



## Office of the Secretary of Transportation

### 49 CFR Part 13

[Docket No. DOT-OST-2020-0229]

RIN 2105-AE97

### Procedures for Considering Environmental Impacts

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The U.S. Department of Transportation (DOT) proposes to update and codify its internal order establishing the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA), currently found in DOT Order 5610.1C, “Procedures for Considering Environmental Impacts,” which was issued in 1979 and last updated in 1985. This proposal would update the DOT NEPA procedures in response to the Council on Environmental Quality’s (CEQ’s) final rule updating its NEPA procedures and also incorporate provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); Moving Ahead for Progress in the 21st Century Act (MAP-21); and the Fixing America’s Surface Transportation (FAST) Act related to the Department’s environmental review process. This proposed rule would modernize the Department’s procedures and promote collaboration and efficiency in the implementation of NEPA. Finally, this proposal would also update the list of the Department’s categorical exclusions consistent with the CEQ’s regulations implementing NEPA.

**DATES:** Persons interested in submitting written comments on this NPRM must do so by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Department will consider late comments to the extent practicable.

**ADDRESSES:** To ensure you do not duplicate your docket submissions, please submit comments by only one of the following means:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building, Ground Floor, Room W12-140, Washington D.C. 20590-0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue. SE., West Building, Ground Floor, Room W12-140, Washington, D.C. 20590-0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

*Instructions:*

All comment submissions must include the agency name, docket name, and docket number (DOT-OST-2020-0229) or Regulation Identifier Number (RIN) for this rulemaking (2105-AE97). Note that all comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov), including any personal information provided. Physical access to the Docket is available at the Hand Delivery address noted above.

This document may be viewed online under the docket number noted above through the Federal eRulemaking portal, [www.regulations.gov](http://www.regulations.gov). An electronic copy of this document may also be downloaded from the Office of the Federal Register’s website, [www.federalregister.gov](http://www.federalregister.gov), and the Government Publishing Office’s website, [www.govinfo.gov/app/collection/fr](http://www.govinfo.gov/app/collection/fr). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments, without edit, including any personal information the commenter provides, to

*www.regulations.gov*, as described in the system of records notice (DOT/ALL-14 FDMS), which can be viewed at *www.transportation.gov/privacy*.

**FOR FURTHER INFORMATION CONTACT:** April Marchese, Director, Infrastructure Permitting Improvement Center, 202-366-4416, [april.marchese@dot.gov](mailto:april.marchese@dot.gov) or Krystyna Bednarczyk, Office of the General Counsel, 202-366-5283, [Krystyna.bednarczyk@dot.gov](mailto:Krystyna.bednarczyk@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

A. Statutory Authority

The National Environmental Policy Act, as amended, 42 U.S.C. 4321–4347 (NEPA), requires all Federal agencies to assess the environmental impact of their actions. 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has issued regulations at 40 CFR parts 1500–1508 (CEQ regulations) implementing NEPA that are binding on Federal agencies. On July 16, 2020, CEQ issued a final rule comprehensively updating those regulations. 85 FR 43304 (July 16, 2020). The CEQ regulations require Federal agencies to develop or revise their procedures for implementing NEPA, as necessary, for consistency with CEQ’s regulations or for efficiency. 40 CFR 1507.3(b), (c). The CEQ regulations require agencies to consult with CEQ during the development of their implementing procedures and prior to their publication in the *Federal Register*. 40 CFR 1507.3. The U.S. Department of Transportation (Department or DOT) has accordingly reviewed its current implementing procedures and undertakes this revision pursuant to 40 CFR 1507.3. The Department developed the proposed rule in consultation with CEQ. In accordance with 40 CFR 1507.3(a), the Department is proposing this rule and providing an opportunity for public review and comment on the proposal.

B. Background

NEPA establishes a national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331(a). Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. It requires Federal agencies to consider the environmental effects of proposed actions in their decisionmaking and prepare detailed environmental statements on recommendations or reports and other major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). In 2005, Congress enacted 23 U.S.C. 139, “Efficient environmental reviews for project decisionmaking,” a streamlined environmental review process for highway, transit, and multimodal transportation projects through the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109–59, sec. 6002 (2005). In 2012, Congress declared it in the national interest to accelerate transportation project delivery and reduce costs, and ensure that transportation planning, design, and construction are completed in an efficient and effective manner. Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, sec. 1301 (2012) (set out at 23 U.S.C. 101 note). In 2015, Congress also directed the Department to implement a variety of reforms to streamline and accelerate its environmental review process. *See* Fixing America’s Surface Transportation Act (FAST) Act, Pub. L. 114-94 (2015).

The Department proposes to revise its current procedures, DOT Order 5610.1C, “Procedures for Considering Environmental Impacts,” originally published in 1979, 44 FR 56420 (Oct. 1, 1979), and codify them in the Code of Federal Regulations. DOT Order 5610.1C, which is now in effect, was updated in 1982 and 1985 (1985

procedures).<sup>1</sup> This proposed rule would update and modernize the 1985 procedures and reflect current departmental NEPA practice. As reflected in the proposed rule, the Department also considered comments it received in response to its publication of proposed Order 5610.1D in the Federal Register on December 20, 2016. 81 FR 92966.

The Department is issuing this proposed rule to enhance and modernize the Department's environmental review processes, bring consistency to the documentation of environmental analyses under these processes, and incorporate strategies to complete environmental review more efficiently in accordance with streamlining efforts developed by the Department at the direction of Congress. This proposed rule would update the procedures to be consistent with CEQ's updated regulations and promote agency efficiency. This proposed rule would also update the 1985 procedures to account for relevant project delivery provisions and other streamlining efforts included in SAFETEA-LU, MAP-21 and the FAST Act, that apply departmentwide. Accordingly, the proposed rule would reflect the Department's modern NEPA practices and unique project delivery statutory authorities by providing direction on analyzing multimodal projects in an expedited and streamlined manner, enhancing early coordination, and incorporating a multimodal categorical exclusion (CE) process that allows the Department's Operating Administrations (OAs) to utilize each other's CEs. The proposed rule would also incorporate agency practice, including environmental review tracking requirements, and would provide for accountability for agency NEPA compliance to senior agency officials, consistent with the updated CEQ regulations. *See* 40 CFR 1508.1(dd).

The proposed rule seeks to ensure a full and fair environmental review process that includes meaningful public involvement throughout, and balanced consideration of

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<sup>1</sup> Available at [https://www.transportation.gov/sites/dot.gov/files/docs/Procedures\\_Considering\\_Environmental\\_Impacts\\_5610\\_1C.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Procedures_Considering_Environmental_Impacts_5610_1C.pdf).

alternatives and potential impacts on the human environment. The proposed rule would modernize the 1985 procedures to improve efficiency and expedite project delivery; provide enhanced customer service to stakeholders through consistent implementation of NEPA across the Department, where possible; provide support for the Department's OAs to apply OAs specific NEPA implementing procedures to their specific programs; and balance the needs of all OAs. These reforms are intended to ensure that NEPA documents inform and involve the public, focus on the significant issues that require analysis, and foster informed decisionmaking based on an understanding of the potential action's environmental consequences.

### C. Expected Impact of the Proposed Rule

This proposed rule would revise the internal procedures of the Department, promoting consistent implementation across the Department of its responsibilities under NEPA while still allowing flexibility for each OA to carry out its own mission. Facilitating the appropriate use of departmental CEs would reduce the expenditure of government resources on the preparation of environmental assessments (EAs) or environmental impact statements (EISs) and would shorten approval timelines for activities or projects that, based on the Department's experience, normally do not have the potential to have a significant effect on the human environment and therefore normally do not require the preparation of an EA or EIS. 40 CFR 1501.4. Promulgating CEs for the entire Department also promotes consistency, reduces inefficiency, and allows OA procedures to focus on the unique issues in their programs. Codifying all these policies and procedures would provide consistency, aid efficiency, reduce duplication, and refocus agency practice on fostering informed decisionmaking, rather than generating paperwork. The Department expects that this would reduce unnecessary delays. The Department also expects the proposed changes to increase the availability and use of CEs,

early collaboration, and dispute resolution and coordination techniques, and to improve timely completion of the environmental review process.

## **II. Proposed Revisions Generally**

The proposed rule would comprehensively update the 1985 procedures. This proposal would update the organization of the 1985 procedures to align with current Department organization, practice, and policies to more effectively and efficiently implement the DOT NEPA policies and the new revisions of the CEQ regulations published on July 16, 2020 (85 FR 43304). The proposal would update the existing Departmentwide CEs, including adding 11 new CEs and modifying the existing CEs. The proposal would also improve clarity and reduce ambiguity regarding the entities responsible for taking the actions specified in the rule. To improve readability, this proposal would designate “OA” as the entity responsible for conducting NEPA analyses, and would define “OA” to include a Secretarial Office that carries out its own NEPA responsibilities (as opposed to an office that relies on an OA’s expertise to prepare the NEPA document). This proposal also would update the names of the relevant offices that have responsibilities, including the Office of Policy and Office of the General Counsel (and relevant subdivisions thereof). The proposal would apply to the Department’s diverse programs and actions, and, to the extent possible, would avoid creating conflicts with existing OA programs and actions. To that end, the Department does not propose to include the more detailed policy concerning the format and content of EISs that was contained in Attachment 2 of the 1985 procedures. DOT also does not propose to include Attachment 1 of the 1985 procedures, which provided a list of the States and localities with EIS requirements. Finally, this proposal would update terminology for consistency with modern NEPA practice and the Department’s current operations. The proposed revisions to the 1985 procedures are provided in Table 1.

TABLE 1—CROSSWALK OF PROPOSED REVISIONS TO 1985 PROCEDURES

1985 Procedures	Section	Proposed Subpart	Proposed Section
Introduction	1. Purpose	A	13.1
	2. Cancellation	Removed	Removed
	3. Authority	B; Appendix C of part 13	13.7(d); Appendix C of part 13
1. Background	--	Removed	Removed
2. Policy and Intent		A; B	13.5; 13.13
3. Planning and Early Coordination		B	13.9
4. Environmental Processing Choice	a. Action Covered	A	13.3
	b. Environmental Impact Statements	B	13.23
	c. Categorical Exclusions	B; Appendix A of part 13	13.17; Appendix A of part 13
	d. Environmental Assessment	B	13.19
	e. Exemptions	Removed	Removed
5. Finding of No Significant Impact (FONSI)		B	13.21
6. Lead Agencies and Cooperating Agencies		B	13.11
7. Preparation and Processing of Draft Environmental Impact Statements (DEISs)	a. Scope of Statement	B	13.23(c)
	b. Timing of Preparation of Draft Statements	B	13.25(a)
	c. Interdisciplinary Approach and Responsibility for EIS Preparation	B	13.13(d)
	d. Preparation of Draft	Removed	13.13(a); Appendix C
	e. Format and Content	B	13.23(e)
	f. Circulation of the Draft Environmental Impact Statement	B	13.25(c)
	g. Tiering	B	13.13(f)
	--	B	13.25(b)
	--	B	13.23(f)

			13.23(g)
8. Inviting Comments on the DEIS	a. State and Local Review	B	13.25(c)
	b. Review of EISs Prepared Pursuant to Section 102(2)(D) of NEPA	B	13.23(d)
9. Review of Environmental Impact Statements Prepared by Other Agencies		Removed	Removed
10. Predecision Referrals to the Council on Environmental Quality	a. DOT Lead Agency Proposals	B	13.13(e)(2)(i)
	b. DOT Referrals to CEQ on Other Agencies' Proposals	B	13.13(e)(2)(ii)
11. Final Environmental Impact Statements	a. Preparation		13.27(a)
	b. Compliance with Other Requirements.	A; B; Appendix C of part 13	13.5; 13.13(a);13.27(b); Appendix C of part 13
	c. Legal Review	B	13.7
	d. Approval	B	13.27(e)
	e. Availability Pending Approval	Removed	Removed
	f. Availability of Statements to EPA and the Public.	B	13.25(h)-(i); 13.27(g)
	g. Implementation of Representations in Environmental Statements	B	13.13(g)
	h. Supplemental Statements	B	13.33(b)
	--	B	13.27(b)
12. Determinations under Section 4(f) of the DOT Act		Removed	Removed
13. Responsibility		B	13.7
14. Citizen Involvement Procedures		B	13.13(h)
15. Proposals for Legislation	a. Preparation	B	13.37(a)

	b. Processing	B	13.37(b)
16. International Actions		B	13.39
17. Timing of Agency Action		B	13.23(j)
18. Effective Date.		Removed	Removed
19. Time in Effect of Statements		B	13.33(a)
20. Implementing Instructions		B	13.7(e)
21. Responsible Official for Office of the Secretary Actions		B	13.7
Attachment 1. State and Localities with EIS Requirements		Removed	Removed
Attachment 2. Format and Content of Environmental Impact Statements		Removed	Removed
--	--	B	13.29
--	--	B	13.31
--	--	B	13.35

### III. Section-by Section Description of Changes in the Proposed Rule

This proposal would rearrange the 1985 procedures and would separate them into two subparts to divide the generally applicable provisions in subpart A from the provisions addressing the NEPA review process and compliance responsibilities in subpart B. In addition, subpart B would reorder sections from the 1985 procedures to align with the Department’s environmental review process and the levels of NEPA documentation.

