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Streamlining Environmental Reviews of Highway and Transit Projects: Analysis of Legislative Proposals During the 108th Congress

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Summary

Before final design activities, property acquisition, or construction for a federally funded surface transportation project can proceed, the Department of Transportation (DOT) is required by law to comply with environmental review provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321, et seq.). In addition, any surface transportation project will potentially require compliance with a variety of federal, state, and local environmental laws, rules, and regulations, in turn requiring the cooperation of federal, state, and local agencies.

Some Members of Congress have expressed concerns that the interagency coordination required to complete the environmental review process for large, complex transportation projects can lead to project delays. To address this concern, "Environmental Streamlining" provisions were included in legislation that reauthorized federal surface transportation programs for FY1998-2003 in the Transportation Equity Act for the 21st Century (TEA-21; P.L. 105-178).

During the 108th Congress, debate on the streamlining issue continued. Both House- and Senate- passed legislation to reauthorize surface transportation programs for FY2004-FY2009 (H.R. 3550 and S. 1072) included streamlining provisions. Conferees failed to reach an agreement on reauthorization before Congress adjourned. The 109th Congress is expected to revisit the streamlining issue when the reauthorization legislation is reintroduced in early 2005.

Streamlining provisions from bills passed during the 108th Congress included the designation of DOT as the "lead agency" in the environmental review process; the designation of authority to the lead agency to define a project's purpose and need, and to determine the range of alternatives to be considered; the creation of a dispute resolution process to address issues of concern between agencies; amendments to current statutory requirements to potentially allow for the use of certain public lands or historic sites for transportation projects; delegation of certain authority to state agencies; and the establishment of a statute of limitations on final agency actions or comment deadlines applicable to agencies and the public.

This report provides background and detail on streamlining provisions proposed during the 108th Congress that may be expected to be revisited in legislation proposed during the 109th Congress. This report will not be updated. For more information on issues regarding the environmental review process, see CRS Report RL32024, *Background on NEPA Implementation for Highway Projects: Streamlining the Process*.

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In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178), which reauthorized federal surface transportation programs for FY1998-2003. During the reauthorization process, some state transportation departments and transportation construction organizations reported to Congress that the process required to obtain various federal, state, and local environmental approvals and permits, often needed for major highway projects, was sometimes inefficiently implemented and overly time-consuming. In particular, stakeholders expressed concern about the lack of effective interagency cooperation when multiple federal or state agencies were required to participate in a project. Congress attempted to address these concerns by including "Environmental Streamlining" provisions in TEA-21.

Although not defined in statute, FHWA defines environmental streamlining as the timely delivery of federally funded transportation projects, while protecting and enhancing the environment. Because major transportation projects may be affected by dozens of federal, state, and local environmental requirements, administered by multiple agencies, improved interagency cooperation was identified by Congress as a critical element to the success of environmental streamlining. The streamlining provisions of TEA-21 required the Department of Transportation (DOT) to develop and implement a "coordinated environmental review process" for highway projects that either do have or may have a significant impact on the environment (approximately 9% of all highway projects fall into one of these categories). This coordinated review process encourages full and early participation by all relevant federal and state agencies required to participate in a highway project.

Since the passage of TEA-21, numerous administrative activities have been undertaken to facilitate streamlining. However, regulations to implement the streamlining provisions have not been promulgated. Some Members of Congress have expressed the need for further legislation to expedite the environmental review process required of highway construction and transit projects. As a result, legislation to reauthorize surface transportation programs for FY2004-FY2009, passed in both the House (H.R. 3550) and the Senate (S. 1072) during the 108th Congress, included provisions intended to further streamline the environmental review process.

TEA-21 was to expire on September 30, 2003. Congress has passed a series of extension bills to continue funding for federal highway and transit programs at FY2003 levels, while work proceeds on a final reauthorization bill. The most recent extension (H.R. 5183) extended funding for surface transportation programs until

May 31, 2005. Until new reauthorization legislation is enacted, streamlining provisions in TEA-21 will continue.

Environmental Review Requirements: Current Status

Before final design, property acquisition, or construction on a highway or transit project can proceed, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) must demonstrate compliance with all applicable state and federal legal requirements regarding the environment, including the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.). Discussed below are selected elements of the environmental review process relevant to the current debate regarding transportation reauthorization legislation. (For more detailed information about the NEPA process, see CRS Report RL32024, *Background on NEPA Implementation for Highway Projects: Streamlining the Process*.)

