branch to identify or verify the proposed project's permitting need.

- Letters of Permission (LOP): The USACE may issue a LOP, which is a form of an individual permit issued through an abbreviated process, for proposed activities similar to previous USACE-approved activities when the proposed activity is minor and does not have significant impacts. The LOP includes coordination with Federal and State resource agencies and public interest evaluation but does not require a public notice.
- Individual Permits (IP)**:** If a proposed project exceeds the allowable impact threshold or does not meet the requirements of a general permit and cannot be authorized by a LOP, an IP is required. The USACE will only issue an IP if: a) the proposed project is not contrary to the public interest and b) the permit application satisfies Section 404 (b)(1) Guidelines requirements. Those guidelines include conducting an analysis demonstrating the proposal is the least environmentally damaging practicable alternative (LEDPA) (40 CFR § 230.10(a)). To increase the likelihood the LEDPA required for an IP and FTA's preferred alternative are the same alternative, FTA Regional staff should coordinate with the USACE early and often in the environmental review process.

During the early environmental review process, FTA Regional staff, in coordination with the project sponsor, should consider alternatives that avoid and/or minimize impacts to WOTUS as the degree of impact affects the type of Section 404 permit or authorization required for a proposed project. For any project that may require a Section 404 IP, FTA Regional staff should (1) coordinate with the USACE and other agencies (e.g., EPA, USFWS) early for all classes of action, and (2) invite them to be a cooperating or participating agency[9] in the NEPA process for an EIS. In addition, FTA should seek concurrence from the USACE at specific milestones such as the purpose and need, alternatives, and the preferred alternative. This will increase efficiency in consideration of alternatives requirements under NEPA and the CWA Section 404(b)(1) and public concerns, as well as increase the likelihood that the permitting agency will adopt the FTA environmental document when making decisions pertaining to a permit for the proposed activities affecting WOTUS in a timely manner.

4.1.5 **CWA Section 401--Water Quality Certification.** Section 401 of the CWA (40 CFR part 121) establishes the state certification process to ensure that Federal permits (e.g., Section 404) are in compliance with the CWA and the state water quality standards (i.e., a Federal agency may not issue a permit to conduct any activity that may result in any discharge into WOTUS without Section 401 water quality certification from a State or authorized tribe). Most States issue a "blanket" Section

[8] https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/

[9] FTA identifies an agency as a cooperating or participating agency by their responsibilities or interest, as defined in 40 CFR 1508.5 and 23 U.S.C. §139(d). See FTA SOP #20 for more information.

401 certification for activities covered under NWPs and RGPs. However, certain Section 404 permits (e.g., IP, NWP for projects on tribal lands) will require Individual Section 401 water quality certifications. In general, a Section 404 permit is contingent upon Section 401 certification from the state water quality agency, tribe, or EPA for projects occurring on tribal lands. FTA Regional staff should ensure that the project sponsor coordinates with the appropriate state permitting agencies, authorized tribes, or EPA early for any project requiring an Individual Section 401 certification because the Individual Section 401 certification could take up to 1 year to process.

4.1.6 **CWA Section 402--National Pollutant Discharge Elimination System (NPDES).** Section 402 of the CWA (40 CFR part 122) creates the NPDES permit program for discharges of pollutants from all point sources into WOTUS. NPDES may also be referred to as the "stormwater" permit. The EPA, or a State to which EPA has delegated NPDES authority, is responsible for the oversight of Section 402, including issuing the NPDES permit for stormwater discharges due to construction activities. A NPDES permit would be required for any project that would disturb one acre or more.[10] FTA Regional staff is responsible for ensuring the project sponsor contacts the State agency or EPA Regional Office responsible for issuing NPDES permits to obtain the appropriate permit prior to project construction.

4.1.7 **Documentation**. The environmental document should discuss the degree of impact (e.g., location, quantity or size), identify the type of permit (e.g., NWP, IP) and any identified mitigation measures to compensate for the impact or loss of WOTUS (including wetlands) due to the proposed project (23 CFR 771.105(a)). Mitigation measures may include in-lieu fee, on-site banking, or off-site banking, and are coordinated with the USACE. Issuance of a Section 404 permit is not needed to complete the NEPA document, but the environmental document presents the results of agency coordination and the project sponsor's Section 404 permit application status or plan.

Executive Order (EO) 11990, Section 2(b) requires Federal agencies to provide opportunity for early public review of any plans or proposals for new construction in wetlands. FTA may use the NEPA public involvement process to satisfy that requirement and to collect public and resource agency input for evaluating wetland impacts or to identify other information needed for wetland related approvals or permits. Further, per EO 11990 and DOT Order 5660.1A, for new construction located in wetlands, the decision document (i.e., finding of no significant impact (FONSI), combined Final EIS (FEIS)/record of decision (ROD), or ROD) must include a written finding on wetland impacts. The environmental document should contain information to support the FONSI, combined FEIS/ROD or ROD, as applicable:

- There is no practicable alternative to the construction; and
- The proposed action includes all practicable measures to minimize harm to wetlands that action would cause.