#### A. Subpart A—General

This proposal would remove the Introduction and Background sections of the 1985 procedures and would transfer content addressing the purpose of the Department’s NEPA implementing procedures to proposed §§ 13.1 and 13.5. Proposed subpart A would significantly reorganize and update section 2 of the 1985 procedures, “Policy and Intent,” in proposed § 13.5 to reflect current policy and intent of the DOT NEPA procedures. As discussed more specifically in the section-by-section summaries of

proposed §§ 13.1 through 13.5, this proposed subpart would emphasize the Department's goals to: (1) achieve the Department's mission and ensure consistency with national transportation policy (§ 13.5(a)); (2) use the NEPA process as an umbrella to achieve a single, integrated environmental review process<sup>2</sup> (§ 13.5(b)); (3) use sound science and reliable data (§ 13.5(c)); (4) facilitate a collaborative process to achieve optimal outcomes while protecting and enhancing the environment (§ 13.5(d)); and (5) ensure meaningful public participation and collaboration (§ 13.5(e)).

This proposed subpart would set forth the Department's overarching environmental policy in the context of its agency mission, which is to ensure the safest, most efficient and modern transportation system in the world, which improves the quality of life for all American people and communities, from rural to urban, and increases the productivity and competitiveness of American workers and businesses. The proposed subpart would provide consistency between the Department's NEPA procedures and congressional declarations of policy, which provide that it is in the national interest to "accelerate project delivery and reduce costs" and to ensure that transportation project delivery is completed in "an efficient and effective manner, promoting accountability for public investments and encouraging greater private sector involvement . . . while enhancing safety and protecting the environment." MAP-21 sec. 1301 (set out at 23 U.S.C. 101 note). Finally, this subpart would support the presumptive time limits established in the updated CEQ regulations to complete environmental documentation.

*See* 40 CFR 1501.10.

### § 13.1 Applicability

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<sup>2</sup> For the purpose of this NPRM, "environmental review" encompasses both the NEPA process and authorizations, including reviews or actions taken to comply with relevant substantive environmental requirements.

The applicability section would focus on the implementation of NEPA pursuant to the CEQ regulations and include covered actions. Covered actions would identify categories of Department actions typically subject to NEPA. For consistency with the CEQ regulations at 40 CFR 1508.1(q), this section would clarify that loans and loan guarantees may be actions subject to NEPA when the OA exercises sufficient control and responsibility over the effects of such assistance. This list would also include “approvals of policies and plans (including those submitted to the Department by State, Tribal, or local agencies, or other public or private applicants, unless otherwise exempted).”

The CEQ regulations at 40 CFR 1501.1 and 1507.3(d) provide that agencies should identify activities or decisions that are not subject to NEPA. This section would exclude transportation improvement plans (TIPs) and statewide improvement plans (STIPs) conducted pursuant to 23 U.S.C. 134 and 135 because TIPs and STIPs are statutorily exempt from review under NEPA pursuant to 23 U.S.C. 134(q) and 23 U.S.C. 135(k), respectively. In addition, the section would clarify, consistent with 40 CFR 1501.1(a)(5) and 1507.3(d)(5), and with *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), that a proposal is not an action subject to NEPA if the proposal is ministerial in nature; if the Department lacks discretion to consider the environmental impacts in making the decision; or if the Department does not have responsibility for, or cannot control, the outcome. DOT recommends that OAs identify any specific additional activities or decisions to which NEPA does not apply, consistent with 40 CFR 1501.1 and 1507.3(d), as appropriate, in their own implementing procedures as stated in § 13.7(c)(1).

The Department proposed to use “rulemakings” rather than the phrase “rulemaking and regulatory actions” as used in DOT Order 5610.1C because the term rulemaking already encompasses regulatory actions by its definition. In addition, the Department does not include “research activities” because most of the Department’s research activities would not have environmental impacts subject to NEPA. To the extent that a

research activity is an action, it may be appropriate to categorically exclude an action under CE # 9. References to other environmental requirements are updated and reorganized. The Department therefore proposes to list certain authorities previously listed in paragraph 3 of the Introduction section of the 1985 procedures in Appendix C of proposed part 13. In addition, the Department would not include statutory references that are not broadly applicable to the Department, are substantively addressed elsewhere in the proposed rule, or are implemented by OA procedures. As a result, this proposal would not include the following references: Section 2(b) of the Department of Transportation Act of 1966 (49 U.S.C. 1653); Section 309 of the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*); Section 303 of the Coastal Zone Management Act of 1972 (43 U.S.C. 1241); and, where environmental statements are required, Sections 138 and 109 of Federal aid highway legislation (Title 23); Sections 16 and 18(a) of the Airport and Airway Development Act of 1970 (49 U.S.C. 1716, 1718); and Section 14 of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1601 *et seq.*).

### § 13.3 Definitions

While the 1985 procedures did not contain a definitions section, the Department determined that it would be helpful to define certain terms to reduce ambiguity as to certain terminology used in this proposed rule and by the Department's NEPA practitioners. This proposed section would incorporate by reference the definitions from the CEQ regulations set forth in 40 CFR 1508.1, and supplement those definitions where necessary. This section would define the following terms:

(a) Applicant. This definition would define "applicant" broadly to reflect the variety of applicants encountered across the Department. This definition also would recognize that some OA NEPA implementing procedures (OA Procedures) provide that the applicant will carry out some of the responsibilities of the OA on its behalf, and therefore could conduct activities under the Department's NEPA procedures on behalf of that OA.

This definition is intended to provide flexibility to OAs that administer programs where applicants are responsible for preparing NEPA documents on behalf of OAs. This includes State DOTs, transit agencies, and other applicants that prepare NEPA documents or carry out other responsibilities for the NEPA process pursuant to OA NEPA procedures. For purposes of this part, the definition of “applicant” does not include States that are assigned environmental review responsibilities pursuant to a memorandum of understanding executed pursuant to statutory authority under 23 U.S.C. 326 and 327. States that carry out such assignments are deemed to be OAs for purposes of this part.

(b) Environmental review process. The Department would include this term to emphasize that the Department strives to comply not just with NEPA, but with all applicable environmental requirements in a single process, so as to ensure efficient project delivery and decisionmaking.

(c) Level of NEPA Review. The Department would include this term to mean the level of NEPA review required for a particular action (i.e., a CE, an EA, or an EIS).

(d) NEPA Document. The proposal would use the term “NEPA document” in addition to “environmental document” as used in the CEQ regulations, and would define it more broadly to include an EIS, a record of decision (ROD), an EA, a finding of no significant impact (FONSI), or any documentation that may be prepared in the application of a CE to a proposed action.

(e) Operating Administration (OA): The Department would define “OA” to mean any agency established within the Department, and cross reference to the list of the current OAs in 49 CFR 1.3. As noted in Section II of this rulemaking, to improve readability of this proposal, “OA” would also include a Secretarial Office where that office is carrying out its own NEPA responsibilities.

## § 13.5 Environmental Review Policy

This proposed section would set forth the Department's policies for evaluating environmental impacts caused by Department actions. This section would modify language previously contained in sections 1 and 2 of the 1985 procedures and would state in proposed paragraphs (a), (b), and (c) that the policy of the Department is to: integrate Federal environmental objectives into Department programs while avoiding or minimizing adverse environmental effects wherever practicable; synchronize NEPA and other environmental requirements into a single, concurrent process; and apply sound science, reliable data, and a systematic interdisciplinary approach.

The Department's policies further statutory directives set forth in section 1313 of the FAST Act to: develop a coordinated and concurrent environmental review and permitting process for transportation projects as well as align Federal reviews; reduce permitting and project delivery timelines; and facilitate interagency collaboration. Accordingly, proposed paragraphs (d) and (e) would include instructions to: maximize the use of proven strategies to complete the environmental review process efficiently; and encourage meaningful, proactive, open, and transparent public participation and collaboration.

In addition, this proposed section would not include certain policy language from the 1985 procedures to update and align the Department's processes with the updated CEQ regulations and statutory provisions contained in section 1301 of MAP-21 (set out at 23 U.S.C. 101 note) directing the Department to accelerate transportation project delivery, reduce costs, and ensure that transportation projects are completed in a streamlined manner and that environmental reviews are efficient and effective. The Department will continue to conduct environmental reviews consistent with 40 CFR 1501.3 and other authorities, where applicable, including Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303). For purposes of streamlining the procedures, the Department would clarify in Appendix C its expectation that OAs would integrate into the NEPA process

compliance with substantive environmental laws. As to this section, the Department is of the view that it is not necessary to include specific references regarding: preservation of the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites; preservation, restoration, and improvement of wetlands; improvement of the urban physical, social, and economic environment; and provision of opportunities for disadvantaged persons. These matters are otherwise covered in substantive environmental laws.

The Department would not include language stating that the EIS, FONSI, and determination that a proposed action is categorically excluded serve as the record of compliance with the Department's environmental review policy, NEPA procedures, and other environmental statutes and Executive orders. The proposal recognizes that an EIS contains analyses, but is not a decision document like a FONSI or CE determination, and an EIS alone is not final agency action. *See* 40 CFR 1500.3(c) and 85 FR at 43318.

#### B. Subpart B—NEPA Review Process

##### § 13.7 Managing NEPA Compliance

Proposed § 13.7 would be a new addition to the Department's implementing procedures. This section would list the roles and responsibilities within the Department for implementing NEPA, the CEQ regulations, this proposed rule, OA implementing procedures, and other applicable laws.

The CEQ regulations introduce the term "senior agency official" to differentiate between an agency decisionmaker for an individual action and the agency official who oversees the agency's overall compliance with NEPA. 40 CFR 1508.1(dd). CEQ acknowledged that multiple individuals may carry out these responsibilities in agencies that have subunits with their own agency procedures or NEPA compliance programs. 85 FR 43304, 43315 (July 16, 2020). Within DOT, OAs carry out their own NEPA compliance programs. Accordingly, proposed paragraph (a) would identify the Assistant

Secretary for Transportation Policy (Assistant Secretary) as the senior agency official responsible for implementing NEPA, establishing NEPA policy, and identifying the OA that will serve as the lead agency for all actions taken by the Department pursuant to 49 CFR 1.25a(a)(2). For example, to create efficiencies, the senior agency official may designate one OA to act as the lead agency and to prepare the environmental documentation on behalf of all OAs for certain actions, such as when a multimodal project receives funding from or requires approval by one or more OAs. In addition, consistent with CEQ's direction and to maximize efficiency, these procedures would, in certain instances, permit an OA Administrator to carry out the responsibilities of a senior agency official at an OA level. For example, paragraph (c) of § 13.19 would permit either the Assistant Secretary or an OA Administrator to act as the senior agency official for purposes of allowing an OA to exceed the presumptive limit of 75 pages and to establish a new page limit for the EA. Similarly, for purposes of setting EA time limits for EAs, paragraph (c) of § 13.19 would authorize either official to set new time limits. Finally, consistent with the Department's Interim Guidance on Page Limits for National Environmental Policy Act Documents and Focused Analyses (84 FR 44351 (August 23, 2019)), the Department would reserve to the Assistant Secretary in § 13.23(f) through (g) similar decisionmaking authority for EISs.

Proposed paragraph (b) would identify the Office of the Secretary of Transportation, Office of Policy Development, Strategic Planning, and Performance (Office of Policy) as the responsible office for NEPA implementation and compliance with related environmental requirements, and as the source of additional environmental review process information. It would require OAs to consult with the Office of Policy, and in turn with the Office of the General Counsel (OGC), in certain situations.

Proposed paragraph (c) would identify OGC as legal counsel to the Office of Policy on topics related to the implementation and interpretation of NEPA, the CEQ

regulations, this proposed rule, and other applicable laws; charge OGC with providing legal sufficiency determinations on Department NEPA documents; and charge OGC with coordinating with OAs and the Department of Justice on NEPA-related litigation.

Proposed paragraph (d) would identify this proposal as a supplement to CEQ regulations that sets forth procedures specific to Department actions, with which all OAs must comply. This provision originally appeared in the Introduction section of the 1985 procedures.

Proposed paragraphs (e)(1) through (5) would require each OA to issue or modify its NEPA implementing procedures through an Order or regulations consistent with this proposal, the CEQ regulations, and other applicable laws. This section would also outline the minimum requirements of each OA's procedures, and the process that OAs may use to revise existing or create new provisions. This direction was originally found at section 20 of the 1985 procedures and has been updated to reflect the updated CEQ regulations (85 FR 43304 (July 16, 2020)). Finally, this proposed section would authorize OAs, subject to 40 CFR 1507.3(a), to rely on their existing procedures until their new procedures are reviewed and revised, and to use, on a discretionary basis, portions of the Department's procedures to the extent such direction has not been incorporated into the OA's procedures.

