

# National Environmental Policy Act: Federal Transportation Agencies' Revised Review Processes are Effective Today



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11/28/2018

Effective today, the Federal Highway Administration (“FHWA”), Federal Transit Administration (“FTA”), and Federal Railroad Administration (“FRA”) begin operating with amended regulations to implement the purposes and processes of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq.

The final rule implements various changes authorized by the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 505 (“MAP-21”), and the Fixing America’s Surface Transportation Act, Pub. L. 114-94, 129 Stat. 1312 (the “FAST Act”).

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement (“EIS”). However, the requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

MAP-21 and the FAST Act were each signed into law by former President Barack Obama and sought, collectively, to streamline environmental review processes for major transportation infrastructure by creating faster, simpler and more efficient examination of potential environmental impacts. The changes also sought to bring the regulations up-to-date with the agencies’ current practices and also to improve the overall readability of the regulations.

Significant substantive changes to the regulations included:

- **Policy** – The regulations include revised policy statements that promote agency coordination to the “maximum extent possible.” 23 CFR 771.105. The policy also encourages the use of a “programmatic approach” to environmental review, which is defined as an “approach that reduces the need for project-by-project reviews, eliminates repetitive discussion of the same issue, or focuses on the actual issues ripe for analyses at each level of review.” 23 CFR 771.107.
- **Scheduling** – The final rules requires that the lead agency must:

- invite other relevant agencies to join the environmental review as a “participating agency” within 45-days of publishing a notice of intent to prepare an Environmental Impact Statement (“EIS”) (23 CFR 771.111(d)); and
- establish a coordination plan and schedule for preparation of an EIS within 90-days of publishing a notice of intent to prepare an EIA (23 CFR 771.123(b)).
- Implementation – The final rule adopts several specific provisions that should simplify the agencies’ environmental review:
  - *Combined Documentation*: The final rule directs the use of a combined final EIS/ROD for purposes of a single environmental decision document, unless certain specific conditions exist. This directive for a combined final document is effectuated with other substantive changes that: (i) encourage the agency to identify a “preferred alternative” in the draft EIS (23 CFR 771.123(e)), and (ii) authorize the agency to develop the “preferred alternative” to a higher level of detail than other alternatives (23 CFR 771.123(f))
  - *Overlapping Exclusions*: The final rule authorizes the agencies to rely on each of the other’s separately developed and separately promulgated Categorical Exclusions (“CEs”). 23 CFR 771.116(d), 117(h), and 118(e).
  - *Expanded Section 4(f) Exceptions*: The final rule incorporates additional exceptions to Section 4(f) review, which required for federal transportation projects on park and recreation lands, wildlife refuges, and historic sites. The new exceptions incorporate changes from the FAST Act and except from 4(f) review: (i) the use of common concrete and steel bridges built after 1945 and exempted from Section 106 review by the Advisory Council on Historic Preservation and (ii) “improvements” to historic railroad and transit lines.

It remains to be seen whether these changes will actually expedite the development of critically needed improvements to the nation’s transportation infrastructure. It will be equally interesting to monitor what, if any, NEPA environmental review processes will be amended by other federal departments and agencies.

A copy of the Federal Register notice can be found [here](#).