[10] https://www.epa.gov/npdes/stormwater-discharges-construction-activities

The NEPA document should also discuss stormwater and/or sediment runoff associated with the proposed project and the need for a NPDES permit, as applicable, per 23 CFR 771.105(a). Note, projects with new construction in wetlands do not generally receive a CE determination.

FTA Regional staff is responsible for ensuring the project sponsor (permittee) complies with all terms and conditions of the applicable permits during the project implementation phase (23 CFR 771.109(b)(1)).

4.2. Rivers and Harbors Act of 1899 (33 U.S.C. § 401*, et seq.*)

4.2.1. **Section 10 (Navigable Waters) and Section 9 (Bridge) Permits.** Section 10 of the Rivers and Harbor Act (33 U.S.C. § 403; 33 CFR part 322) requires authorization from the Secretary of the Army for constructing any obstacle (e.g., jetty, wharf, pier) in any port, harbor, canal, navigable water, or other U.S. waters located outside fixed harbor lines or in areas where no harbor line exists. A Section 10 permit is administered by the USACE and can be jointly issued with a Section 404 (CWA) permit. If a project involves construction of a bridge or causeway over or in navigable waterways, a Section 9 permit from the U.S. Coast Guard would also be required (33 CFR parts 114-115). FTA Regional staff will need to ensure early and often coordination with the applicable permitting agencies for potential impacts to navigable waters and that required permits are obtained by the project sponsor prior to any construction activities occurring within any navigable water or WOTUS.

4.2.2. **Section 408 (Civil Works)**. Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (Section 408), requires that any proposed alteration or modification or use of an existing USACE Civil Works project (i.e., levees, dams, sea walls, bulkheads, jetties, dikes, wharfs, piers, etc.) be authorized by the Secretary of the Army. The USACE may grant such permission if it determines the proposed alteration "will not be injurious to the public interest and will not impair the usefulness" of the Civil Works project.[11] For any project affecting a navigable water and a USACE Civil Works project (e.g. levee), the USACE cannot issue a Section 404 permit until Section 408 review and approval is complete. In that case, FTA Regional staff will coordinate with both USACE Civil Works program office (Section 408 review) and the USACE Regulatory program (Section 10, CWA Section 404) early in the NEPA process. FTA Regional staff will need to ensure required Section 408 approvals are obtained by the project sponsor prior to project construction.

4.2.3. **Documentation**. The environmental document should discuss the impacts and the need for applicable permits, results of permitting agency coordination, and the project sponsor's commitment to obtain and to comply with the terms and conditions of the permits required for the project (23 CFR 771.105(a)).

4.3. Floodplains. Per Section 2(a) of EO 11988, *Floodplain Management*, and paragraph 3 of the U.S. DOT Order 5650.2, *Floodplain Management and Protection*, FTA must avoid adverse impacts associated with the occupancy and modification of land within floodplains if a practicable alternative exists and to the extent possible. Additionally, if no practicable alternative exists, development in a floodplain must be

[11] https://www.usace.army.mil/Missions/Civil-Works/Section408/

designed to minimize adverse impact to the floodplain's natural and beneficial values as well as to minimize the potential risks for flood-related property loss and the loss of human life.

4.3.1 **Definition and Identification of Floodplains.** Per Section 6 (b)-(c) of EO 11988, floodplains (also referred to as "base floodplains") are the lowlands and relatively flat areas adjoining inland and coastal waters, including flood prone areas of offshore islands, at a minimum, that are prone to the 100-year flood (i.e., there is a one percent chance of a flood occurring in any given year).

Regulatory floodway is defined as the floodplain area that is reserved by federal, State or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) (44 CFR § 9.4).

To determine whether a proposed project encroaches on the floodplain, FTA Regional staff reviews the applicable Federal Emergency Management Agency (FEMA)-developed Flood Insurance Rate Map (FIRM).[12] If a FIRM is not available, then contact the USACE, the NRCS, or State or local floodplain management agencies for assistance in determining the floodplain boundary.

4.3.2 **Significant encroachment.** Significant encroachments on the floodplain are rare for transit projects. Expansion of a facility already located within a floodplain usually would not be considered a significant encroachment. According to DOT Order 5650.2, a significant encroachment would result in one or more of the following construction or flood-related impacts:

- A considerable probability of loss of human life;
- Likely future damage associated with the encroachment that could be substantial in cost or extent, including interruption of service on or loss of a vital transportation facility; or
- A notable adverse impact on natural and beneficial floodplain values.

FTA Regional staff should encourage the project sponsor to avoid significant encroachment through early coordination with the local floodplain management agencies and/or design modifications.

4.3.3 **Public Involvement.** Section 2(a)(4) of EO 11988 and paragraph 7 of the DOT Order 5650.2 require FTA to provide an opportunity for early public review of any plan or proposal that would encroach on the floodplain and the public notices must identify significant encroachments. FTA may use the NEPA public involvement process to meet the public notification requirements for a project encroaching on a floodplain.