### § 13.9 Planning and Early Coordination

Proposed § 13.9 would retain the direction provided in the 1985 procedures at section 3, "Planning and Early Coordination," and would incorporate direction for the early portions of the NEPA process. Proposed paragraph (a) is intended to implement MAP-21 sec. 1320, which encourages agencies to coordinate with one another "at the earliest practicable time." Consistent with 40 CFR 1501.2(a), proposed paragraph (a)(1) would encourage early and ongoing coordination, and would require early efforts to identify the purpose and need, environmental impacts, reasonable alternatives, and

measures to avoid, minimize, or mitigate adverse environmental impacts, as appropriate. Consistent with requirements in 40 CFR 1506.1, the proposed paragraph (a)(2) would include a general prohibition against taking actions that will have an adverse environmental impact or limit the choice of reasonable alternatives until after a final NEPA determination is made; and it would set forth notification requirements should the OA become aware that such an action may have been taken. Proposed paragraphs (b) and (c) would build on section 3(b) of the 1985 procedures. Proposed paragraph (b) would require OAs to ensure that applicants are aware of environmental review and analysis requirements. Proposed paragraph (c) would require coordination with other OAs; Federal, State, Tribal, and local resource and regulatory agencies; stakeholders; and the public to comply with NEPA and other relevant statutes, regulations, and Executive Orders. Proposed paragraph (d) would encourage reliance on information developed during the planning process to avoid duplicating efforts in the NEPA process. This proposal would encourage consideration of environmental impacts during transportation planning; however, this process is explicitly exempted from NEPA pursuant to 23 U.S.C. 134(q) and 135(k). Nevertheless, in accordance with MAP-21 sec. 1310 and FAST Act sec. 1305, this proposal would recognize the statutory framework that permits the products of statewide and metropolitan planning processes to be adopted for use in the NEPA process. Proposed paragraph (e) would discuss the use of the scoping process in early coordination to identify significant issues and to ensure early public involvement in the NEPA process. It further would instruct OAs to use early coordination tools to accelerate the EIS process.

#### § 13.11 Lead, Cooperating, and Participating Agencies

Proposed § 13.11 would include language, with minor revisions, generally consistent with section 6 of the 1985 procedures, “Lead Agencies and Cooperating Agencies.” This section would outline the responsibilities of lead, joint lead, cooperating,

and participating agencies consistent with the CEQ regulations, the appropriate timing for coordination with cooperating agencies, and protocols for coordinating with agencies that decline a DOT-requested cooperating agency status. This section would align with the update to the CEQ regulations, 40 CFR 1501.7 and 1501.8, to highlight the responsibilities of the lead agency, including the responsibility to issue a single environmental document, single FONSI, or single ROD for the lead and cooperating agencies, the responsibility to determine the scope and significant issues to be analyzed in depth in the environmental impact statement, and the responsibility to determine the purpose and need and range of alternatives in consultation with the cooperating agency. In addition, the lead agency would be responsible for creating and updating the project schedule in coordination with the cooperating agencies. Finally, proposed paragraph (d) would recommend inviting agencies that may have an interest in the proposed action and are not cooperating or lead agencies to participate in the environmental review process. This approach is similar to the participating agency role set forth in 23 U.S.C. 139(d). Since applicants may carry out the responsibilities of the OA on its behalf, this proposal would not include the requirement from the 1985 procedures for applicants to serve as joint lead agencies.

#### § 13.13 General Principles for the NEPA Review Process

This proposal would include a new proposed § 13.13. This proposed addition would build upon several provisions from the 1985 procedures, including section 2, “Policy and Intent;” section 7, “Preparation and Processing of Draft Environmental Statements;” section 10, “Predecision Referrals to the Council on Environmental Quality;” and section 14, “Citizen Involvement Procedures.”

Proposed paragraph (a) would address the integration, to the maximum extent possible and at the earliest possible time, of all environmental reviews into the NEPA process to create a single environmental document.

To expedite project delivery, proposed paragraph (b) would instruct OAs to incorporate by reference previously prepared and publicly available analyses, whenever possible, and to include a brief summary of the material in the NEPA document.

Proposed paragraph (c) would set forth general requirements for NEPA documents, in accordance with 40 CFR 1500.4(d), 1502.2(a) and (c), and 1502.8, including that they be written in plain language and that they address impacts in proportion to their significance.

Proposed paragraph (d) would require OAs to use an interdisciplinary approach, consistent with 40 CFR 1502.6, and provide that they may use professional services but must have staff with the capacity to evaluate these services and must take responsibility for the final content of their NEPA documents, consistent with 40 CFR 1506.5 and 1507.2.

Proposed paragraph (e) would promote the use of informal conflict resolution as well as environmental collaboration and conflict resolution (ECCR), consistent with the applicable requirements related to issue elevation and resolution outlined in section 6002 of SAFETEA-LU, 40 CFR 1504.2, and 1504.3(d) through (h), Executive Order (E.O.) 13807, and the September 7, 2012, CEQ/OMB joint “Memorandum on Environmental Collaboration and Conflict Resolution.” Proposed paragraph (e)(2) would include with revisions section 10 of the 1985 procedures, “Pre-decision Referrals to the Council on Environmental Quality”. This proposed paragraph would address the internal process for addressing or making referrals to CEQ. Overall, the process would remain the same, with revisions to reflect current practices for internal clearance and documentation requirements.

Proposed paragraph (f) would provide direction on the use of tiering to improve or simplify the environmental analysis of actions that are similar or broad in nature, or when future decisions or unknown future conditions preclude a complete NEPA analysis,

consistent with 40 CFR 1501.11 and 1502.4(b)(2). It also would encourage the use of programmatic approaches with resource or regulatory agencies, where possible. This instruction is consistent with MAP-21 sec. 1305, which modified the environmental review process mandated in sec. 6002 of SAFETEA-LU by explicitly authorizing the Department to use programmatic approaches to conduct environmental reviews. 23 U.S.C. 139(b).

Proposed paragraph (g), which is consistent with 40 CFR 1501.6(c), 1505.2(a)(3) and 1505.3, would instruct OAs to identify in the FONSI or ROD those measures that the lead agency is adopting and committing to implement. Due to the importance of ensuring implementation of mitigation measures, OAs would be instructed to take appropriate steps to ensure that these mitigation measures are implemented, including, for third-party actions, by conditioning the agency decision upon the performance of the mitigation commitments. Where legal authority exists, OAs would be permitted to provide for mitigation monitoring.

Proposed paragraphs (h)(1) and (2) would identify public involvement as an important part of each stage of the development of a proposed action that should begin as early as reasonable and should be integrated into the NEPA process. The language would remain relatively unchanged from the original section 14 of the 1985 procedures, but has been updated to include modern technologies, such as using social media. Because the CEQ regulations provide flexibility with regard to public hearings, the Department does not include section 14(e) of the 1985 procedures. The revised provision provides flexibility in implementation and recognizes the importance of various engagement strategies. In addition, the proposed rule states that that methods to solicit the views of the public should be tailored to reach those persons who are interested or affected by the action, and NEPA documents should be made available online where appropriate and practicable. Finally, this provision would incorporate CEQ's requirements from 40 CFR

1500.3(b), 1500.4(n), and 1503.3, that public comments be solicited as early in the process as possible, that they be specific, and that OAs provide notice that comments not submitted shall be forfeited as unexhausted.

Proposed paragraph (i) would recognize that NEPA decisionmaking may not be delegated to third parties, but that many NEPA documents are prepared by third parties. Accordingly, this paragraph would address the use of contractors in preparing NEPA documents and set forth requirements consistent with 40 CFR 1506.5, which require OAs to provide guidance, participate in the preparation of, and independently review and assume responsibility for the content of all NEPA documents. OAs would retain responsibility for the documents' accuracy, scope, and contents. The section also would provide guidance for the selection of contractors. The Department notes that OA procedures may include different requirements regarding the OA's use of contractors. *See, e.g.,* 23 U.S.C. 112.

Proposed paragraph (j) would incorporate existing NEPA tracking requirements at 40 CFR 1501.7(i), 1501.9(d)(5), and 1507.4 under which certain OAs must report applicable actions on the Permitting Dashboard, *www.permits.performance.gov*. The DOT Reporting Standards<sup>3</sup> clarify which OAs and which projects must be tracked. Currently the DOT Reporting Standards require the Federal Highway Administration, Federal Transit Administration, Federal Railroad Administration, and Federal Aviation Administration (including Stage agencies with NEPA assignment pursuant to 23 U.S.C. 327) to track all EAs and EISs for infrastructure projects. In addition, the DOT Reporting Standards reflect the E.O. 13807 requirement that all OAs must track major infrastructure projects, as that term is defined in E.O. 13807. These reporting standards have been

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<sup>3</sup> The DOT Reporting Standards are available at: <http://www.transportation.gov/transportation-policy/permittingcenter/federal-permitting-dashboard-reporting-standard>.

subject to modification since first established in 2016 and may be subject to additional revisions in the future. Accordingly, the proposed rule would include only a high-level reference to the reporting requirements, while the specifics are addressed in the Reporting Standards to make it easier to revise as necessary.

#### § 13.15 Determination of the Level of NEPA Review

Proposed § 13.15 would include with modifications the 1985 procedures at section 4, “Environmental Processing Choice.” The discussions of CEs and EAs in section 4 would be addressed in proposed §§ 13.17 and 13.19, respectively, and the list of references to OA CEs would be addressed in Appendix B. Proposed paragraph (a) would require OAs to establish the appropriate scope of the proposed action using, as applicable, the criteria in 40 CFR 1501.9(e) to determine the appropriate level of NEPA review. Proposed paragraph (b) would instruct OAs to ensure that the scope of a proposed action has independent utility or significance and does not unreasonably restrict the consideration of alternatives for other reasonably foreseeable actions to ensure meaningful and objective evaluation of alternatives. Proposed paragraph (c) would require analysis of the potentially affected environment and the degree of the effects in considering significance, consistent with 40 CFR 1501.3(b), which includes consideration of short- and long-term effects, beneficial and adverse effects, effects on public health and safety, and effects that would violate Federal, State, Tribal, or local laws protecting the environment where the effects are reasonably foreseeable and have a reasonably close causal relationship to the proposed action (*see* 1508.1(g)). Proposed paragraph (d) would reflect the Office of Policy’s role as the responsible office for NEPA implementation and compliance and provide guidance to OAs to notify the Office of Policy for situations involving unresolved disagreements between the OA and an applicant regarding the appropriate level of NEPA review.

#### § 13.17 Categorical Exclusions

Section 13.17 would provide an update to the 1985 procedures at section 4(c), “Categorical Exclusions.” Proposed paragraph (a) would provide the definition of CEs, consistent with 40 CFR 1508.1(d) and 1501.4, and the requirement to consider whether extraordinary circumstances are present such that the OA must prepare an EA or EIS. Proposed paragraph (b) would provide a list of extraordinary circumstances that an OA must consider before applying a CE listed in proposed Appendix A of part 13. These represent circumstances in which a normally excluded action may have significant environmental effects; this updated list would add substantial increases of noise in a noise-sensitive area; substantial adverse effects on a species listed or proposed to be listed on the List of Endangered or Threatened Species, or designated Critical Habitat for these species; a site that involves a unique characteristic of the geographic area, such as prime or unique agricultural land, a coastal zone, a historic or cultural resource, park land, wetland, wild and scenic river, designated wilderness or wilderness study area, sole source aquifer (potential sources of drinking water), or an ecologically critical area; as well as inconsistency with any applicable Federal, State, or local air quality standards, including those under the Clean Air Act, as amended; substantial short-or long-term increases in traffic congestion or traffic volumes on any mode of transportation; or substantial impacts on the environment resulting from the reasonably foreseeable, reportable release of hazardous or toxic substances. This list only would be applicable to the CEs listed in proposed Appendix A of part 13. However, when updating OA Procedures, OAs would be directed to consider whether any of the extraordinary circumstances provided in proposed paragraph (b) are appropriate to add to their list.

Under section 1314 of MAP-21, Congress first amended 49 U.S.C. 304 to establish a process by which OAs could apply CEs to multimodal projects, as that term is defined in 23 U.S.C. 139(a). Through section 1310 of the FAST Act, Congress later amended 49 U.S.C. 304 so that one OA could apply the CE established in the procedures

of another OA for multimodal projects, as defined in 23 U.S.C. 139(a)(5). Proposed paragraph (c) would implement these authorities departmentwide.

The CEQ regulations allow agencies to establish a process to use other Federal agencies' CEs for their proposed actions after consultation with the other agencies to ensure that use of their CEs is appropriate. The regulations require documentation of the consultation and identification to the public of those CEs that the OA may use for its proposed actions. 40 CFR 1507.3(f)(5). DOT requests comments on whether the Department should create such a process and on the design of any such process, or whether it is more appropriate to direct each OA to develop a process in its own OA Procedures. If the departmental procedures were to include such a process, the provisions could describe the agency process under which an agency may borrow another agency's CE, including describing the proposed action, identifying potentially applicable CEs, documenting the applicability analysis, consulting with the originating agency, keeping records, and providing public notice. The Department will consider appropriate measures or provisions if it elects to establish such a process.

The CEQ regulations require agencies to review their existing NEPA procedures to ensure that they are consistent with CEQ's revised regulations and to adopt, as necessary, agency procedures that improve agency efficiency. 40 CFR 1507.3(b), 40 CFR 1501.4(a). The Department undertook such a review, and Appendix A would update and maintain a list of Departmental CEs. Based on its review, the Department would propose to add 11 new CEs, eliminate existing CE 3 and the subpart for existing 6b, and modify the remaining five existing CEs. Modifications to existing CEs would provide clarity and reflect the Department's experience with these activities. The Department provides additional information and justification for updating the existing CEs and supporting the new CEs in the docket for this rulemaking.

The proposed rule would re-order and re-number the Departmentwide CEs from the 1985 procedures. In the new proposed CEs, the Department has identified routine operational activities, including training and educational activities (proposed CE 3); leasing of space in existing buildings (proposed CE 6); remodeling existing facilities (proposed CE 7); landscaping and landscape maintenance that does not cause introduction or spread of invasive species (proposed CE 8); investigations, research activities, and studies (proposed CE 9); hearings and public meetings (proposed CE 12); administrative actions and proceedings (proposed CE 13); financial assistance to an applicant solely for the purpose of refinancing outstanding debt, where the debt funds an action that is already completed as a categorically excluded activity (proposed CE 14); and certain agreements concerning foreign governments, foreign civil aviation authorities, and international organizations and the implementation of such agreements (proposed CE 15).