The Environmental Review Process. The "environmental review process" generally refers to the procedures required to comply with NEPA, but may also refer to the process for compliance with any other environmental law applicable to a given transportation project. NEPA requires the preparation of an environmental impact statement (EIS) for all major federal actions "significantly" affecting the environment. An EIS is a full disclosure document that provides a description of the proposed project, and the existing environment, as well as analysis of the anticipated beneficial and adverse environmental effects of all reasonable alternatives. Preparation is done in two stages, resulting in a draft and final EIS.

Projects for which it is not initially clear whether impacts will be significant require the preparation of an environmental assessment (EA). If it is determined, at any time during the assessment, that a project's impacts *will be* significant, an EIS must be prepared. However, if the EA determines that the project creates no significant environmental impact, a Finding of No Significant Impact (FONSI) will be issued by DOT. The FONSI must briefly present the reasons why the project will not have a significant effect on the environment. Projects requiring an EA, and a subsequent FONSI, accounted for approximately 6% of FHWA-funded highway projects (representing approximately 15% of the total federal funds) in FY2001.[1] According to FHWA, in FY2001, approximately 3% of all FHWA-funded highway projects required an EIS. Those projects accounted for just under 9% of the $17.6 billion in federal funding distributed to states for highway projects in FY2001.[2]

The Council on Environmental Quality (CEQ), in the Executive Office of the President, promulgated regulations specifying NEPA compliance procedures applicable to all federal agencies.[3] At CEQ's direction, DOT promulgated its own regulations governing the preparation of EISs and related environmental

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[1] General Accounting Office, *Highway Infrastructure: Stakeholders' Views on Time to Conduct Environmental Reviews of Highway Projects*, GAO-03-534, May 23, 2003, pp 3-4.

[2] Ibid.

[3] 40 C.F.R. §§ 1500-1508

documentation required for FHWA and FTA projects.[4] In addition to formal regulations, DOT has issued a variety of guidance documents and technical advisories to assist decision makers in completing the NEPA process for transportation projects.[5]

NEPA compliance fits into the overall project delivery process as a subset of one or more of the following four major elements generally considered to be part of the full transportation project delivery process: preliminary engineering, final or construction engineering, right-of-way acquisition, and construction. Any delays in completion of the NEPA process could also impact upon the cost of project delivery if the delays are extensive enough for inflationary cost increases to result.

Interagency Cooperation. Projects requiring NEPA documentation involve the participation of a "lead agency" and "cooperating agencies." The lead agency is defined in CEQ regulations as the federal agency that has taken responsibility for preparing the NEPA documentation.[6] For federally funded highway and transit projects, the lead agency will usually be DOT (specifically FHWA or FTA). The project applicant, such as state DOTs, will likely participate in the NEPA process as a joint lead agency. The project applicant is required to initially develop substantive portions of the environmental document, while DOT will be responsible for its scope and content.[7]

DOT requires that the draft and final EIS demonstrate that appropriate comments and coordination were solicited from relevant federal, state, and local cooperating agencies. Cooperating agencies (also referred to sometimes as "participating" agencies) required to provide input during the environmental review process are those that are obligated to provide comments within their agency's jurisdiction, expertise, or authority. This means that an agency with jurisdiction over or expertise regarding any identified environmental consequence anticipated from a project is required to provide DOT with the appropriate input. For example, if historical and archeological preservation consequences are identified, the Advisory Council on Historic Preservation or the state historic preservation officer will likely be included as a cooperating agency during the environmental review process. If farmland impacts are identified, the EIS should summarize the results of comments and analyses from the U.S. Department of Agriculture (USDA) and, as appropriate, state and local agriculture agencies. If impacts to wetlands are identified, the U.S. Army Corps of Engineers may need to issue a permit before a project may proceed.

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[4] 40 C.F.R. § 771; final rule at 53 *Federal Register* 32646.

[5] The FHWA Office of NEPA Facilitation maintains a website, "NEPA: Project Development Process," which includes information regarding FHWA's environmental policy, FHWA Technical Advisories, and a variety of guidance materials to facilitate compliance with NEPA at all stages of the process. The site is accessible at [http://environment.fhwa.dot.gov/projdev/index.htm] (as of April 15, 2004). For FTA, information regarding NEPA compliance is available on the agency's Environmental website at [http://www.fta.dot.gov/1243_ENG_HTML.htm] (as of April 15, 2004).