4.3.4 **Documentation.** As applicable, the floodplain section in the environmental document should describe the project location and activities within the limits of the base floodplain (i.e., encroachment), type of the floodplain (e.g., 100-year or regulatory floodway), the natural and beneficial floodplain values, and measures to minimize floodplain impacts or measures to restore

[12] https://msc.fema.gov/portal/home

and preserve natural and beneficial floodplain values (23 CFR 771.105(a)). Any required local floodplain permit should also be noted in the environmental document. To comply with Section 2(a)(1) of EO 11988, if the preferred alternative involves significant encroachment on the floodplain, the final environmental document must include:

- A description of why the proposed project must be located within the floodplain, including a discussion of reasonable alternatives and why they were not practicable;
- A statement indicating that the project conforms to applicable State and/or local floodplain standards.

4.4. Coastal Zone Management Act (CZMA) (16 U.S.C. § 1451-1464). "Coastal zone" means "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches" (16 U.S.C. § 1453(1)). See 16 U.S.C. § 1453(1) for the complete definition. The CZMA applies when a proposed project occurs in a coastal zone or impacts coastal zone resources of any State with a National Oceanic and Atmospheric Administration (NOAA)-approved Coastal Zone Management Plan (CZMP) (15 CFR part 930). FTA Regional staff must ensure the project sponsor certifies that the proposed project is consistent with the policies of the State's CZMP, per CZMA (15 CFR §§ 930.50-930.66). Under CZMA, FTA may not fund a proposed project impacting coastal zone resources, unless:

- the State agency managing the CZMP agrees with the project sponsor's certification that the action is consistent with the applicable CZMP;
- State concurrence is conclusively presumed; or
- The Secretary of Commerce determines the activity is either consistent with the objectives of the CZMA or it is needed for national security (15 CFR §§ 930.60-930.64).

If a proposed project occurs in or may impact a coastal zone of a State having an approved CZMP, FTA Regional staff should ensure the project sponsor consults with the State's CZM agencies[13] to determine whether the proposed project is consistent with the State's CZMP.
The environmental document should state whether the project is consistent with the CZMP and present the results of coordination with the state CZM agency (23 CFR 771.105(a)).

4.5. Coastal Barrier Resources Act of 1982 (CBRA) (16 U.S.C. § 3501 *et seq*.)
The CBRA established the Coastal Barrier Resources System (CBRS), which is the designated coastal barrier units located along the Atlantic Ocean, Gulf of Mexico, Great Lakes, U.S. Virgin Islands, and Puerto Rico coasts. Section 5 of the CBRA prohibits Federal agencies from providing funding for almost all construction and development within the CBRS. Section 6 of CBRA provides exceptions (16 U.S.C. § 3505) that allow Federal agencies to provide funding for certain actions such as maintenance of existing channel improvements and related structures, and the maintenance, replacement, reconstruction, or repair (not expansion) of publicly-operated roads or facilities, but the expenditure must be consistent with the CBRA.

[13] https://coast.noaa.gov/czm/mystate/

As applicable, FTA Regional staff asks the project sponsor to review USFWS-official CBRS maps[14] to determine if a proposed project would occur within the CBRS and whether it is an excepted action. FTA, in coordination with the project sponsor, should consult USFWS to verify whether the proposed action would involve CBRA and whether it would be consistent with the CBRA. Prior to approving the environmental document, FTA Regional staff needs to ensure consultation with USFWS has occurred for any activity that would involve CBRS.

The environmental document should include the direct and indirect impacts to the coastal barrier unit(s), the result of USFWS coordination, and mitigation measures that would prevent or reduce an excepted action's effects on the barrier island's ecology, consistent with 23 CFR 771.105(a).

4.6. Wild and Scenic Rivers. The Wild and Scenic Rivers Act of 1968 (16 U.S.C. § 1271-1287) preserves certain rivers with remarkable scenic, historic, cultural, and recreational values in a free-flowing condition for the enjoyment of the public. Federal land management agencies National Park Service (NPS), Bureau of Land Management (BLM), USFWS, and the U.S. Forest Service (USFS) manage the Wild and Scenic Rivers Act. The National Wild and Scenic Rivers System (WSRS) is a list of rivers the Secretaries of the Interior or Agriculture have determined have remarkable scenic, recreational, geologic, fish and wildlife, historic or other similar values. The National Rivers Inventory (NRI) is a listing of more than 3,200 free-flowing river segments in the United States that possess one or more "outstandingly remarkable" natural or cultural values judged to be at least regionally significant.[15] NRI river segments are potential candidates for inclusion in the WSRS.

Under the Wild and Scenic Rivers Act, section 5(d)(1) and 36 CFR part 297, all Federal agencies must seek to avoid or mitigate actions that would adversely affect WSRS or NRI river segments. Further, per Council on Environmental Quality (CEQ)'s *Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers of the Nationwide Inventory* (45 FR 59190), Federal agencies must:

- determine if their actions would adversely affect the characteristics of an NRI river that would qualify it for the System; and
- study and develop reasonable alternatives that would avoid or mitigate impacts.