This rule also would add two new CEs relating to rulemaking and policy activities. The first would cover the promulgation, modification, or revocation of rules and development of policies, notices, and other guidance documents that are strictly administrative, organizational, or procedural in nature; or are corrective, technical, or minor (proposed CE 10). The second CE would cover the promulgation, modification, revocation, or interpretation of safety standards, rules, and regulations that do not result in a substantial increase in emissions of air or water pollutants, noise, or traffic congestion, or increase the risk of reportable release of hazardous materials or toxic substances (proposed CE 11).

Finally, proposed CE 5 would modify existing CE 5 from the 1985 procedures, which incorporates by reference CEs identified in OA Procedures, and would expressly allow one OA to apply the CE of another OA. In order to apply a CE listed in another OAs procedures, the OA that has established the CE in its procedures must confirm that

the OA administering the action is applying the CE appropriately, and that the action to which the CE is being applied was contemplated when the CE was established.

Therefore, the Department would revise the CE to read, “Action categorically excluded in an OA’s procedures where the action is administered by another OA. The OA with the CE must provide a written determination that the CE applies to the action proposed by the other OA and must provide expertise in reviewing the action being categorically excluded.”

Over the last decade, the Department has implemented a number of new programs and projects that go beyond the bounds of a particular OA. This updated CE would allow the Department the flexibility to administer its projects and programs more effectively and efficiently, taking advantage of multiple OAs’ resources and expertise, while ensuring that CEs are appropriately applied to proposed actions. For example, the Department may ask one OA to administer a grant because it has extensive experience with that type of grantee, but the underlying project falls within the environmental expertise of another OA. The latter OA would determine whether application of its CEs to the project is appropriate because it is contemplated within that category of action and whether any extraordinary circumstances are present such that preparation of an EA or EIS may be required.

#### § 13.19 Environmental Assessments

Proposed § 13.19 is a new section to address the preparation of EAs; it would update the 1985 procedures at section 4(d), “Environmental Assessment,” which provided guidance for the preparation of EAs. In accordance with 40 CFR 1501.5 and 1508.1(h), proposed paragraph (a) would explain when an EA must be prepared. Proposed paragraph (b) would provide the required elements for an EA, consistent with 40 CFR 1501.5, while proposed paragraph (c) would set forth an EA page limit of 75 pages consistent with 40 CFR 1501.5(f) unless a senior agency official approves in

writing an EA to exceed 75 pages and establishes a new page limit. It also would outline the senior agency official approval required to exceed page limits beyond these lengths. This paragraph would require the EA to be concise and to correlate to the magnitude of the proposed action and its anticipated impacts. Proposed paragraph (d) would provide the requirement that an EA should be prepared within one year from the agencies' determination to prepare an EA consistent with 40 CFR 1501.10(a)(1). If, during development of the EA, the OA concludes that there will be significant impacts and therefore would not issue a FONSI, the OA would issue an NOI, and the time limits for EISs would apply consistent with 40 CFR 1501.10(a)(1).

Proposed paragraph (e) addresses the alternatives analysis for EAs, which may be limited to the proposed action and no action alternative, and may be analyzed to a degree commensurate with the nature of the proposed action and the OA's experience with the potential environmental impacts of similar projects. OAs would be instructed to indicate a preferred alternative in the EA, if one has been identified. For those alternatives that were considered and eliminated, the OAs would be directed to provide a brief justification of these decisions in the EA. Proposed paragraph (f) would note that EAs should reflect compliance or plans for compliance with other applicable environmental requirements, 40 CFR 1501.5(g)(3) and 1502.24, and proposed paragraph (g) would require an OA to evaluate the environmental issues independently and take responsibility for the accuracy, scope and contents of EAs prepared by applicants, 40 CFR 1506.5(b)(2). Proposed paragraph (h) would require OAs to involve the public, State, Tribal and local governments, relevant agencies, and any applicants to the extent practicable, 40 CFR 1501.5(e), and to make EAs available to the public, 40 CFR 1506.6(b) and 1501.6(a)(2). It would allow OAs to use their discretion to determine if a draft EA should be released for public comment, though OAs would be required to address substantive comments in the final EA or FONSI.

§ 13.21 Findings of No Significant Impact

Proposed § 13.21 would incorporate with updates section 5 of the 1985 procedures, “Finding of No Significant Impact,” continuing to focus on the CEQ regulatory requirements for a FONSI set forth in 40 CFR 1501.6. Consistent with that provision, proposed paragraph (b) would set forth the circumstances when an OA may issue a mitigated FONSI, including identifying the mitigation measures necessary to reduce the potential impacts below a level of significance; ensuring the existence of sufficient legal authority and adequate commitment and resources to execute the mitigation measures; requiring implementation of the mitigation measures in any agreement with an outside party; and where appropriate, providing for monitoring and further action when there is a failure to implement mitigation measures or a failure in their effectiveness.

As OAs, must make FONSI available to the public as specified in 40 CFR 1501.6, this section would not include the unnecessary instructions contained in section 5(c) of the 1985 procedures regarding internal coordination of FONSI and circulation of Notices of Availability to State and area-wide clearinghouses. The proposed rule also does not include the instruction in section 5(c) that consultation with other Federal agencies concerning Section 4(f) (23 U.S.C. 138/49 U.S.C. 303), the National Historic Preservation Act, Clean Water Act Section 404 permits, and other Federal requirements should be accomplished prior to or during the 30-day period. This requirement to consult applies to all EAs, not just when a 30-day public comment period is required. Rather than providing in this proposed rule specific direction on compliance with substantive requirements contained in other environmental statutes, the Department instead proposes to include in Appendix C a non-exhaustive list of relevant environmental reviews, authorizations, and consultations that OAs would be expected to integrate into the NEPA process.

§§ 13.23 – 13.27 Environmental Impact Statements

Proposed sections 13.23 through 13.27 would address the requirements for EISs. To improve clarity, the Department would include the requirements that apply to both draft and final EISs in proposed § 13.23, and address requirements specific to draft EISs (DEISs) in proposed § 13.25, and FEISs in proposed § 13.27. Generally, these sections would set forth the requirements from the CEQ regulations, including those in 40 CFR part 1502, and update the information previously included in the 1985 procedures at section 7, “Preparation and Processing of Draft Environmental Statements,” section 8, “Inviting Comments on the Draft EIS,” and section 11, “Final Environmental Impact Statements.” However, generally applicable instructions from these provisions in the 1985 procedures would be addressed in proposed § 13.9.

Proposed paragraph (a) of proposed § 13.23 would set forth when NEPA requires an EIS (42 U.S.C. 4332(2)(C)), and for clarity and consistency with 40 CFR 1507.3(e)(2), would note that examples of typical actions that require an EIS are listed in OA Procedures. Proposed paragraph (b) would instruct OAs to prepare a notice of intent to prepare an EIS and publish it in the *Federal Register*, 40 CFR 1501.9(d) and 1508.1(u). Proposed paragraph (c) would set forth scoping requirements pursuant to 40 CFR 1501.9, 1506.3, and 1508.1(cc), including the actions, alternatives, and impacts that must be considered when determining the appropriate scope of issues to be addressed in the EIS. The scoping process must consider the type of action and determine the level of NEPA review. (*See* Section 13.15(c)). To determine whether the effects of the proposed action are significant, the OA must analyze the degree of the effects of the proposed action relative to the affected environment consistent with 40 CFR 1501.3. Proposed paragraph (d) would instruct OAs to provide early notice and solicit the views of any State or Federal land management entity that may be significantly affected by an action proposed by a State agency or official with statewide jurisdiction (42 U.S.C. 4332(2)(d)).

Proposed paragraphs (e)(1) through (6) would, consistent with 40 CFR part 1502, address the format and content of EISs, including purpose and need, alternatives, affected environment, environmental consequences, mitigation, and the summary of submitted alternatives, information, and analyses. The detailed discussion of the contents of an EIS that is in Attachment 2 to the 1985 procedures, as well as discussions regarding documenting impacts to specific resources, is not included in the proposed rule. Specifically, proposed paragraph (e)(2) would emphasize that the draft EIS should identify the OA's preferred alternative(s), if one or more exists, unless in conflict with other laws; otherwise the OA should provide agencies and the public with the opportunity to assess the environmental consequences of the preferred alternative prior to issuing a combined FEIS/ROD, or the OA should provide the public with an opportunity to evaluate the preferred alternative during a waiting period after the publication of the notice of availability of the FEIS. Proposed paragraph (f) would require OAs to comply with document page limits in accordance with 40 CFR 1502.7. Proposed paragraph (g) would require that EISs be completed within two years from NOI to ROD. OAs must obtain approval from the Assistant Secretary to exceed this time frame, consistent with 40 CFR 1501.10(b)(2). Proposed paragraph (h) would reflect Departmental policy and CEQ regulations at 40 CFR 1502.11(g) to require OAs to include the total cost of the EIS on the cover page of an FEIS and a supplemental EIS. The amount reported would include the entire cost of the environmental review. Proposed paragraph (i) would set forth the requirement to file EISs with the Environmental Protection Agency (EPA) pursuant to 40 CFR 1506.10 and would note EPA's guidance on filing. Proposed paragraph (j) would address public notice and notice of availability requirements consistent with 40 CFR 1506.6. This proposed rule would remove from Attachment A of Order 5610.1C additional guidance not required under the CEQ regulations. Finally, proposed paragraph

(k) would set forth the timing requirements for the OA's final decision, including the ability to reduce or extend time periods.

#### § 13.25 Draft Environmental Impact Statements

As noted in the discussion of proposed § 13.23, proposed § 13.25 would address requirements specific to the preparation of DEISs. Proposed paragraph (a) would encourage early preparation of the DEIS to ensure that the decisionmaker can meaningfully consider the analysis in the decisionmaking process. 40 CFR 1502.5.

Proposed paragraph (b) would encourage OAs to indicate in the DEIS when they intend to issue a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b) or 23 U.S.C. 139(n). To ensure meaningful participation in the environmental review process, proposed paragraph (c) would set forth the specific circulation and request for comment requirements for DEISs. Pursuant to the updated CEQ regulations, an OA must provide for electronic submission of public comments as well as ensure that the comment process is accessible to affected persons. *See* 40 CFR 1503.1(c).

#### § 13.27 Final Environmental Impact Statements

As noted in proposed § 13.23, proposed § 13.27 would address requirements specific to the preparation of FEISs and the Department's unique statutory authorities. For example, section 1319(a) of MAP-21 clarified that the lead agency can issue an FEIS that consists of "errata pages"—rather than a complete, stand-alone document—if the agency received only "minor comments" on the DEIS. This flexibility existed under the CEQ regulations even before the enactment of MAP-21; however, section 1319(a) confirmed that this format is acceptable. It also required that errata pages "(1) cite the sources, authorities, or reasons that support the position of the agency" and "(2) if appropriate, indicate the circumstances that would trigger agency reappraisal or further response."

In addition, section 1319(b) of MAP-21 provided authority to issue a combined FEIS/ROD. The FAST Act repealed this provision and codified identical provisions at 49 U.S.C. 304a and 23 U.S.C. 139. These provisions direct the Department, when it acts as the lead agency, to issue the FEIS and ROD as a single document “to the maximum extent practicable,” unless (1) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and the circumstances or information bears on the proposed action or the impacts of the proposed action.

Proposed paragraphs (a) and (b) address resolution of comments on the DEIS in the FEIS. Consistent with 40 CFR 1503.4, proposed paragraph (a) would provide direction on responding to comments on the DEIS in the FEIS. Proposed paragraph (b) would provide for the use of errata sheets consistent with 49 U.S.C. 304a(a), 23 U.S.C. 139(n), and 40 CFR 1503.4(c).

Proposed paragraph (c) would implement the requirements of 49 U.S.C. 304a(b) and 23 U.S.C. 139(n) to issue a combined FEIS/ROD to the maximum extent practicable, unless the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or 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. When an OA is the lead agency and there are cooperating agencies, the cooperating agencies must, to the extent practicable, issue the FEIS/ROD jointly with the OA pursuant to 40 CFR 1501.8(b)(8).

To ensure the integration of all environmental reviews into the NEPA process, proposed paragraph (d) would direct the FEIS to reflect compliance or plans for compliance with other environmental requirements; should such compliance not be possible by the time the FEIS is prepared, proposed paragraph (d) would direct OAs that the document should reflect consultation with the appropriate agencies and provide

reasonable assurance that the OA can meet the requirements. This rule would not include section 12 of the 1985 procedures, “Determinations Under Section 4(f) of the DOT Act,” as discussion of determinations under Section 4(f) is outside the scope of the Department’s NEPA implementing procedures. Proposed paragraph (e) would reiterate existing delegations for approval of FEISs. Proposed paragraph (f) would set forth the Department’s policy to notify the Office of Policy for certain FEISs. Finally, to ensure meaningful participation in the environmental review process, proposed paragraph (g) would address circulation requirements for the FEIS.