[6] 40 C.F.R. § 1508.16

[7] 23 C.F.R. § 771.109(c)

For any given transportation project, compliance with a wide variety of legislative and regulatory requirements, enforceable by multiple agencies, may be required. DOT regulations require that the final EIS or the FONSI document compliance with all applicable environmental laws, executive orders, and other related requirements.[8] It is DOT policy that compliance with *all* applicable environmental requirements be coordinated under the "NEPA umbrella." This means that, for any given transportation project, any study, review, or consultation required by law, that is related to the environment, should be conducted within the framework of the NEPA process.

Depending upon the complexity of the project or resources impacted, a significant number of environmental requirements may be applicable. According to FHWA, legal requirements frequently applicable to highway projects are:

- Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.),
- National Historic Preservation Act (16 U.S.C. 460 et seq.),
- Clean Water Act (33 U.S.C. 1251 et seq.), and
- "Section 4(f)"of the Department of Transportation Act of 1966 (40 U.S.C. 303) (see "Requirements Applicable to Parks, Refuges, and Historic Sites" section, below) .

For the requirements listed above, the U.S. Fish and Wildlife Service, the Advisory Council on Historic Preservation, the U.S. Army Corps of Engineers, or the Environmental Protection Agency (EPA) may be required to participate in the NEPA process as a cooperating agency. That participation may take the form of providing comments on DOT documentation, performing scientific analysis, issuing permits, or providing an assessment of project impacts, to name a few.

The role of a cooperating agency is frequently set out in a memorandum of agreement with the lead agency. That agreement may involve the cooperating agency drafting certain portions of the EIS that relate to its jurisdiction or expertise. For example, if a highway project has the potential to impact prime farmland, USDA may agree to provide FHWA with an analysis of those impacts.

Project "Purpose and Need" and Alternatives. As required under both CEQ and DOT regulations, the EIS must include a statement clarifying the project's "purpose and need." This section of an EIS is the foundation upon which subsequent sections of the EIS are built. DOT requires the discussion to be clear and specific and support the need for the project. Further, it is the purpose and need section that drives the selection of the range of alternatives that will be considered and analyzed for a given project. CEQ regulations require agencies to discuss a range of alternatives that will include all "reasonable alternatives" under consideration as well as any other alternatives that were considered but subsequently eliminated from consideration. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the agency or a potentially affected stakeholder.

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[8] 23 C.F.R. § 771.133.

In his capacity as the Chairman of the Interagency Transportation Infrastructure Streamlining Task Force (established under Executive Order 13274, "Environmental Stewardship and Transportation Infrastructure Project Review"[9]), Transportation Secretary Norman Mineta sought guidance from CEQ Chairman James Connaughton regarding the role of lead and cooperating agencies with regard to developing a highway project's "purpose and need."[10] Secretary Mineta referred to the sometimes extended interagency debates over purpose and need statements as a reason for delay in highway project development.

In his response, Chairman Connaughton cites excerpts of NEPA itself as well as CEQ regulations that specify that the lead agency has the authority for and responsibility to define a project's purpose and need. Further, Chairman Connaughton references previous federal court decisions giving deference to the lead agency in determining a project's purpose and need. While not addressed in this correspondence, CEQ regulations also specify the selection of reasonable alternatives as within the authority of the lead agency.

Designation of Categorical Exclusions. Transportation projects that do not individually or cumulatively have a significant social, economic, or environmental effect, and which DOT has determined from past experience with similar projects have no significant impact, are excluded from the requirement to prepare an EA or EIS. Such actions are processed as categorical exclusions. A common misconception is that such projects are categorically excluded from compliance with NEPA. Such projects do require a certain level of NEPA compliance, but are excluded only from the requirement to prepare an EA or EIS. Unlike EISs or EAs, categorical exclusions are not a type of document, but are classes of DOT actions that may be, in effect, pre-approved. Projects funded as "transportation enhancements" often fall into this category of action.[11] In FY2001, almost 91% of all FHWA projects were classified as categorical exclusions.[12]

DOT regulations specify two groups of categorical exclusions. Whether or what type of documentation will be required will depend upon which of the two groups the project falls. The first group includes projects that call for no or limited construction.[13] Examples include the construction of bicycle and pedestrian lanes, landscaping, emergency repairs, and the installation of pavement markings, or traffic signals.