To identify whether a WSRS or NRI river is located within or near the proposed project area, review the National Wild and Scenic Rivers System website[16] and Federal land management agencies' websites, including NPS,[17] BLM,[18] and USFS.[19]

[14] https://www.fws.gov/cbra/maps/index.html
[15] https://www.nps.gov/orgs/1912/nationwide-rivers-inventory.htm
[16] https://www.rivers.gov/national-system.php
[17] (https://www.nps.gov/orgs/1912/index.htm
[18] https://www.blm.gov/programs/national-conservation-lands/wild-and-scenic-rivers
[19] https://www.fs.fed.us/managing-land/wild-scenic-rivers

If the proposed project involves a NRI river, FTA Regional staff should invite the agency managing that river to be a cooperating agency. The environmental document should include an analysis of impact to the river or within its ¼-mile boundary[20] and a summary of comments from the managing agency. FTA Regional staff should consult CEQ's *August 1980 Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the National Inventory* for guidance.

If the proposed project involves a WSRS river, FTA Regional staff must ensure that a Section 7 Consent Determination from the Secretary of Agriculture has been obtained prior to approving the environmental document (36 CFR § 297.5). Further guidance on the Section 7 Determination process can be found on the Wild and Scenic Rivers website.[21]

4.7. Safe Drinking Water Act (SDWA). Section 1424(e) of the SWDA (42 U.S.C. § 300f *et seq.*) prohibits Federal agencies from funding actions that would contaminate a sole source aquifer or its recharge area. In other words, FTA may not approve funds for any action if the EPA determines the action would contaminate a sole source aquifer. "Sole Source Aquifer" (SSA) means an aquifer that has been designated by EPA as the sole or principal source of drinking water for an area (40 CFR § 149.2).

To identify whether a SSA is located within the project area, review the EPA's Map of Sole Source Aquifer Locations.[22] If the proposed action may affect a SSA, contact the state, tribal and local government agencies responsible for developing and managing a Comprehensive State Groundwater Protection Program or a SSA program and the EPA regional office responsible for reviewing that program.

The environmental document should discuss the SSA location in relation to the project activities, any potential threats to the integrity of public drinking water supplies or a SSA, project commitments or mitigation measures (e.g., identifying construction best management practices, developing response plans to contain potential spills, etc.), as appropriate, and summarize coordination results from EPA and the state, local, or tribal water quality agencies regarding these impacts.

5. Permitting Dashboard

FTA Regional staff is responsible for entering each permit or authorization action and associated milestone dates onto the Federal Permitting Dashboard[23] for FTA-funded projects that require either an EA or EIS.

6. References

- Clean Water Act, 33 U.S.C. 1344 - Permits for Dredged or Fill Material
- 33 CFR § 320-Authorities to Issues Permits; 33 CFR § 330- Nationwide Permit Program
- Rivers and Harbors Act, 33 U.S.C. 401

[20] https://www.rivers.gov/documents/q-a.pdf
[21] https://www.rivers.gov/publications.php#section7
[22] https://www.epa.gov/dwssa/map-sole-source-aquifer-locations
[23] https://www.permits.performance.gov

- Section 401 Water Quality, 40 CFR § 121
- Section 402 NPDES, 40 CFR § 122
- Coastal Zone Management Act, 16 U.S.C § 1451
- Coastal Zone Management Program, 15 CFR § 930
- Coastal Resources Barrier Act, 16 U.S.C § 3501
- Executive Order 11988, Floodplain Management
- Executive Order 11990, Protection of Wetlands
- Floodplain Management and Protection of Wetlands, 44 CFR § 9.4
- Section 408, 33 U.S.C. § 408
- CWA Section 404(b)(1) Guidelines, 40 CFR § 230
- Wild and Scenic Rivers Act, 16 U.S.C. § 1271-1287
- CEQ's Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory
- Section 7 Determination, 36 CFR § 297.5
- Safe Water Drinking Act, 42 U.S.C. § 300f *et seq*.
- Sole Source Aquifers, 49 CFR § 149

APPROVAL: _____

Megan W. Blum
Director, Office of Environmental Programs

DATE: 9/30/2019_____

This SOP is not legally binding in its own right and will not be relied upon by the Department as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance document (as distinct from existing statutes and regulations) is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations.

Title: Biological Resources
Date: December 20, 2019
SOP No.: 23
Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on the coordination and documentation for proposed projects or actions affecting biological resources, including listed or protected wildlife, plants, fish, birds, reptiles, amphibians, marine mammals and their habitats, to comply with the Endangered Species Act of 1973 (16 U.S.C. § 1531-1544), Migratory Bird Treaty Act (16 U.S.C. § 703-712), Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c), Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq*.), Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361-1423h), and Executive Order 13112—*Invasive Species*.