#### § 13.29 Records of Decision

This new section would reference requirements for an OA record of decision (ROD). Proposed paragraph (a) would implement the requirements of 49 U.S.C. 304a(b) and 23 U.S.C. 139(n) to develop a combined FEIS/ROD. This paragraph would set forth the 30-day waiting period required by 40 CFR 1506.11(b)(2) in those instances where the OA determines it is not practicable within the meaning of 49 U.S.C. 304a(b) and 23 U.S.C. 139(n) to issue a combined FEIS/ROD. In general, if a combined FEIS/ROD will not be prepared, and when the proposal requires action by multiple Federal agencies, proposed § 13.29 clarifies that the OA should issue a single ROD with the other Federal agencies. Furthermore, for expediency, proposed § 13.29 would allow the OA to integrate the ROD into another record or decision document, such as a final rule. Proposed paragraph (b) would set forth the topics to be addressed in the ROD, including alternatives, factors balanced in decisionmaking, and mitigation measures. Proposed paragraph (c) includes a requirement that the ROD provide a certification by the decisionmaker that the agency has considered all the alternatives, information, and analyses, and objections submitted for consideration by the lead and cooperating agencies in developing the EIS. FEISs certified in accordance with 40 CFR 1505.2(b) are entitled to a presumption that the agency has considered the submitted alternatives, information,

and analyses including the summary in the FEIS. Proposed paragraph (d) would clarify that the ROD should not repeat the analysis in the EIS, but should document the OA's decision and briefly discuss compliance with environmental laws applicable to the action or procedures, and expected timeframe for completion of such compliance. Finally, to reflect the Department's policy of using an interdisciplinary approach, proposed paragraph (e) would allow OAs to discuss preferences among alternatives based on relevant economic, technical, or other factors, and OA mission and authority.

#### § 13.31 Adoption

Proposed § 13.31 would introduce a new section that is not in the 1985 procedures. This section would address adoption of NEPA documents pursuant to the CEQ regulation, 40 CFR 1506.3, and the Department's discretionary adoption authority under 49 U.S.C. 304a(c)(2). Proposed paragraph (a) would discuss the adoption by OAs of EISs prepared by a lead agency on an action for which the OA is a cooperating agency, in accordance with 40 CFR 1506.3(b)(2)), while proposed paragraph (b) would provide information on adoption when the OA is not a cooperating agency but the action covered by the original EIS and the proposed action are substantially the same, including circulation requirements, in accordance with 40 CFR 1506.3(b)(1). Proposed paragraph (c) would cover the full or partial adoption of EISs when the OA is not a cooperating agency and the actions covered are not substantially the same, in accordance with 40 CFR 1506.3(b). Where the OA was not a cooperating agency, proposed paragraphs (b) and (c) direct the OA to issue a combined FEIS/ROD consistent with the directive in 49 U.S.C. 304a and 23 U.S.C. 139(n). Proposed paragraph (d) provides for the full or partial adoption of an EA. Proposed paragraph (e) provides for adoption of a CE determination by another Federal agency when the action in the original CE determination and the proposed action are substantially the same. When doing so, the OA must document the adoption consistent with 40 CFR 1506.3(d) and proposed section 13.25(b). Proposed

paragraph (f) would require re-evaluation of an EIS or EA that is more than 5 years old prior to its full or partial adoption, in accordance with proposed § 13.33 and 40 CFR 1502.9(d)(4). Proposed paragraph (g) would require filing with the EPA when an OA adopts and publish an EIS, and finally, proposed paragraph (h) would allow an OA to adopt an EA, DEIS, or FEIS of another OA under 49 U.S.C. 304a(c)(2).

#### § 13.33 Re-evaluation and Supplementation

Consistent with 40 CFR 1502.9(d)(4), re-evaluation is a longstanding practice of the Department to determine whether new information triggers the requirement to supplement an EIS pursuant to 40 CFR 1502.9(d). A re-evaluation is a continuation of the project development process, and it does not necessarily re-open the NEPA decision. Proposed § 13.33 would update and clarify the existing practice for re-evaluation outlined in section 19 of the 1985 procedures, “Time in Effect of Statements.” In addition, the Department would revise the interval for re-evaluation from three to five years. Proposed paragraph (a)(1) would encourage the use of re-evaluation when there are changes to the proposed action or new circumstances or information relevant to environmental concerns. Additionally, proposed paragraph (a)(2) would require OAs to re-evaluate in writing DEISs if the OA has not issued an FEIS within five years of circulation of the DEIS, and FEISs if major steps toward implementation have not commenced within five years of FEIS approval. Proposed paragraph (b) would address the CEQ regulatory criteria for a supplemental EIS, as well as the discretion to supplement, circulation requirements for supplemental EISs, and the process for the approval of an alternative circulation procedure. 40 CFR 1502.9(d)(1).

#### § 13.35 Emergency Actions

Section 1432 of the FAST Act provided for exemptions and expedited procedures for certain environmental review processes during emergencies. Specifically, section 1432(b)(1) references alternative arrangements under 40 CFR 1506.12. Proposed § 13.35

concerns such alternative arrangements. This new section would also address the CEQ regulation on emergencies, 40 CFR 1506.12, and related CEQ guidance. Finally, this section would build on section 17(c) of the 1985 procedures, “Timing of Agency Action,” which details the internal process for consulting with CEQ concerning emergencies.

Proposed § 13.35 would address emergency situations in proposed paragraph (a) and would provide mechanisms for NEPA compliance where the OA anticipates significant impacts in proposed paragraph (b) or non-significant impacts in proposed paragraph (c). In both instances, this section would provide the internal coordination process for such compliance.

#### § 13.37 Environmental Impact Statements for Legislative Proposals

Proposed § 13.37 would address the requirements for legislative EISs consistent with 40 CFR 1506.8(c)(2). Consistent with the general updates set forth in Section II of this rulemaking, this proposed section would also incorporate and revise for clarity the substance of section 15 of the 1985 procedures, “Proposals for Legislation,”

#### § 13.39 International Actions

Proposed § 13.39 would address implementation of Executive Order 12114, Environmental Effects Abroad of Major Federal Actions addressed in section 16 of the 1985 procedures, “International Actions.”<sup>4</sup> This section would streamline the provision by cross-referencing to the E.O., rather than repeating its applicability criteria. It also would direct OAs to prepare any required EIS consistent with this rule and OA procedures. Finally, this section would reflect minor edits for clarity consistent with the general updates set forth in Section II of this NPRM.

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<sup>4</sup> This section addresses compliance with the Executive Order rather than NEPA. The Executive Order’s requirements were not altered by CEQ’s revisions to its NEPA regulations. See CEQ, Update of the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act: Final Rule Response to Comments at 551-52 (July 30, 2020).

## Appendix A— Appendix A to Part 13 – List of Departmental Categorical Exclusions

Appendix A would list the existing, revised, and new departmentwide CEs. Consistent with the CEQ regulations, agencies or their subunits may determine that certain categories of actions normally do not have significant environmental impacts and therefore do not require further review under NEPA. As discussed in the analysis of proposed § 13.17 in Section III of this rulemaking, this proposed rule would clarify which categories of activities are categorically excluded and normally would not require additional NEPA analysis. The Department substantiated the proposed new and revised CEs by reviewing EA and EIS analyses to identify the environmental effects of previously implemented actions, benchmarking other Federal agencies' experience implementing similar categories of actions, and relying on the judgment and expertise of the Department's NEPA practitioners. The Department notes that other Federal agencies have established CEs for activities that are similar in nature, scope, and effect on the human environment. The Department provided for CEQ review the proposed draft changes and justification for each proposed change to the list in this appendix.

## Appendix B to Part 13 – List of Categorical Exclusions in Operating Administration Procedures.

Appendix B would provide cross-references to the OA CEs. The proposal would incorporate by reference all current CEs established and maintained by the OAs for use pursuant to CE #5.

## Appendix C to Part 13 – Environmental Requirements for Integration with the NEPA Process.

This rule would direct OAs to coordinate and integrate all relevant environmental and planning studies, reviews, and consultations into their environmental review process. This instruction is consistent with MAP-21 sec. 1305, and FAST Act sec. 1304, which

requires the Department to align the environmental review process and substantive environmental legal compliance. To assist the Department's NEPA practitioners in harmonizing these reviews, Appendix C would provide a non-exhaustive list of the environmental requirements that should be integrated with the NEPA process.

#### **IV. Rulemaking Analyses and Notices**

(a) **Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulations (49 CFR Part 5)**

The Office of Information and Regulatory Affairs determined that this rule is a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563, because it is related to the agency's implementation of the CEQ regulations implementing the procedural requirements of NEPA.

E.O. 12866 and E.O. 13563 require agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." The rule would implement several changes to Department policies, procedures, and internal coordination to streamline project delivery.

Several provisions are expected to create one-time *de minimis* administrative costs for the Department, including the requirement that OAs update their regulations and revise Department policies and processes to comply with the provisions in the regulation. The Department would also incur ongoing *de minimis* administrative costs due to staff time required by additional internal reporting and coordination.

The Department expects that the rule would yield administrative cost savings as a result of better intra- and interagency coordination and more efficient program management within the Department. The Department expects that these potential cost

savings from the proposed rule would outweigh any one-time or ongoing *de minimis* administrative costs.

Several provisions could result in savings:

- Requiring the use, where appropriate, of coordination tools including programmatic approaches and interagency agreements would decrease required staff time and resources by shortening review times and by reducing the duplication of efforts by the Department and by State and Federal resource agencies.
- Establishing Departmentwide internal reporting and coordination requirements would allow the Department to allocate resources better to ensure that the environmental review process remains on schedule while also improving the identification of potential issues earlier in the environmental review process.
- Setting presumptive NEPA document page limit provisions and increasing the timeframe that NEPA documents remain valid from three to five years would reduce the Departmental time and resources required to develop, issue, or review NEPA documents.
- Allowing OAs to share CEs would save Department resources and staff time by reducing the number of EAs prepared for categories of projects that another OA has previously determined would not normally have a significant impact on the environment.
- Introducing Departmentwide CEs that include research activities and rulemakings would reduce the administrative costs of conducting those activities.
- Removing prescriptive EIS contents that were included in Attachment 2 of the 1985 procedures would allow documents to be tailored to use a more effective

format for communication, thereby saving the Department and project sponsors time and resources in document preparation.

Project sponsors may also incur *de minimis* costs from the rule, such as staff time to calculate and provide the total cost of the environmental review process on the final environmental impact statement cover page. However, the Department expects that project sponsors would also achieve cost and time savings in the environmental review process which would outweigh these costs. An emphasis on programmatic approaches and interagency agreements in this regulation would save project sponsors staff time and resources by reducing environmental impact review times and by limiting duplicative submissions to multiple State and Federal agencies. Additional internal coordination and reporting requirements would increase the accountability and transparency of the environmental review process for project sponsors, and will allow for earlier identification and mitigation of risks that could otherwise slow down the overall environmental review process. The Department also expects that the provisions on page limits and an increase in the timeframe that NEPA documents remain valid would allow for savings in environmental document preparation.

The Department also expects that these changes would reduce the time required for projects to move through the environmental review process. As a result, projects may be completed earlier, and the benefits of transportation infrastructure improvements or research would accrue to the public sooner than they otherwise would have. The Department expects that codifying the required online posting of environmental documents would also improve the transparency of the environmental review process for the public. Finally, shorter environmental documents would facilitate reviews by decisionmakers and the public. The Department has issued a page limits policy memorandum, which would support this proposal, and which encourages using a clear and concise writing style to meet the page limits. Such environmental documents would

be easier to read and may make it easier for the public to understand the potential environmental impacts of proposed transportation projects.

**(b) E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs)**

This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis in section IV(a).

**(c) Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA), (Pub. L. 96-354, 5 U.S.C. 601–612) requires an agency to assess the impacts of proposed and final rules on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. DOT has evaluated the effects of this proposed rule on small entities such as small businesses, small organizations, and small governmental jurisdictions. Based on the evaluation, the Department anticipates that this action would not have a significant economic impact on small entities. The proposed rule would not directly regulate small entities, as the proposed rule applies to the Department and sets for its procedures for implementing the provisions of NEPA. Accordingly, the Department certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

**(d) E.O. 13132 (Federalism)**

E.O. 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. DOT analyzed this action in accordance with the principles and criteria contained in E.O. 13132. This NPRM would establish internal administrative procedures for the DOT to comply with NEPA. This action will not have a substantial direct effect or

federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions because this proposed rule applies to the Department, not States. This action contains no Federal mandates for State and local governments and does not impose any enforceable duties on State and local governments. Because this action addresses only internal Department procedures for implementing NEPA, consultation with State or local governments is not necessary. The Department notes that some states have voluntarily assumed NEPA responsibility pursuant to 23 U.S.C. 327.

(e) **E.O. 13175 (Consultation and Coordination with Indian Tribal Governments)**

Pursuant to E.O. 13175, "Consultation and Coordination with Indian Tribal Governments," the Department has assessed the impact of this proposed rule on Indian tribal governments and has determined that the proposed rule would not significantly or uniquely affect communities of Indian tribal governments. The proposed rule deals with administrative procedures for complying with the requirements of the NEPA and, as such, has no direct effect on Indian Tribal governments. Because the proposed rule does not mandate Tribal participation in the Department's environmental review process, it does not impose substantial direct compliance costs on Indian tribal governments. The proposed rule will recognize the obligation to and benefit of including Indian tribes in public engagement strategies to fulfill relevant environmental review responsibilities. Accordingly, the funding and consultation requirements of Executive Order 13175 do not apply.