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[9] This Executive Order is available at [http://www.fhwa.dot.gov/stewardshipeo/index.htm], (as of April 15, 2004).

[10] Text of Secretary Mineta's May 6, 2003 letter, and Chairman Connaughton's May 12, 2003 response, are available at [http://www.fhwa.dot.gov/stewardshipeo/minetamay6.htm], (as of April 15, 2004).

[11] Activities classified as "transportation enhancements" are specifically listed by Congress under 23 U.S.C. §101(a)(35). For more information, see FHWA's Transportation Enhancement website at [http://www.fhwa.dot.gov/environment/te/index.htm], (as of April 15, 2004).

[12] GAO-03-534.

[13] Specified under 23 C.F.R. § 771.117(c).

The second group consists of actions with a higher potential for impacts than the first group, but are generally determined to meet the criteria for a categorical exclusion because environmental impacts are minor.[14] An example of such a project is the modernization of a highway through resurfacing, reconstruction, adding shoulders, or adding auxiliary lanes.

Since the second group of actions has a higher potential for impacts than the first, DOT may require that the state or local project sponsor provide analyses or documentation to allow DOT to determine if the categorical exclusion designation is proper. Further, although a categorically excluded project's environmental impacts may not be "significant" as defined under NEPA, requirements of other laws may still apply. For example, the installation of traffic signals is generally considered an action with no environmental impacts. However, if those traffic signals will be installed in a historic district, compliance with provisions of the National Historic Preservation Act may apply. Also, for example, if the proposed route of a bicycle path borders endangered species habitat, a biological assessment, in compliance with the Endangered Species Act, may be required.

Requirements Applicable to Parks, Refuges, and Historic Sites. Requirements of "Section 4(f)" of the Department of Transportation Act of 1966 apply to the use of publicly owned parks and recreation areas, wildlife and waterfowl refuges, and to publicly *or* privately owned historic sites of national, state, or local significance. Section 4(f) of the DOT Act was originally set forth at 49 U.S.C. § 1653(f) and applies to all DOT projects. A similar provision, found at 23 U.S.C. § 138, applies specifically to Federal-aid highways. In 1983, as part of a general recodification of the DOT Act, 49 U.S.C. § 1653(f) was formally repealed and codified in 49 U.S.C. § 303 with slightly different language. This provision no longer falls under a "Section 4(f)," but DOT has continued this reference, given that over the years, the whole body of provisions, policies, and case law has been collectively referenced as Section 4(f).

Under the law, any use of a Section 4(f) resource for a transportation project is prohibited unless there is no "prudent and feasible" alternative to do otherwise, *and* the project includes all possible planning to minimize harm to the resource. When a project proposes the use a Section 4(f) resource, a separate "Section 4(f) evaluation" must be prepared and included with the appropriate NEPA documentation. The evaluation must analyze alternatives and design shifts that avoid the protected resource. If Section 4(f) land is subsequently chosen for use in a project, the evaluation must demonstrate that the use of other alternatives would have resulted in unique problems. "Unique problems" are present when there are truly unusual factors or when the costs or community disruption reach "extraordinary magnitude. This test was introduced in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and subsequently referred to as "Overton Park Criteria."

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[14] Specified under 23 C.F.R. § 771.117(d).

Streamlining Environmental Reviews Under TEA-21

Section 1309 of TEA-21, "Environmental Streamlining," was intended to lead to better coordination of agency involvement in the NEPA process. It directed the Secretary of DOT to develop and implement a "coordinated environmental review process" for highway construction projects that require an EIS or an EA, under NEPA, or for the conduct of any other environmental review, analysis, opinion, issuance of an environmental permit, license, or approval required under federal law. The Secretary of Transportation (the Secretary) was directed to identify all agencies required to participate in the coordinated environmental review process at the earliest possible time, and to require those agencies, whenever practicable, to conduct required reviews concurrently, rather than sequentially, in accordance with cooperatively established time periods. The review process could be incorporated into a memorandum of understanding between DOT and participating federal and state agencies.