2. Applicability/Scope

The National Environmental Policy Act (NEPA) requires analysis and consideration of the effects of a proposed project or action on the quality of the human environment, including protected wildlife and plant species and/or their habitats (42 U.S.C. § 4332). Consideration of impacts to biological resources applies to any Federal Transit Administration (FTA)-funded project, regardless of class of action (i.e., categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS)).

3. Responsibilities

FTA Regional staff, in coordination with the project sponsor, is responsible for making effect determinations under Section 7 of the Endangered Species Act and for compliance with other biological resource-related requirements. These other environmental reviews are typically conducted during the NEPA process. FTA Regional staff is responsible for ensuring coordination with appropriate Federal and/or State resource agencies is conducted; the environmental documents include adequate analysis of potential impacts to biological resources; and any applicable Federal agency concurrence is received prior to making a CE determination, issuing a finding of no significant impact (FONSI), a combined final EIS (FEIS)/record of decision (ROD), or ROD.

4. Standard Procedures

4.1. Endangered Species Act of 1973 (ESA). The ESA (16 U.S.C. § 1531-1544) protects federally-listed endangered or threatened species and their critical habitats. Per 16 U.S.C. § 1536, also known as Section 7 of the ESA, Federal agencies are required to consult with the Secretary of the Interior or the Secretary of Commerce (as appropriate) on any actions likely to adversely affect or jeopardize a federally-listed species or its critical habitat. The Department of the Interior's United States Fish and Wildlife Service (USFWS) generally has jurisdiction over terrestrial and freshwater species and their critical habitats, as well as bird species and their critical habitats. The Department of Commerce's National Marine Fisheries Service (NMFS) generally has jurisdiction over marine fish species, marine

mammals, or critical marine habitat. The USFWS/NMFS joint regulations (50 CFR part 402), Interagency Cooperation provide the procedures for agency coordination under Section 7 of the ESA.

4.1.1. **Definitions**. The following definitions are the most applicable for understanding this SOP. Additional definitions are available at 50 CFR § 402.02 and 16 U.S.C. § 1532.

- **Biological assessment (BA):** The information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat (50 CFR § 402.02).
- **Biological opinion (BO)**: A document that states the opinion of USFWS/NMFS as to whether the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (50 CFR § 402.02).
- **Critical habitat** refers to specific geographic areas, whether occupied by listed species or not, that are determined to be essential for the conservation and management of listed species, and that have been formally described in the *Federal Register* (16 U.S.C. § 1532(5)(A)).
- **Endangered species** means any species that either USFWS or NMFS designates in danger of extinction throughout all or a significant portion of the species' range (16 U.S.C. § 1532(6)).
- **Incidental take** refers to "take" of listed species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant (50 CFR § 402.02).
- **Jeopardize the continued existence of** means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR § 402.02).
- **Listed species** means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under Section 4 of the ESA. Listed species are found in 50 CFR §§ 17.11-17.12.
- **Proposed species**: Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act (50 CFR § 402.02).
- **Service(s)** refers to the USFWS or the NMFS, or both, as appropriate (50 CFR § 402.02).
- **Take,** as defined by Section 3 of the ESA**,** means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- **Threatened species** means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of the species' range (16 U.S.C. § 1532(20)).

4.1.2. **Identification of listed endangered or threatened species.** To determine if a proposed project area contains any listed species or critical habitat, FTA Regional staff, in coordination with the project sponsor, reviews the species list compiled or the list that USFWS/NMFS provides. This includes requesting species lists and designated critical habitat areas from USFWS's Information, Planning,

and Consultation System (IPaC)[1] and reviewing State natural resource agency websites. FTA Regional staff then determines whether a field survey and/or a Biological Assessment (BA) will be necessary for the proposed project to comply with Section 7 of the ESA using the species list information. For proposed projects that may adversely affect listed species or critical habitat, FTA Regional staff should invite USFWS/NMFS, as appropriate, to participate as a cooperating agency in the NEPA process for an EIS.

For projects occurring on tribal lands, FTA Regional staff should also coordinate with the tribal biologists. Under Secretarial Orders[2] issued jointly by the Departments of the Interior and Commerce, Federal agencies that administer the ESA must consult with any federally recognized tribe whose lands, trust resources, or treaty rights may be impacted by any decision, determination, or activity implementing the ESA. When the Services enter into formal consultations with FTA on a proposed action which may affect tribal rights or tribal trust resources, the Services must notify the affected Indian tribe(s). FTA should also invite the affected tribe(s) and the Bureau of Indian Affairs to participate in the consultation process, as appropriate.

4.1.3. Section 7 of ESA Effect Determinations. Effect determinations for each listed species must be made by FTA for FTA-funded projects. The outcome of effect determinations dictates how FTA proceeds regarding Section 7 consultation.