(f) **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval

from OMB for each collection of information it conducts, sponsors, or requires through regulations. The DOT has determined that the proposed rule does not contain a collection-of-information requirement subject to review and approval by the OMB under the PRA.

**(g) Unfunded Mandates Reform Act**

The Department has determined that the proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, 2 U.S.C. 1531-1538). The actions proposed in this NPRM do not contain any unfunded mandates as described in the UMRA, and does not significantly or uniquely affect small governments. This proposed rule does not impose any mandates on small entities. It addresses the Department's procedures for implementing the procedural requirements of NEPA.

**(h) National Environmental Policy Act**

The CEQ regulations do not direct agencies to prepare a NEPA analysis before establishing agency procedures to supplement the CEQ regulations to implement NEPA. See 1507.3; *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947, 954–55 (7th Cir. 2000) (holding that a decision to issue agency NEPA procedures does not require analysis and documentation under NEPA). The Department's NEPA procedures assist the Department in fulfilling its responsibilities under NEPA and the CEQ regulations, but are not themselves final determinations of the level of environmental review required for particular actions. The Department also anticipates that this rulemaking would be categorically excluded pursuant to the 1985 procedures. Accordingly, the Department does not anticipate any environmental impacts from this proposal, and there are no extraordinary circumstances present in connection with this rulemaking.

**(i) Regulation Identifier Number**

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

**List of Subjects in 49 CFR Part 13**

Administrative practice and procedure, Environmental impact statements, Environmental protection, Natural resources.

Issued in Washington, D.C. on November 6, 2020:

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Elaine L. Chao,  
Secretary.

In consideration of the foregoing, the Office of the Secretary of Transportation proposes to amend Title 49 of the Code of Federal Regulations by adding part 13 to read as follows:

**TITLE 49—TRANSPORTATION**

**PART 13 —ENVIRONMENT REVIEW PROCESS**

**Subpart A —General**

Sec.

13.1 Applicability.

13.3 Definitions.

13.5 Environmental review policy.

**Subpart B —Nepa Review Process**

13.7 Managing NEPA compliance.

13.9 Planning and early coordination.

13.11 Lead, cooperating, and participating agencies.

13.13 General principles for the NEPA review process.

13.15 Determination of the level of NEPA review.

13.17 Categorical Exclusions.

13.19 Environmental Assessments.

- 13.21 Findings of No Significant Impact.
- 13.23 Environmental Impact Statements.
- 13.25 Draft Environmental Impact Statements.
- 13.27 Final Environmental Impact Statements.
- 13.29 Records of Decision.
- 13.31 Adoption.
- 13.33 Re-evaluation and supplementation.
- 13.35 Emergency actions.
- 13.37 Environmental Impact Statements for legislative proposals.
- 13.39 International actions.

Appendix A to Part 13 – List of Departmental Categorical Exclusions

Appendix B to Part 13 – List of Categorical Exclusions in Operating Administration Procedures

Appendix C to Part 13 – Environmental Requirements for Integration with the NEPA Process

Authority: 42 U.S.C. 4321-4347; 40 CFR parts 1500-1508; 49 U.S.C. 304; 49 U.S.C. 304a; 49 U.S.C. 310; and E.O. 12114, 44 FR 1957, Jan. 9, 1979, 3 CFR, 1979 Comp.

## **Subpart A—General**

### **§ 13.1 Applicability.**

- (a) Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321–4347 (NEPA) and the Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 CFR 1500 through 1508, this part establishes procedures for the consideration of environmental impacts by officials of the Department of Transportation (Department or DOT) as part of the decisionmaking process for DOT actions.
- (b) Typical DOT actions may include grants; construction; regulatory actions; certifications; licenses; permits; waivers; approval of policies and plans (including those submitted to DOT by State, Tribal, or local agencies, or other public or private applicants, unless otherwise exempted); adoption or implementation of programs; legislation proposed by DOT; and any renewals or re-approvals of the foregoing. Consistent with 40 CFR 1508.1(q), an action is not subject to NEPA if, for example, it either does not allow for agency discretion to consider

environmental impacts in decisionmaking or is not subject to DOT control and responsibility. Loans, loan guarantees, or other forms of financial assistance may be actions subject to NEPA when the OA exercises sufficient control and responsibility over the effects of such assistance.

- (c) Consistent with 40 CFR 1501.1, proposed activities or decisions expressly exempt from NEPA under another statute are not actions. For example, decisions concerning plans, Transportation Improvement Programs (TIPs), and Statewide Improvement Programs (STIPs) are not actions pursuant to the express exemptions in 23 U.S.C. 134 and 135, respectively.

### **§ 13.3 Definitions.**

The definitions in 40 CFR part 1508 apply to this part. The following definitions supplement these for the purposes of this part:

- (a) *Applicant* means an individual; Federal agency, State, Tribal or local government; corporation; company; or any other party seeking an approval, financial assistance, special permit, waiver, certification, or other action from an OA.
- (b) *Environmental review process* means the integrated process for compliance with NEPA and any other applicable environmental statutes, regulations, or Executive Orders (E.O.), including those that require a permit, approval, consultation, or authorization to proceed with an action.
- (c) *Level of NEPA review* means the appropriate type of analysis required for a particular action (i.e., a categorical exclusion (CE), an environmental assessment (EA), or an environmental impact statement (EIS)).
- (d) *NEPA document* means an EIS, record of decision (ROD), EA, finding of no significant impact (FONSI), or any documentation prepared to support the application of a CE to a proposed action.

(e) *Operating Administration* (OA) means any agency established within the Department, as listed in § 1.3(b) of this subtitle, or an office within the Office of the Secretary of Transportation (OST).

### **§ 13.5 Environmental review policy.**

The policies in paragraphs (a) through (e) of this section govern the consideration of environmental impacts at DOT:

- (a) Consistent with NEPA, the Department will integrate Federal environmental objectives into the programs of DOT to ensure the safest, most efficient and modern transportation system in the world, while considering measures to avoid, minimize, or compensate for adverse environmental effects wherever practicable, consistent with other essential considerations of national policy.
- (b) The Department will strive to synchronize NEPA and other Federal environmental requirements and authorizations into a single, concurrent environmental review process that satisfies the requirements of all agencies with a role in a proposed action, expedites project delivery, and is completed within presumptive time limits.
- (c) The Department will apply sound science, reliable data, and a systematic interdisciplinary approach to the environmental review process, including the use of geographic information systems, as appropriate.
- (d) The Department will maximize the use of proven strategies to complete the environmental review process efficiently, including the use of electronic collaboration tools; programmatic agreements and approaches; and planning processes and products to inform NEPA requirements pursuant to applicable laws and regulations.

- (e) The Department encourages meaningful, proactive, open, and transparent public participation and collaboration with affected and interested stakeholders, including Federal agencies, States, Tribes, localities, and the public in its environmental decision-making process to avoid, minimize, and compensate for impacts.

## **Subpart B—Nepa Review Process**

### **§ 13.7 Managing NEPA compliance.**

- (a) *Responsibility.* Pursuant to § 1.25a(a)(2) of this subtitle, the Assistant Secretary for Transportation Policy (Assistant Secretary) is the senior agency official who establishes policy and oversees the implementation of the NEPA process for the Department. The Assistant Secretary may determine which OA will serve as the lead agency to prepare the NEPA document for all actions taken by the Department for a proposed activity or project.
- (b) *Office of Policy.* The OST Office of Policy Development, Strategic Planning, and Performance (Office of Policy) oversees NEPA implementation and compliance with related environmental requirements, and OAs must consult with or notify the Office of Policy as set forth in this part. The Office of Policy in turn will coordinate with the Office of the General Counsel to ensure compliance with legal requirements. Additional information on the environmental review process may be obtained from the Office of Policy.
- (c) *Office of the General Counsel.* The Office of the General Counsel (OGC) provides counsel to the Department concerning the interpretation of and compliance with NEPA, the CEQ regulations, this part, and other applicable laws. Where appropriate, OGC determines the legal sufficiency of the Department's

NEPA documents and coordinates with the OAs and the Department of Justice on NEPA-related litigation.

(d) *Applicability*. This part supplements the regulations at 40 CFR parts 1500 through 1508, setting forth procedures specific to DOT actions. The OAs must comply with the regulations at 40 CFR parts 1500 through 1508, this part, and their own NEPA implementing procedures, as applicable.

(e) *OA Procedures*. Each OA must issue or modify NEPA implementing procedures (OA Procedures), consistent with this part, 40 CFR parts 1500 through 1508, and any other applicable laws or regulations, that establish requirements for and provide guidance on integrating the environmental review process into the OA's programs and actions. To the extent applicants carry out the OA's responsibilities under OA Procedures (where appropriate and in compliance with 42 U.S.C. 4332(2)(D) and 40 CFR 1506.5), the OA must require the applicants to comply with the OA Procedures.

(1) OA procedures should include a list of actions that are not subject to NEPA.

(*See* 40 CFR 1507.3(d));

(2) OA procedures must include lists of actions that normally require the preparation of an EIS or EA (40 CFR 1507.3(e)(2)(i) and (iii)); include lists of categorically excluded actions and extraordinary circumstances (40 CFR 1507.3(e)(2)(ii)) and note which categorical exclusions require documentation (40 CFR 1507.3(e)(2)(ii)); identify when it might be appropriate to use tiering and programmatic approaches to facilitate an efficient environmental review (40 CFR 1501.11 and 1508.1(ff)); ensure that decisions are made in accordance with NEPA's policy and procedures (40 CFR 1507.3(c)); describe the public participation process; describe the process to ensure early involvement of interested parties (40 CFR 1501.2(b)(4)); identify where

interested parties can find information about the NEPA process, including NEPA documents (40 CFR 1506.6(e)); and describe the procedures for ensuring implementation of mitigation measures committed to in NEPA documents (40 CFR 1501.6(c), 1505.3, and 1508.1(s)).

- (3) OAs must submit proposals for new or revised implementing procedures to the Office of Policy and the OGC for review and concurrence prior to CEQ consultation and publication in the *Federal Register*. These offices will assist with CEQ consultation. The Office of Policy and the OGC will provide written concurrence on the final new or revised implementing procedures. OAs must provide notice of proposed new or revised implementing procedures in the *Federal Register* for public comment and provide notice of final new or revised implementing procedures.
- (4) No later than 30 days of the effective date of this part, OAs must evaluate their OA procedures to develop a plan and schedule to make revisions necessary to achieve consistency with 40 CFR parts 1500 through 1508 and this part. OAs must submit this determination or plan to the Office of Policy and the OGC for concurrence. Consistent with 40 CFR 1507.3(b), OAs must, as necessary, develop or revise proposed procedures no later than September 14, 2021.
- (5) Subject to 40 CFR 1507.3(a), to the extent an OA's existing procedures are inconsistent with 40 CFR parts 1500 through 1508, the regulations in 40 CFR parts 1500 through 1508 apply, consistent with 40 CFR 1506.13, unless there is a clear and fundamental conflict with the requirements of another statute. An OA may choose to apply 40 CFR parts 1500 through 1508 or the procedures of this part to a review begun before September 14, 2020, or the effective date of this part, respectively.

### **§ 13.9 Planning and early coordination.**

- (a) *Timing.* OAs should begin the environmental review process at the earliest practicable time in the planning or development of an action.
- (1) OAs should integrate the NEPA process with other processes at the earliest reasonable time to ensure that planning and decisions reflect environmental values and avoid potential conflicts that may delay the process. (40 CFR 1501.2). For actions, likely to require an EA or EIS, OAs must engage in early identification and evaluation of the purpose and need; the environmental impacts; reasonable alternatives (as further described in § 13.19(b) for EAs and § 13.23(a)(2) for EISs); and measures to avoid, minimize, or compensate for adverse environmental impacts, as appropriate.
- (2) Unless otherwise provided by law, prior to making a final NEPA determination on a proposed action, OAs must not take any action concerning the proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives. (40 CFR 1506.1(a), 1502.2(f) and (g)). If an OA becomes aware an applicant is about to take an action that would have an adverse environmental impact or limit the choice of reasonable alternatives, the OA must promptly notify the applicant and the Assistant Secretary, and take appropriate action to ensure that the objectives and procedures of NEPA are achieved. (40 CFR 1506.1(b)).
- (b) *Coordination with applicants.* OAs must ensure that applicants are aware of the environmental analysis and review requirements in this part.
- (c) *Coordination with other agencies.* OAs must coordinate with other OAs, Federal, State, Tribal, and local resource and regulatory agencies, stakeholders, and the public, as appropriate, to satisfy their responsibilities under NEPA and other

relevant statutes, regulations, and Executive Orders, such as those listed in Appendix C of this part. OAs should communicate early and continually, and coordinate to identify and resolve issues. OAs may prioritize actions and improve early coordination with regulatory and resource agencies by executing interagency agreements such as Memoranda of Understanding (MOUs), Memoranda of Agreement (MOAs), or Programmatic Agreements, and using other tools at their disposal.

- (d) *Use of planning analysis and decisions in the NEPA process.* OAs should, as appropriate, integrate, adopt, and use planning information or decisions in the NEPA process.
- (e) *Early coordination.* The scoping process (40 CFR 1501.9) is a tool for early coordination that OAs must use in the preparation of an EIS in accordance with § 13.23(c) and may use in the preparation of an EA to identify any significant issues and ensure that all interested or affected persons have an opportunity to participate early in the process. As part of scoping, OAs should use early coordination tools, such as planning, interagency working groups or agreements, programmatic approaches, coordination plans, and project schedules. OAs should use such tools prior to issuing the notice of intent.