DOT has undertaken a variety of actions to meet the goals of TEA-21's streamlining requirements. However, no final regulations were promulgated. In May 2000, under the Clinton Administration, DOT proposed a rule on "NEPA and Related Procedures for Transportation Decisionmaking."[15] Some commenters indicated that the proposed rule failed to streamline the review process. Elements of the rule presented an increased burden of paperwork and procedural requirements, they said, and increased the potential for litigation. There was also a concern that the proposed rule lacked specific provisions addressing time frames, comment deadlines, dispute resolution, and "closing the record" on decisionmaking at an appropriate stage. Due to these concerns, the proposed rule was withdrawn by DOT in September 2002.[16]

Since withdrawal of the proposed rule came within a year of the legislative reauthorization of surface transportation programs, the agency stated it would wait for the outcome of the legislative process to see what further regulatory changes were needed. In lieu of final regulations, DOT has implemented a variety of administrative actions in response to TEA-21's streamlining requirements. (For detailed information regarding the streamlining provisions of TEA-21 and the Administration's activities to implement those provisions, see CRS Report RL32024, *Background on NEPA Implementation for Highway Projects: Streamlining the Process*.)

Several elements of the coordinated environmental review process exist in current CEQ and DOT regulations. For example, CEQ regulations require agencies to reduce paperwork and delays by:

- Integrating the NEPA process into early planning.
- Emphasizing interagency cooperation before the EIS is prepared, rather than submission of adversary comments on a completed document.

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[15] 65 *Federal Register* 33960.

[16] 67 *Federal Register* 59225.

- Insuring the swift and fair resolution of lead agency disputes.
- Using the scoping process for an early identification of what are and what are not the real issues.
- Establishing appropriate time limits for the EIS process.
- Preparing EISs early in the process.
- Integrating NEPA requirements with other environmental review and consultation requirements.[17]

On September 30, 2003, the day TEA-21 expired, the President signed the first in a series of extension bills. Under those extensions, all existing surface transportation programs continue to operate according to provisions of TEA-21 while Congress considers reauthorization proposals. The most recent extension, the Surface Transportation Extension Act of 2004, Part V (H.R. 5183), extended funding for surface transportation programs until May 31, 2005. Since the environmental streamlining provisions of TEA-21 are not tied to highway funding, the provisions of Section 1309 will continue until new legislation is enacted.

Overview of Provisions of the Administration's Proposal

In May 2003, the Bush Administration submitted its own legislative proposal to reauthorize surface transportation programs, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (SAFETEA). This proposal was introduced by request in both the House and the Senate as H.R.2088 and S. 1072, respectively, and is hereafter referred to as the "Administration bill." The bill that was ultimately passed by the Senate carries the title originally proposed by the Administration bill. Further, the Senate Committee on Environment and Public Works chose to use S. 1072 as its markup vehicle and amended the bill by including its own provisions in the nature of a substitute. S. 1072 in its Senate-passed form, however, is the Senate bill (discussed below), and although it contains selected provisions proposed by the Administration, the bill itself is significantly different from the introduced version. In this report, any reference to SAFETEA refers to the Senate-passed version of the bill.

The Administration's bill included several provisions intended to expedite the environmental review process for highway and transit projects funded by FHWA and FTA. In general, the Administration's bill included provisions that proposed to:

- Expand upon or clarify elements of the "coordinated environmental review process" required under TEA-21.
- Establish a statute of limitations of 180 days for legal challenges to federal agency decisions made in connection with the issuance of permits, licenses, or approvals for highway construction or public transit projects.
- Codify the long-standing practice of allowing state and local governments to be joint lead agencies with DOT in preparing environmental documents.

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[17] 40 C.F.R. 1500.5

- Allow for the delegation of authority to state DOTs to determine if certain projects are categorical exclusions.
- Revise requirements applicable under Section 4(f).

Several of the provisions of the Administration's bill, or elements of them, were found in the bills passed by the House or Senate.