- ***No Effect.*** If there are no listed species, critical or suitable habitat in the action area or no listed species or habitat will be impacted by the proposed action, FTA can make a "no effect" determination for the proposed project. Concurrence from the Service is not required and no Biological Assessment is required.
- ***May affect, but is not likely to adversely affect/adversely modify critical habitat***. This determination can be made when effects to the species or critical habitat are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact and include those effects that are undetectable, not measurable, or cannot be evaluated. Discountable effects are those extremely unlikely to occur. These determinations require written concurrence from the Service (see section 4.1.5) unless another agreement is made with the Service (e.g., Programmatic Agreement).
- ***May affect, and is likely to adversely affects/adversely modify critical habitat.*** This determination can be made if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable, insignificant or beneficial. Formal consultation with the Service is required[3] (see section 4.1.5).

[1] https://ecos.fws.gov/ipac/
[2] https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Secretarial-Orders
[3] https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf; https://www.fws.gov/Midwest/endangered/section7/ba_guide.html

4.1.4 **Biological Assessments (BA)** (50 CFR § 402.12). If FTA determines that the proposed action "may affect" listed species, a BA should be prepared. The purpose of a BA is to document FTA's evaluation of the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are "likely to be adversely affected" by the proposed action (50 CFR § 402.12(a)). The outcome of the BA determines whether formal consultation or a conference is necessary.

The contents of the BA are at the discretion of FTA Regional staff and depend on the nature of the proposed action. As appropriate, the BA should include the following information:

- The results of an on-site inspection of the project-affected area to determine the presence (including seasonal occupancy or use) of federally-listed species or critical habitat;
- The views of recognized experts regarding the species of concern;
- A review of the literature and other information regarding the species of concern;
- An analysis of the action's effects on the species or habitat of concern, including consideration of cumulative effects, and the results of any related studies; and
- An analysis of alternate actions FTA considered for the proposed action (50 CFR § 402.12(f)).

FTA Regional staff should also consult USFWS Region or Field Office websites and the Service's 1998 Consultation Handbook[4] for further guidance on BA preparation. The USFWS/NMFS Director has 30 days to provide written concurrence with the findings presented in the BA after receiving the BA from FTA (50 CFR § 402.12(j)). FTA may initiate formal consultation under § 402.14(c) concurrently with the submission of the BA (see section 4.1.5).

4.1.5 **Types of Section 7 Consultation** (50 CFR § 402)**.** The type of consultation depends on the status of the affected species or habitat and the severity of impacts.

- **Early consultation (optional).** FTA Regional staff may request early consultation with the Service(s) if the project information indicates the proposed action "may affect" federally-listed species or critical habitat (50 CFR § 402.11(b)). To begin this process, FTA Regional staff must prepare a letter to the Service requesting initiation of early consultation. The letter must contain the information outlined in 50 CFR § 402.11(b) and (c) and 50 CFR § 402.14(c). USFWS or NMFS will then issue a preliminary Biological Opinion (BO) in response to this early consultation (50 CFR § 402.02). The contents and conclusions of a preliminary BO are the same as a BO issued after formal consultation except that the incidental take statement provided with a preliminary BO does not constitute authority to take listed species (50 CFR § 402.11(e)).

[4] https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf

- **Informal consultation.** If the proposed action "may affect" listed species or critical habitat, FTA Regional staff may request informal consultation with the Service(s). Informal consultation may help FTA determine if a formal consultation or a conference is needed. FTA's discussion with the Service may include the types of listed species that occur in the proposed action area, and what effect the proposed action may have on those species/critical habitats. The informal consultation also provides an opportunity for the Service to recommend changes or modifications to the proposed project that FTA could implement to avoid the likelihood of adverse effects to the listed species or critical habitat (50 CFR § 402.13(b)). Informal consultation may conclude if either of the following outcomes occurs:
  - If FTA, after discussions with the Service, determines that the proposed action is "not likely to adversely affect" listed species or critical habitat in the project area, and if the Service concurs in writing, the consultation is terminated, and no further action is necessary (50 CFR § 402.13(a)).
  - If, during the informal consultation or the review of the BA, FTA or the USFWS/NMFS Director determines that proposed action "may affect" listed species or designated critical habitat, formal consultation is necessary (50 CFR § 402.14(b)(1)).

  FTA's written request for concurrence of "not likely to adversely affect" determination under informal consultation must include similar information as that required for formal consultation at § 402.14(c)(1), but only at a level of detail sufficient for the Service to determine if it concurs. The Service has 60 days to provide written concurrence from the date of receipt of FTA's written request. The 60-day timeframe may be extended upon mutual agreement of the Service and FTA, but cannot exceed 120 days from the date the Service receives FTA's written request (50 CFR § 402.13(c)).

