



Final Rule Amends FHWA, FTA & FRA Regulations to NEPA and Section 4(f)

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Through a Final Rule effective November 28, 2018, the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA) will amend their National Environmental Policy Act (NEPA) and Section 4(f) regulations governing highway, transit, and railroad projects. The purpose of these amendments is to improve the efficiency of the NEPA process by streamlining the environmental review process and allowing for cross-agency coordination.

With respect to the FRA, the amended regulations will only apply to environmental reviews initiated after the effective date of the Final Rule. The Final Rule also states that the FRA will issue further direction clarifying what information should be included in the FRA's environmental documents. In the meantime, the FRA will continue to rely on certain sections of existing FRA Procedures for Considering Environmental Impacts. (See 64 Fed. Reg. 28545, as modified by 78 Fed. Reg. 2713 (Jan. 14, 2013)). Once the FRA has completed the environmental review for all projects initiated before the effective date of the Final Rule, the FRA plans to rescind its old regulations. Aligning the FRA's procedures with the FHWA and the FTA will provide a more consistent and predictable process for potential project sponsors, especially those that engage in environmental reviews for more than one mode of surface transportation.

Background

The Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation (FAST) Act imposed requirements that the FHWA and FTA must meet related to NEPA and Section 4(f).

On November 20, 2015, the FHWA and FTA issued draft amended regulations intended to conform their regulations with the NEPA and Section 4(f) requirements in MAP-21 and the FAST Act, and after receiving and considering public comments, the FHWA, FTA, and FRA (collectively, referred to as the Agencies) issued

the Final Rule. Specifically, the Agencies changed NEPA implementing regulations at 23 CFR Part 771 – Environmental Impact and Related Procedures – to implement various procedural changes, such as combining final environmental impact statement/record of decision (FEIS/ROD) documents, and to improve readability and reflect current practice. (See Pub. L. 112-141, 126 Stat. 405 (MAP-21), §§ 1302, 1305, 1315, 1319, 1320(d), 20003, 20016, and 20017; Pub. L. 114-94, 129 Stat. 1312 (FAST Act), §§ 1304 and 11503). The Final Rule also amends Section 4(f) implementing regulations at 23 CFR Part 774 – Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites to reflect exceptions created by MAP-21 and FAST Act. (See MAP-21, §§ 1119(c)(2) and 1122; FAST Act, §§ 1303 and 11502).

Major Changes

- **Cross-Agency Categorical Exclusions.** The Agencies are now allowed to use each other's Categorical Exclusions (CE) where the CE approved for an operating administration is applicable to the proposed action. (See Final Rule, 83 Fed. Reg. 54480 (to be codified at 23 CFR 771.116(d), 771.117(h) and 771.118(e). This approach provides increased efficiencies while not expanding the type of projects for which the CE was originally established. It also allows for consultation as necessary to ensure appropriate application of the CE.
- **Combined Final Environmental Impact Statement/Record of Decision.** The Agencies now require the combined FEIS/ROD be publicly available after filing the document with the Environmental Protection Agency. However, the public availability notice will not establish a waiting period or a period of time for the return of comments on a combined FEIS/ROD. (See Final Rule, 83 Fed. Reg. 54480 (to be codified at 23 CFR 771.124(b).
- **Coordination Plan and Schedule requirement.** The lead agencies must establish a coordination plan, including a schedule, within 90 days of publishing the notice of intent publication. (See Final Rule, 83 Fed. Reg. 54480 (to be codified at 23 CFR 771.123(b)(2).
- **Operational Right-of-Way (ROW) CE.** The existing operational ROW definition at 23 CFR 771.117(c)(22) and 771.188(c)(12) has been broadened to mean all real property interests acquired for the construction, operation or mitigation of a project. This revision aligns language in MAP-21, which provides that the ROW CE should apply to any project within an existing right-of-way, providing further consistency between the implementing regulation and statute.
- **New Section 4(f) Exemptions.** Allows for the use of historical transportation facilities in limited circumstances. (See Final Rule, 83 Fed. Reg. 54480 (to be codified at 23 CFR 774.13(a).

For a further analysis of the comments received on the proposed changes, and the Final Rule, access the Federal Register's website.