Legislative Efforts to Expedite Project Delivery

During the 108th Congress, both the House and Senate passed their own legislation to reauthorize federal surface transportation programs for FY2004-2009. The Senate passed its version of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004 (SAFETEA, S. 1072) on February 12, 2004. The House passed its bill (H.R. 3550), the Transportation Equity Act: A Legacy for Users (TEA-LU), on April 2, 2004. Each bill had distinct provisions related to the environmental review process. Provisions common to each bill included:

- A statutory designation of DOT as the lead agency for the environmental review process under NEPA;
- A statutory delineation of the roles and responsibilities of the lead agency and cooperating agencies;
- A requirement to involve the public and agencies in defining the purpose and need statement and in developing the range of project alternatives;
- A requirement to follow specified procedures to identify and resolve issues or disputes that could lead to the delay of a project or the denial of any needed approval required by law;
- Authorization for the DOT Secretary to approve the use of highway or mass transit funds to assist participating agencies to meet time limits for the environmental review (previously included in the streamlining provisions of TEA-21);
- An exemption of the Interstate System from consideration as a "historic site" under provisions of Section 4(f); and
- A repeal of the streamlining provisions in Section 1309 of TEA-21.

Details of each bill, particularly details that differed from one bill to another, are discussed below. Also, briefly discussed below are the positions taken by various interest groups on selected legislative proposals. Groups interested in the streamlining provisions generally include "transportation improvement stakeholders" (i.e., state departments of transportation or transportation advocacy or construction organizations) and "environmental stakeholders" (i.e., state or federal resource agencies, historic preservation agencies or advocacy organizations, and environmental advocacy organizations).

Establishment of a New Environmental Review Process. Each bill proposed to delineate a new environmental review process for certain types of surface transportation programs. SAFETEA proposed to establish a new "transportation project development process" (as opposed to building upon the TEA-21's "coordinated environmental review process"). This process, applicable to highway and transit projects, could have been implemented at the request or with the

concurrence of the project sponsor and carried out by the lead agency. Otherwise, the environmental review process required under current CEQ and DOT regulations would be implemented.

TEA-LU included its version of streamlining provisions under Title VI, "Transportation Planning and Project Delivery." TEA-LU's environmental review process was referred to as "project development procedures." The procedures in the House bill were similar to, but in some instances not as detailed as, those found in the Senate bill. Unlike the Senate bill, the project development procedures in the House bill were applicable to all highway projects, public transportation capital projects, and multimodal projects that require an EIS. If determined appropriate by the Secretary, the procedures could also have been applied to projects that required an EA or a categorical exclusion.

Delineation of Authority of the Lead Agency. Each bill proposed to designate DOT as the lead agency for certain surface transportation projects requiring compliance with NEPA. The Senate bill proposed to designate DOT as the lead agency for highway and transit projects and proposed to allow the project sponsor to serve as a joint lead agency. The bill proposed to give authority to the lead agency to carry out certain responsibilities when implementing the transportation project development process. For example, SAFETEA proposed to authorize the lead agency to develop a "coordination plan" to coordinate public and agency participation in the environmental review process. As part of the coordination plan, the lead agency would have been required to develop a workplan and schedule, in consultation with cooperating agencies and the project sponsor, for completion of the environmental review process and the collection of information needed to complete that process. The schedule would have been required to include deadlines on specific milestones in the environmental review process. Criteria for establishing those deadlines were specified in the Senate bill, and included the establishment of deadlines on agency comments, procedures for extending comment deadlines, procedures for accepting late comments, and procedures applicable to deadlines for decisions under other laws.

Further, in SAFETEA, the lead agency would have been authorized to determine the purpose and need and the range of alternatives to be considered for the project. Each of these elements of the environmental review process would have required the solicitation of comments from agencies and the public for 30 days. The bill specified factors that might have been considered by the lead agency in determining the project's purpose and need and alternatives. These factors included transportation, land use, economic development, and environmental protection plans adopted by the state, local, or tribal government.

Responsibilities of cooperating agencies were also delineated in SAFETEA. For example, cooperating agencies involved in the transportation development process would have been required to conduct required environmental reviews concurrently, to the extent practicable.

Similar to the Senate bill, TEA-LU proposed to designate DOT as the "federal lead agency." In addition, the project sponsor, if a state or local government (as opposed to a private entity), was required to be the "joint lead agency" for the

environmental review process. The joint lead agency may have prepared any required environmental documents, if the federal lead agency provided guidance and assistance and approved the documents. The environmental review process must have been initiated by the project sponsor after proper notification to the Secretary.