- **Formal consultation**. If FTA determines the proposed action, through a BA or other review, is "likely to adversely affect" a listed species or adversely modify critical habitat, FTA must submit a written request to the USFWS/NMFS Director to initiate formal consultation (50 CFR § 402.14). FTA sends this initiation letter (also known as the initiation package) after the BA is prepared under § 402.12 and FTA, or in consultation with the Director, determines whether the proposed action would "likely adversely affect" a listed species or critical habitat (50 CFR § 402.14(c)). The written request must include:
  - A description of the proposed action;
  - A map or description of all areas to be affected directly or indirectly by the action;
  - Information on the listed species or designated critical habitat in the action area;
  - A description of the effects of the action and an analysis of any cumulative effects;
  - A summary of any relevant information provided by the applicant (i.e., project sponsor), if available;

- Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as EISs and EAs. (See 50 CFR § 402.14(c)(1)-(6) for more information.)

Formal consultation may last up to 90 days after its initiation. The Service has 45 days after concluding formal consultation to prepare a BO on whether the proposed activity will jeopardize the continued existence of a listed species. Typically, formal consultation ends when the Service issues the BO. A formal consultation will not be needed if a preliminary BO issued after early consultation is confirmed as the final BO (50 CFR § 402.14(b)(2)).

FTA may request (in writing) to review the Service's draft BO at least 10 days before the end of the Service's 45-day time-period to complete the BO. Although FTA may review the entire draft BO, the comments should address only the reasonable and prudent alternatives in the draft BO. If FTA submits comments on the draft BO within 10 days of the deadline, the Service is entitled to an automatic 10-day extension on the deadline (50 CFR § 402.14(g)(5)).

FTA may terminate formal consultation in writing if the proposed project is unlikely to occur or if FTA concludes the proposed project is unlikely to adversely affect a listed species or critical habitat, and the Service concurs with that determination (50 CFR § 402.14(l)).

- **Reinitiation of Consultation.** Reinitiating consultation applies to all Section 7 consultations. FTA Regional staff must reinitiate consultation with the Service if:
  - the amount or extent of taking specified in the incidental take statement is exceeded;
  - new information reveals an action's impacts may affect a listed species or critical habitat in a manner or to an extent not previously considered;
  - the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the BO or written concurrence from the Service; or
  - the identified action may affect a newly-listed species or newly-designated critical habitat (50 CFR § 402.16).

- **Conference.** A conference applies only to proposed species or critical habitats and is required if the BA indicates the proposed project would likely jeopardize a proposed species or cause the destruction or adverse modification of the proposed critical habitat (50 CFR § 402.10). FTA Regional staff should request an informal conference with the Service if there are proposed species or proposed critical habitat in the project area. An informal conference will help FTA, the Service, and the project sponsor to identify potential conflicts between the proposed action and a proposed species or proposed

critical habitat early in project planning and/or to develop recommendations to minimize or avoid adverse effects to proposed species or proposed critical habitat (50 CFR § 402.10 and § 402.12(d)(1)).

- **Programmatic Consultation.** If the proposed action involves potential impacts to Indiana bats and northern long-eared bats, FTA Regional staff should consult the *Programmatic Biological Opinion for Transportation Projects in the Range of the Indiana Bat and Northern Long-Eared Bat* (February 2018) which can be found on USFWS's website[5] for the standardized assessment, mitigation, and consultation approach. FTA Regional staff should also check for regional or statewide programmatic agreements that may exist to cover regionally specific species or activities.

- **Expedited Consultation** (optional and applies only to formal consultation)**.** If the proposed action involves minimal adverse effects or predictable effects based upon the nature, size, scope of the action, and previous consultation experience, FTA Regional staff should discuss this consultation option with the Service to streamline consultation. FTA and the Service need to develop and sign an agreement, which would include expedited timelines to complete this consultation process. FTA would need to provide the necessary information to the Service to initiate consultation (50 CFR § 402.14).

4.1.6 **Documentation.** The environmental document should summarize the results of the Section 7 informal or formal consultation process, FTA's determination/finding, ("no effect," "may affect, but is not likely to adversely affect/adversely modify critical habitat," or "may affect, but is likely to adversely affect/ adversely modify critical habitat") and mitigation measures, as appropriate. An appendix to the environmental document should include copies of the BO or USFWS or NMFS concurrence letters. The BA should be incorporated by reference.

4.2. Migratory Bird Treaty Act (MBTA). The Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703-712), as amended, prohibits private entities and Federal agencies from intentionally "taking or killing" of migratory birds, their nests, or their eggs unless USFWS authorizes such activities under a special permit.[6] Migratory bird species protected by MBTA are listed in 50 CFR § 10.13.

FTA Regional staff, in coordination with the project sponsor, should review USFWS online tools (IPaC system and Avian Knowledge Network Histogram Tools[7]) and State resource agency websites to identify potential migratory bird occurrence within or near the project area, and breeding season. Field reconnaissance may be necessary in the identification of protected birds and/or to confirm their presence or nesting habitats. FTA Regional staff should coordinate with the respective regional USFWS offices regarding compliance with MBTA, as appropriate.