**§ 13.11 Lead, cooperating, and participating agencies.**

- (a) *Lead agency.* An OA with primary responsibility for a proposed action, including a multimodal transportation project, generally will serve as the lead agency for preparing and processing EISs and EAs, where appropriate, and is responsible for inviting other agencies to serve as cooperating agencies or otherwise participate in the NEPA process. (*See* 40 CFR 1501.7). When an OA serves as lead agency, it is responsible for the scope, objectivity, accuracy, and content of the NEPA

documents and ensuring completion of the environmental review process. When more than one OA is involved in an action, the OAs should determine together their respective roles (i.e., lead agency, joint lead agency, or cooperating agency) early in the process. However, if the OAs cannot agree on this determination within 30 days, they must consult the Office of Policy, which will resolve the dispute. The lead agency must:

- (1) Request participation of cooperating agencies in the NEPA process at the earliest practicable time;
- (2) Meet with a cooperating agency at the latter's request;
- (3) To the extent practicable prepare a single environmental document and joint FONSI or ROD for the lead and cooperating agencies;
- (4) Use environmental analysis and proposals from cooperating agencies with jurisdiction by law or special expertise to the maximum extent practicable;
- (5) Determine the scope and the significant issues to be analyzed in depth in an EIS;
- (6) Determine the purpose and need and range of alternatives in consultation with the cooperating agencies;
- (7) Create and update as necessary the project schedule in consultation with the cooperating agencies; and
- (8) Notify the Office of Policy if a milestone will be missed and elevate issues to the Assistant Secretary for timely resolution. (*See* 40 CFR 1501.7).

(b) *Joint lead agencies.* An OA serving as a joint lead agency assumes the same roles, responsibilities, and authority as a single lead agency.

(c) *Cooperating agencies.* When serving as a lead or joint lead agency, OAs should identify and request Federal, State, Tribal, and local agencies that have jurisdiction by law or special expertise to be cooperating agencies under 40 CFR

1501.8 and 1508.1(e). When an OA serves as a cooperating agency, it must fulfill its responsibilities in coordination with the lead agency.

- (1) If another agency declines an OA's invitation to participate as a cooperating agency, the OA must still provide the declining agency with a copy of the NEPA document and should attempt to coordinate with it to avoid potential issues that could delay the action. If that agency raises concerns or indicates that it may delay or withhold action on some aspect of the proposed action, the OA should initiate a conflict resolution process in accordance with § 13.13(e).
- (2) When an agency requests an OA to serve as a cooperating agency, the OA must accept and participate if it has jurisdiction by law, and should make every practicable effort to accept and participate if it has special expertise.
- (3) If another agency fails to invite an OA to serve as a cooperating agency when it has jurisdiction by law or special expertise, the OA should ask the lead agency to extend an invitation to participate as a cooperating agency.
- (4) The OA must cooperate on schedule development and elevate issues that may affect the schedule to the senior agency official for resolution consistent with 40 CFR 1501.8(b)(6) and (7).

(d) *Participating agencies.* OAs should invite other agencies (including other Federal, State, Tribal, or local agencies) that may have an interest in the proposed action to be participating agencies. OAs should invite such other agencies as early as possible (before or during scoping).

**§ 13.13            General principles for the NEPA review process.**

(a) *Integration of all environmental reviews into the NEPA process.* To the maximum extent practicable and at the earliest possible time, OAs should integrate all relevant environmental reviews, authorizations, and consultations into the NEPA

process. A list of authorities under which these may be conducted can be found in Appendix C of this part. To the extent practicable, OAs should develop a single NEPA document for all Federal agency actions necessary for a proposed activity or project. (*See* 40 CFR 1501.7(g)).

- (b) *Incorporation by reference.* OAs should incorporate by reference previously prepared and publicly available analyses wherever possible and provide a brief summary of the incorporated material in a NEPA document. (*See* 40 CFR 1501.12). Types of documents that may be incorporated by reference include previously prepared studies, analyses, and, to the extent permitted by law, decisions from prior environmental reviews. (*See* 40 CFR 1501.12).
- (c) *Focused, quality documents.* NEPA documents should effectively and concisely communicate the environmental effects of a proposed action to the public and the decisionmaker. NEPA documents should be written in plain language, and be analytic rather than encyclopedic. (*See* 40 CFR 1500.4(d), 1502.2(a) and (c), and 1502.8). The depth and scope of analysis and resulting documentation must be meaningful, high-quality, relevant, and proportionate to the complexity of the action and degree of anticipated environmental effects and the affected environment (*See* 1501.3, 1501.5, 1502.2(b), and 1502.23).
- (d) *Interdisciplinary approach.* OAs must use an interdisciplinary approach throughout the planning and preparation of EISs and EAs, as applicable, and ensure a systematic evaluation of alternatives and their potential environmental consequences. (*See* 40 CFR 1501.5(c) and 1502.6). Analyses should identify applicable methodology and explain the use of best available information. Where appropriate, OAs may use professional services from other Federal, State, Tribal, or local agencies, universities, consulting firms, or other experts; however, OA staff must have the capacity to evaluate the information these entities provide, and

OAs must take responsibility for the final content of their NEPA documents. (*See* 40 CFR 1506.5 and 1507.2).

(e) *Conflict resolution.*

(1) *Resolution of disputes.* OAs should seek to resolve expeditiously all disputes as early as possible in the NEPA process consistent with applicable requirements. OAs should communicate and collaborate to recognize and resolve disputes as they arise to maintain constructive relationships among all parties, including other OAs, Federal or State agencies, Tribes, and members of the public in accordance with 40 CFR parts 1500 to 1508, DOT Order 5611.1a and applicable CEQ/Office of Management and Budget guidance. OAs must report on their use of formal environmental conflict resolution in annual reports to the Office of Policy and OGC's Office of Operations on Environmental Collaboration and Conflict Resolution (ECCR). OAs must notify CEQ and obtain CEQ concurrence, as necessary, to use the John S. McCain III National Center for Environmental Conflict Resolution (20 U.S.C. 5607b(c)).

(2) *Pre-decisional referrals to CEQ.* The following procedures apply to referrals to CEQ under 40 CFR part 1504:

(i) *Referrals on DOT actions.* If another Federal agency advises an OA that it intends to make a referral to CEQ, the OA must coordinate with the Office of Policy. The OA should make a concerted, timely effort to resolve issues raised by another Federal agency with respect to an EIS for a proposed DOT action to avoid a referral to CEQ. The OA should document these efforts in the project record.

(ii) *DOT referrals to CEQ on other agency proposals.* Whenever possible, OAs should make efforts to resolve issues informally to avoid referrals to

CEQ. If the issues are not resolved prior to filing the final EIS (FEIS) with EPA, the OA Administrator must obtain concurrence from the Office of Policy and OGC to make a referral to CEQ. Referrals should include all content specified in 40 CFR 1504.3(c). The OA should notify the Office of Policy as early as possible that a referral is anticipated. OAs must make formal referrals to CEQ no later than 25 calendar days after EPA publishes the notice of availability of the EIS or the lead agency makes an EA available.

(f) *Tiering and programmatic approaches.* OAs should use tiering (*see* 40 CFR 1501.11 and 1508.1(ff)) to improve or simplify the environmental analysis of proposed DOT actions that are similar in nature, broad in scope, or where future decisions or unknown future conditions preclude a complete NEPA analysis. This would eliminate repetitive discussions of the same issues, focus on issues ripe for decision and exclude from consideration issues already decided or not yet ripe at each level. OAs should also use programmatic approaches, where appropriate, including resource or regional specific programmatic agreements or consultations with resource or regulatory agencies. Where possible, OAs should develop programmatic approaches that cover the activities of multiple OAs.

(g) *Mitigation and monitoring.* The ROD and FONSI must identify those mitigation measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document and that have a nexus to those effects that the lead agency is adopting and committing to implement, including any monitoring and enforcement program applicable to such mitigation commitments.

(1) The OA must take steps to ensure that the mitigation measures committed to in the ROD and FONSI are implemented. For third-party actions, to the extent

practicable, OAs must condition relevant funding agreements, permits, licenses, and other approvals on the performance of the mitigation commitments. Methods of enforcement of commitments may include withdrawal of funding, permit, license, or approval, and any other action deemed necessary by the appropriate OA.

(2) Where legal authority exists, OAs may provide for monitoring to ensure their decisions are carried out and should do so in important cases. In determining when monitoring mitigation commitments is appropriate, OAs should apply professional judgment and the rule of reason. (40 CFR 1505.3).

(h) *Public involvement.* Public involvement provides an opportunity for the public to consider, offer input on, and inform proposed actions, their potential environmental impacts, and proposed mitigation. The level of public involvement should be commensurate with the type of action proposed and its potential to cause significant impacts, and be consistent with 40 CFR 1501.5(e), 1501.9, 1503.1(a)(2)(v), and 1506.6.

(1) Public involvement in environmental analyses is important at each appropriate stage of the development of a proposed action, and OAs should seek public involvement as early as possible. Consistent with 40 CFR 1500.3(b), 1500.4(n), and 1503.3, OAs should ensure commenters are invited to submit specific comments as early in the process as possible, and provide notice that comments not submitted shall be forfeited as unexhausted. OAs should integrate public involvement in the NEPA process, as applicable, with other public involvement processes (e.g., 54 U.S.C. 306108 (Section 106 of the National Historic Preservation Act of 1966, as amended), State requirements) to the fullest extent practicable. Methods to solicit the views of the public include public workshops or meetings; hearings in traditional or non-

traditional formats and locations; social media; new technologies; advertisements or notices in print or electronic media; and other appropriate means tailored to reach the relevant audiences. (*See* 40 CFR 1506.6). When OAs provide for public comment, they must include electronic submission of comments, with reasonable measures to ensure the comment process is accessible to affected persons. (*See* 40 CFR 1503.1(c)).

(2) To allow the public to efficiently and effectively access information about NEPA reviews, OAs must make NEPA documents, relevant notices and other relevant information for use by interested persons available online in a manner consistent with 40 CFR 1506.6(e) and 1507.4. Appropriate domains for publication may include Department/OA operated websites or project-specific websites. When posted on a DOT website, NEPA documents must be compliant with the requirements of 29 U.S.C. 794d (section 508 of the Rehabilitation Act of 1973, as amended).

(i) *Use of contractors.* Decisionmaking under NEPA is an inherently governmental function. OAs may use contractors to assist in the preparation of NEPA documents, but must require contractors to comply with this part and OA procedures, and follow relevant guidance. OAs must furnish guidance, participate in the preparation of, and independently evaluate NEPA documents, taking responsibility for their accuracy, scope, and contents. (*See* 40 CFR 1506.5).

(1) When an OA acts as the lead agency and uses a contractor, it may select the contractor for preparation of an EIS or EA, consistent 40 CFR 1506.5. The OA may select the contractor in cooperation with cooperating agencies.

(2) Prior to entering into a contract for the preparation of an EIS or EA, the OA must require the contractor or applicant to execute a disclosure statement specifying any financial or other interest if applicable, or stating it has no

financial or other interests in the outcome of the proposed action. (40 CFR 1506.5).

- (j) *Tracking.* OAs must track and report environmental review milestones in compliance with DOT tracking procedures and other applicable requirements. Consistent with 23 U.S.C. 139(o) and all reporting standards issued by the Office of Policy, OAs must post information for all transportation infrastructure projects requiring an EA or EIS, including applicable NEPA and any permitting or authorization actions and associated milestones, to the publicly accessible Permitting Dashboard. OAs must post and update information as necessary within timeframes established by the reporting standards.

**§ 13.15 Determination of the level of NEPA review.**

- (a) To determine the appropriate level of NEPA review, OAs must establish the appropriate scope (using the criteria for scope in 40 CFR 1501.9(e)) of the proposed action.
- (b) To ensure meaningful and objective evaluation of alternatives, where applicable, and avoid commitments to proposed actions before they are fully evaluated, OAs must ensure that the scope of the proposed action evaluated in an EA, EIS, or CE includes connected actions; has independent utility or independent significance (e.g., would be a usable and reasonable expenditure even if no additional transportation improvements in the area are made); does not unreasonably restrict consideration of alternatives for other reasonably foreseeable actions; and where applicable, connects logical termini.
- (c) In considering whether the effects of the proposed action are significant, agencies must analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with §1501.9(e)(1). In considering the degree of the effects, agencies should consider the following,

as appropriate to the specific action, where the effects are reasonably foreseeable and have a reasonably close causal relationship to the proposed action:

- (1) Both short- and long-term effects.
- (2) Both beneficial and adverse effects.
- (3) Effects on public health and safety.
- (4) Effects that would violate Federal, State, Tribal, or local law protecting the environment. (*See* 40 CFR 1501.3(b)).

(d) If there is an unresolved disagreement between the OA and an applicant regarding the appropriate level of NEPA review, the OA must notify the Office of Policy, to assist in making the determination.