After participating agencies and the public had an opportunity for involvement, TEA-LU required the lead agency to define the project's purpose and need and the range of project alternatives. However, unlike the Senate bill, specific criteria for involving the public and agencies were not specified. The House bill proposed to require the purpose and need statement to specify the project's objectives (such as supporting a transportation objective identified in a statewide transportation plan). With regard to defining a project's alternatives, the lead agency would have been authorized to collaborate with participating agencies to determine methodologies that would have been used for alternatives analysis and the level of detail required for each alternative. Also, the lead agency would have been given the discretion to develop a preferred alternative to a higher degree of detail in order to facilitate development of mitigation measures or concurrent compliance with other applicable laws, if that determination would not prevent the agency from making an impartial decision.

Transportation advocacy groups such as the American Association of State Highway and Transportation Officials (AASHTO)[18] argue that the authority of participating federal and state agencies, particularly that of the "lead agency," should be more clearly defined in statute. They have supported establishing statutory authority that would reiterate the lead agency's authority to delineate a project's purpose and need, and the range of alternatives to be considered. Environmental stakeholders are concerned that, if the lead agency is afforded specific rights in statute, the opinions or contributions of cooperating agencies will be diminished or dismissed. They acknowledge that establishment of lead agency authority in law may serve to reassert DOT's authority to participating agencies. However, since this is a right already afforded DOT under current law and regulations, some environmental groups contend that such provisions may not significantly streamline the NEPA process.

Delegation of Authority to State DOTs. The Senate bill proposed to authorize the Secretary to assign to a state DOT the responsibility for processing the environmental reviews for projects classified as categorical exclusions. The criteria for making such a determination would have been established by the Secretary and would have applied only to projects designated by the Secretary. Such authority would have been determined through a mutual agreement between the state and the Secretary and delineated in a memorandum of understanding.

In practice, project sponsors already assemble documentation that allows DOT to make the categorical exclusion determination. If enacted, SAFETEA would have had the effect of omitting the final step in the process. This final step currently requires DOT to assure that necessary documentation or required analyses to

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[18] AASHTO represents highway and transportation departments in the fifty states, the District of Columbia, and Puerto Rico.

determine a project's categorical exclusion determination is legally sound and accurately reflects a project's status. Under TEA-LU, similar authority would not have been delegated to the states. However, in effect, certain authority would have been extended to the states insofar as they would have been designated as joint lead agencies, allowed to prepare environmental documents and initiate the environmental review process.

Transportation stakeholders such as AASHTO have argued that project review may be expedited if states were given the authority to process categorical exclusions. Such stakeholders argue that delegation of this authority to the states could speed up the environmental review process for highway projects by eliminating a significant layer of bureaucracy that federal approval entails. However, environmental stakeholders have expressed concern that the delegation of authority to the states would create a "fox guarding the henhouse" scenario. They argue that if a state, which has a vested interest in moving a project forward, is allowed to make certain determinations, those determinations would not have the level of scrutiny that would be provided with federal oversight. Further, they are concerned that any legislation that would reduce or eliminate federal oversight may ultimately limit public participation in the environmental review process.

Amendments to Section 4(f) Provisions. Both bills included similar amendments to Section 4(f) protection of publically owned parks, recreation areas, wildlife and waterfowl refuges, and to public or privately owned historic sites. The main differences between the bills concerned the categories of resources to which the amendments would have applied.

SAFETEA included amendments to Section 4(f) requirements that would have allowed for the use of Section 4(f) resources if it was determined that such use would have "de minimis impacts." If the resource involved a park, recreation area, or wildlife or waterfowl refuge, the Secretary's finding of de minimis impacts would have been required to receive concurrence from the official with jurisdiction over that resource (e.g., the U.S. Fish and Wildlife Service, the National Park Service, or applicable state or local park authorities). If the resource involved a public or private historic site, the finding of de minimis impacts would have had to be determined in accordance with the consultation process required under Section 106 of the National Historic Preservation Act (NHPA, 16 U.S.C. § 470f). As such, it would have been required that the transportation program or project would have no adverse effect on the site or property. That finding would have been required to receive concurrence from the Advisory Council on Historic Preservation or the state or tribal historic preservation officer, as applicable.

Further, within a year of enacting SAFETEA, the Secretary was directed to promulgate regulations to clarify existing Section 4(f) requirements. In particular, provisions of the Senate bill would have required the Secretary, in consultation with affected agencies, to clarify standards required to determine the "prudence and feasibility" of a project's alternatives (see "Requirements Applicable to Parks, Refuges, and Historic Sites" section, above).