[5] https://www.fws.gov/midwest/endangered/section7/fhwa/index.html
[6] https://www.doi.gov/solicitor/opinions
[7] https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/decision-support-tools/akn-histogram-tools.php

The environmental document, as applicable, should document the identification methods (e.g., online review, field survey), specific project activities (e.g., tree removal) that may impact migratory birds or nesting habitats, and the results of agency (i.e., USFWS and/or State resources agency) coordination. Mitigation or project commitments (e.g., no tree removal will occur during the breeding season/timeframe) to avoid impact to migratory birds' nesting and to ensure compliance with MBTA should also be discussed.

4.3. Bald and Golden Eagle Protection Act. The Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c) prohibits anyone from "taking" bald or golden eagles, including their parts, nests, or eggs, unless allowed by a permit issued by the Secretary of the Interior (16 U.S.C. § 668(a); 50 CFR part 22). "Take" is defined as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb" (16 U.S.C. § 668c; 50 CFR § 22.3). The identification, coordination, and documentation associated with potential impacts to bald or golden eagles should be similar to the process FTA uses for MBTA (see section 4.2 above).

4.4. Magnuson-Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act). The Magnuson–Stevens Act, as amended (16 U.S.C. § 1855(b)(2) *et seq*.) requires Federal agencies to consult with the Secretary of Commerce on any Federal action that "may adversely affect" any essential fish habitat (EFH). The NMFS's eight regional fishery management councils identify and describe fishery management plans to protect certain anadromous fish species specific to their regions.[8] FTA Regional staff, in coordination with the project sponsor, can determine whether the proposed project is located within or adjacent to EFH using NOAA Fisheries' EFH Mapper tool.[9] If the proposed project may affect EFH, FTA Regional staff must consult with NMFS (50 CFR part 600). The EFH consultation process and EFH Regional contacts can be found on NOAA Fisheries' website.[10] The environmental document should include an impact assessment on the affected EFH and any mitigation identified in consultation with NOAA Fisheries.

4.5. Marine Mammal Protection Act of 1972 (MMPA). The Marine Mammal Protection Act (16 U.S.C. § 1361-1421), prohibits the "take" of marine mammals in U.S. waters and by any person under U.S. jurisdiction on the high seas unless an authorized incidental "take" or permit is issued by the Services. "Take" is statutorily defined as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal" (50 CFR § 216.3). Under MMPA, USFWS is responsible for the protection of walrus, manatees, sea otters, and polar bears. NMFS is responsible for the protection of whales, dolphins, porpoises, seals, and sea lions. If the proposed action may take a marine mammal, FTA Regional staff must consult with the USFWS or NMFS (50 CFR part 18). Many marine mammals are also listed species under the ESA. Accordingly, FTA Regional staff should coordinate with the Service(s) to determine whether a species is protected by both laws and if so, to comply with both the ESA and

[8] https://www.fisheries.noaa.gov/node/2506
[9] https://www.habitat.noaa.gov/protection/efh/efhmapper/
[10] https://www.fisheries.noaa.gov/national/habitat-conservation/consultations-essential-fish-habitat

MMPA concurrently. The environmental document should discuss potential impacts to marine mammals associated with the proposed action, mitigation measures as applicable, and the results of coordination with the USFWS or NMFS.

4.6. Executive Order 13112- Invasive Species. Executive Order 13112 directs Federal agencies to use relevant programs and authorities to the extent practicable to prevent the introduction of invasive species, provide for their control and restoration of native species and habitat conditions in ecosystems that have been invaded (64 FR 6183). During the environmental review process or NEPA scoping, FTA Regional staff should ensure that the project sponsor coordinates with the appropriate State natural resource agency to identify any potential invasive species issues in the project area. The environmental document should include the result of any agency coordination and identified measures or best management practices (e.g., removing attached plant/vegetation debris from earth-moving and hauling equipment prior to entering or leaving the construction site; seeding specifications) to prevent the introduction or the spread of invasive species.

5. Permitting Dashboard

FTA Regional staff is responsible for entering Federal agency "actions" and their associated "milestones" for permits and authorizations onto the Federal Permitting Dashboard[11] for FTA-funded projects that require either an EA or EIS. The complete list of permits and authorizations, including ESA, is found on the Permitting Dashboard under the "Federal Environmental Review and Authorization Inventory."[12]

6. References

- Endangered Species Act, 16 U.S.C. § 1531-1544
- Interagency Cooperation- Endangered Species Act, 50 CFR § 402
- Biological Assessments, 50 CFR § 402.12
- Migratory Bird Treaty Act, 16 U.S.C. § 703-712
- List of Migratory Birds, 50 CFR § 10.13
- Bald and Golden Eagles Protection Act, 16 U.S.C. 668-668c
- Eagle Permits, 50 CFR § 22
- Magnuson–Stevens Act, 16 U.S.C. § 1801 *et seq*.
- Magnuson-Stevens Act Provisions, 50 CFR § 600
- Marine Mammal Protection Act, 16 U.S.C. § 1361-1423h
- Marine Mammals, 50 CFR § 18

[11] https://www.permits.performance.gov
[12] https://cms8.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory

APPROVAL: 

Megan W. Blum
Director, Office of Environmental Programs

DATE: 12/20/2019

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