The House bill also included amendments to Section 4(f). However, its proposal would have applied only to historic sites. Provisions of TEA-LU would have allowed

for the use of a historic site if that use was determined, in accordance with provisions of Section 106 of the National Historic Preservation Act, to have no "adverse effect" on the site.

Some environmental stakeholders have expressed concerns at what they perceive as an overall weakening of the current protections. Most transportation stakeholders are in favor of SAFETEA's revisions to the current Section 4(f) requirements, which have been identified by state transportation agencies as a significant deterrent to timely environmental reviews of transportation projects.[19] Further, AASHTO has argued that the problem with Section 4(f) is what it perceives as the law's lack of flexibility, particularly with regard to privately owned historic sites.[20] AASHTO has expressed concern with the requirement to avoid Section 4(f) resources even when the impact is minor, resulting in situations in which a historic property is protected at the expense of other, more sensitive environmental resources or communities. Historic preservation groups, such as the National Trust for Historic Preservation (NTHP), counter that changes to the law are not needed and any problem with Section 4(f) is with improper interpretation by FHWA. NTHP asserts that FHWA sometimes avoids a Section 4(f) resource "at all costs" and has interpreted situations in which there are "no prudent and feasible" project alternatives too narrowly.[21]

Establishment of Deadlines. Each bill either required or allowed for the establishment of deadlines on certain project milestones. TEA-LU included provisions that would have established various definitive deadlines applicable to agencies and the public. For example, TEA-LU would have established an extendable 60-day deadline on comments to a draft EIS and an extendable 30-day deadline on all other comment periods in the environmental review process. Also, TEA-LU would have established a 90-day statute of limitations on legal challenges related to final agency actions.

The Senate bill would not have set specific deadlines applicable to all projects. However, one component of the "transportation project development process" was the development of a project work plan that included a schedule with deadlines negotiated by the lead and cooperating agencies.

Environmental groups argue that public involvement in highway projects will likely be restricted if deadlines are applied to the interagency processes. Further, they argue that deadlines of 30 to 60 days are not sufficient to fully consider and consent on the major questions of impact exposed throughout the NEPA process. Transportation stakeholders are in favor of the adoption of extendable deadlines on agency comments.

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[19] FHWA newsletter "Successes in Streamlining," January 2002.

[20] AASHTO statement for the record regarding "Stewardship and Streamlining Proposals for Reauthorization of the Surface Transportation Program," before the Senate Environment and Public Works Committee, September 19, 2002.

[21] The National Trust for Historic Preservation newsletter, "Forum News," Volume IX, No. 4, March/April 2003, p 2.

With regard to the creation of a statute of limitations on legal challenges, transportation stakeholders such as AASHTO are in favor of the adoption of time limits for legal challenges to project approvals. They argue that the absence of a statute of limitations in current law allows plaintiffs to file suit when a project is at an advanced stage. They are in favor of limits that would facilitate the resolution of legal disputes more promptly after the conclusion of the environmental review process. Some environmental groups have argued that the proposed statute of limitations of 90 days is too restrictive and does not allow sufficient time to prepare an appeal. They argue that, as a result, this time limit may lead to preemptive suits in an effort to preserve the right to sue.

Pilot Program for States. SAFETEA proposed the establishment of a "surface transportation project delivery pilot program" that would delegate certain federal environmental review responsibilities (in addition to categorical exclusion determinations) to no more than five states. Oklahoma was specifically designated as one of the five states. Responsibility could have been assumed for environmental reviews required under NEPA, or any federal law, for one or more highway projects within the state. The program would have been administered in accordance with a written agreement between the participating state and the Secretary. The Secretary was directed to promulgate regulations to implement the pilot program within 270 days of enacting SAFETEA. TEA-LU did not include a comparable provision.

Requirement to Promulgate Regulations. SAFETEA proposed to require the Secretary to promulgate regulations to implement each of the provisions discussed above, unless otherwise specified, within one year of enacting the law. This provision relates to the concerns of some Members of Congress that regulations to implement the streamlining provisions in TEA-21 were not finalized after its enactment. TEA-LU did not include similar deadlines or requirements.