**§ 13.17          Categorical Exclusions.**

(a) *Application of a Categorical Exclusion (CE).* CEs are categories of actions that normally do not have a significant effect on the environment, and therefore normally do not require the preparation of an EA or EIS. (40 CFR 1501.4). Appendix A of this part lists Departmentwide CEs. An “\*” is used to indicate the CEs that would not require documentation. OA Procedures may identify additional CEs, consistent with § 13.7(d); Appendix B of this part identifies the location of CEs established in each of the Department’s OA Procedures and incorporates those CEs by reference. Paragraph (b) of this section lists extraordinary circumstances (40 CFR 1501.4), that OAs must consider before determining that a CE listed in Appendix A of this part applies to a proposed action. If an OA seeks to apply a CE established in another OA’s procedures (referenced in Appendix B of this part), it must evaluate the action for extraordinary circumstances identified in the OA Procedures in which the CE is

established<sup>5</sup> to determine if a normally excluded action may have a significant effect. If an extraordinary circumstance is present, an OA may nevertheless apply a CE listed in Appendix A of this part to an action if the OA determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects. If the OA cannot apply the CE to the proposed action, it must prepare an EA or EIS, as appropriate.

(b) *Extraordinary circumstances.* With respect to the CEs listed in Appendix A of this part, extraordinary circumstances include:

- (1) Inconsistency with any applicable Federal, State, Tribal, or local law, requirement, or administrative determination relating to the protection of the environment;
- (2) Substantial increases of noise in a noise-sensitive area;
- (3) Substantial adverse effects that are reasonably foreseeable on the following aspects of the environment:
  - (i) Species listed or proposed to be listed on the List of Endangered or Threatened Species, or designated Critical Habitat for these species, as promulgated under 16 U.S.C. 1533(c)(1);
  - (ii) Properties protected under 54 U.S.C. 306108 (Section 106 of the National Historic Preservation Act of 1966, as amended);
  - (iii) Properties protected under 23 U.S.C. 138 or 49 U.S.C. 303 (Section 4(f));
  - (iv) A site that involves a unique characteristic of the geographic area, such as prime or unique agricultural land, a coastal zone, a historic or

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<sup>5</sup> For the purposes of 23 CFR part 771, “unusual circumstances” is synonymous with “extraordinary circumstances.”

cultural resource, park land, wetland, wild and scenic river, designated wilderness or wilderness study area, sole source aquifer (potential sources of drinking water), or an ecologically critical area; or

(v) Applicable Federal, State, or local air quality standards, including those under the Clean Air Act, as amended (42 U.S.C. 7401, et seq.);

(4) Substantial short- or long-term increases in traffic congestion or traffic volumes on any mode of transportation that are reasonably foreseeable; or

(5) Substantial impacts on the environment resulting from the reasonably foreseeable, reportable release of hazardous or toxic substances.

(c) *Multimodal projects.* For multimodal projects, as defined by 23 U.S.C. 139(a), an OA may use the process created under 49 U.S.C. 304 for the application of another OA's CE for that project.

### **§ 13.19 Environmental Assessments.**

(a) *When to prepare an environmental assessment.* An OA must prepare an EA when a proposed action is not categorically excluded and a determination whether to prepare an EIS has not been made or it is required under OA Procedures; or a normally categorically excluded action may involve significant environmental impacts, but does not clearly require the preparation of an EIS. However, an OA need not prepare an EA if it determines that an EIS is necessary or preferable. (See 40 CFR 1501.5 and 1508.1(h)). Examples of typical classes of actions that normally require an EA but not necessarily an EIS are listed in OA Procedures.

(b) *Contents.* An EA must include the purpose and need for the proposal; a description of the proposed action and alternative(s) as required by 42 U.S.C. 4332(2)(E) (section 102(2)(E) of NEPA), as well as the "no action" alternative;

the environmental impacts of the proposed action and alternatives; and the agencies and persons consulted.

- (c) *Page limits.* EAs must be no more than 75 pages unless a senior agency official approves in writing an EA to exceed 75 pages and establishes a new page limit. OAs must obtain approval from an OA Administrator when the Administrator has been designated as a senior agency official for the OA or, for OST actions, the Assistant Secretary if an EA is anticipated to exceed the page limits. An EA should be as concise as possible while proportional to the magnitude of the proposed action and anticipated impacts.
- (d) *Time limits:* EAs should be completed within one year from the agency's determination to prepare an EA. If during development of the EA, the OA concludes that there will be significant impacts, the OA should issue an NOI and the time limits for EISs would apply. OAs must obtain approval from an OA Administrator when the Administrator has been designated as a senior agency official for the OA or, for OST actions, the Assistant Secretary if an EA needs a longer time period than one year. This request must be in writing and provide a reasonable timeframe for the OA to complete the EA. 40 CFR 1501.10(a)(1).
- (e) *Alternatives.* The EA must include the alternatives the OA will consider in its decisionmaking, which may be limited to the proposed action and no action alternative to the extent consistent with applicable authority including NEPA Section 102(2)(E). The EA should address alternatives to a degree commensurate with the nature of the proposed action and OA experience with the environmental issues involved. The EA should indicate a preferred alternative, if the OA identified one. For alternatives considered and eliminated from further study, an EA should briefly explain why they were eliminated.

- (f) *Compliance with other applicable environmental laws, regulations and orders.* In accordance with § 13.13(a), the EA should reflect compliance or plans for compliance with the requirements of other applicable environmental laws, regulations, and orders, such as those listed in Appendix C of this part.
- (g) *Independent evaluation.* If an applicant prepares an EA, the OA must independently evaluate the environmental issues and take responsibility for the accuracy, scope, and contents of the EA. (40 CFR 1506.5(b)(2)).
- (h) *Public comment.* An OA must involve the public, State, Tribal and local governments, relevant agencies, and any applicants to the extent practicable in the development of the EA. (40 CFR 1501.5(e)). At its discretion, an OA may prepare a draft EA for public comment. When an OA prepares a draft EA for public comment, it must consider substantive comments received on a draft EA in the final EA or FONSI. An OA must make EAs available to the public. (See 40 CFR 1506.6(b)). In the circumstances defined in 40 CFR 1501.6(a)(2), a copy of the EA should be made available to the public for a period of not less than 30 days before the FONSI is made and the action is implemented.

**§ 13.21 Findings of No Significant Impact.**

- (a) *Contents.* A FONSI must briefly explain why a proposed action analyzed in an EA will not have a significant impact on the environment and therefore does not require the preparation of an EIS. (40 CFR 1501.6). A FONSI must include the EA or summarize it and incorporate the EA by reference, and must note any other related NEPA documents. (See 40 CFR 1501.6(b) and 1501.9(f)(3)). An OA must make the FONSI available to the public as specified in 40 CFR 1506.6(b) and consistent with 40 CFR 1507.4 and OA Procedures.
- (b) *Mitigated FONSI.* In accordance with § 13.13(g), an OA may rely on mitigation measures to reduce potentially significant adverse impacts below the level of

significance that would trigger the preparation of an EIS. To use this approach, the OA must:

- (1) Describe in the FONSI the mitigation measures necessary to reduce the potential impacts to a level below significance;
- (2) Ensure that sufficient legal authority and an adequate commitment of resources exist to execute the mitigation measures, including funding as necessary;
- (3) Ensure that the articles of agreement, award or grant agreement, permit, license, authorization, or other document reflecting the OA's final decision on the action will require implementation of the mitigation measures;
- (4) Ensure that any monitoring strategies described in the FONSI will be adopted when the OA deems them appropriate for the particular action and set of mitigation measures. This may include making an applicant responsible for implementing the monitoring strategies. Environmental Management Systems may be used for tracking and monitoring mitigation commitments; and
- (5) Provide for corrective action, where appropriate, in the event of a failure to implement the mitigation measures or a failure in the effectiveness of the mitigation measures.

**§ 13.23 Environmental Impact Statements.**

- (a) *When to prepare an EIS.* An OA must prepare an EIS for any proposed major Federal action significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)). Examples of typical actions that normally require an EIS are listed in OA Procedures.
- (b) *Notice of Intent.* To initiate an EIS, the OA must publish a notice of intent (NOI) to prepare an EIS in the *Federal Register* (40 CFR 1501.9(d) and 1508.1(u)).

- (c) *Scoping*. The OA must determine the scope of and the significant issues to be analyzed in depth in the EIS, and it must identify and eliminate from detailed study the issues that are not significant or covered by prior environmental review (40 CFR 1501.9(f)(1); *see also* 40 CFR 1506.3 and 1508.1(cc)). To determine significance, the OA must evaluate the potentially affected environment and the degree of the effects of the proposed action. *See* Section 13.15(c).
- (d) *EISs impacts on another State or a Federal land management entity*. Pursuant to 42 U.S.C. 4332(2)(D) (NEPA Section 102(2)(D)), where a State agency or official with statewide jurisdiction initiates a proposed action that may have significant impacts on any other State or a Federal land management entity, the OA must provide early notice to and solicit the views of those State or Federal land management entities.
- (e) *Format and content*. The format of the EIS must be consistent with the format provided at 40 CFR 1502.10, unless the OA determines there is a more effective format for communication that encourages good analysis and clear presentation of alternatives, and include the following: a cover (40 CFR 1502.11); a summary (40 CFR 1502.12); a table of contents (40 CFR 1502.10(a)(3)); a list of preparers (40 CFR 1502.18); and appendices (40 CFR 1502.19), if the OA prepares any. The EIS must include the following:
- (1) *Purpose and need*. The EIS must briefly describe the underlying purpose and need for the proposed action. (40 CFR 1502.13).
  - (2) *Alternatives*. Consistent with 40 CFR 1502.14 and 1508.1(z), the OA must evaluate reasonable alternatives, including the proposed action and the no action alternative, and a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant. The OA should present

the environmental impacts of the proposal and alternatives in comparative form. The OA should limit consideration to a reasonable number and reasonable range of alternatives. The EIS must identify alternatives considered but eliminated from detailed analysis and briefly discuss the reasons for their exclusion. The Draft EIS (DEIS) should identify the OA's preferred alternative or alternatives, if one or more exists, unless in conflict with other laws. If the DEIS did not identify the preferred alternative, the OA should provide agencies and the public with an opportunity to assess the environmental consequences of the preferred alternative prior to issuing a combined FEIS/ROD, or the OA should provide for a waiting period consistent with paragraph (k)(1) of this section. The FEIS or combined FEIS/ROD must identify the preferred alternative or alternatives unless the requirements of another statute provide otherwise.

(3) *Affected environment.* The EIS must succinctly describe the environment of the area(s) affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). Data and analyses must be commensurate with the importance of the impact. (40 CFR 1502.15).

(4) *Environmental consequences.* The EIS must discuss the environmental consequences of the proposal and the alternatives. The EIS must describe both beneficial and adverse environmental impacts of the proposed action and reasonable alternatives and the significance of those impacts. The EIS also must describe any adverse environmental impacts that cannot be avoided if the proposal is adopted, the relationship between short-term uses of the environment and long-term productivity, any irreversible or irretrievable

commitments of resources that would occur, and other requirements of 40 CFR 1502.16(a)(1) through (10).

- (5) *Mitigation*. The EIS must discuss appropriate measures for mitigating adverse environmental impacts of the proposed action or alternatives. (See 40 CFR 1502.14(e), 1502.16(a)(9), and 1508.1(s)).
- (6) *Summary of submitted alternatives, information, and analyses*. The EIS must include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the EIS. The OA should either append to the EIS or otherwise publish all comments that were received during the scoping process that identified alternatives, information, and analyses for the OA's consideration. The FEIS must include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the FEIS. (See 40 CFR 1502.17).
- (f) *Page limits*. The text of the EIS set forth in paragraphs (e)(1) through (5) of this section must be 150 pages or less, and 300 pages or less for proposed actions of unusual scope or complexity. OAs must obtain approval from the Assistant Secretary if an EIS is anticipated to exceed the page limits. (See 40 CFR 1502.7 and 1508.1(v)).
- (g) *Time limits*. EISs must be completed within two years from the date of publication of the NOI. OAs must obtain approval from the Assistant Secretary if an EIS will require a longer time period than two years from NOI to ROD. This request must be in writing and provide a reasonable timeframe for the OA to complete the EIS. (40 CFR 1501.10(b)(2)).

- (h) *Document cost.* The OA must include the total cost (Federal and non-Federal) of the EIS on the cover page of the FEIS and Supplemental Environmental Impact Statement (SEIS), which includes the entire cost of the environmental review to the extent practicable. (*See* 40 CFR 1502.11(g)).
- (i) *Filing with the U.S. Environmental Protection Agency.* OAs must file EISs with the U.S. Environmental Protection Agency (EPA) when they are transmitted to commenting agencies and made available to the public, or immediately thereafter. (40 CFR 1506.10). OAs must file EISs with EPA in accordance with EPA filing guidance.
- (j) *Public notice and notice of availability.* OAs should notify the public of the availability of EISs through methods such as online notices, social media, direct notification to interested parties, and notices in local media so as to inform those persons and agencies who may be interested or affected by the proposed action. (*See* 40 CFR 1506.6(b)). OAs must consider the ability of affected persons and agencies to access electronic media in providing public notice of NEPA-related opportunities for public involvement. OAs must notify those parties who have requested notice on an individual action. In the case of an action with impacts of national concern, notice must include publication in the *Federal Register* (through EPA's notice of availability of EISs or a separate notice) and notice by email, mail, or other reasonable means to organizations, agencies, and those persons reasonably expected to be interested or affected by the proposed action. Although electronic distribution is preferred, the OA should make documents available in other formats when reasonably necessary and must make available hard copies of the EIS upon request. The OA must make the EIS available to the public without charge to the fullest extent practicable or at no more than the actual cost of reproduction. (*See* 40 CFR 1506.6(f)).

(k) *Timing.* An OA may not make a decision on the proposed action until 90 days after publication of EPA's notice of availability of the DEIS. (40 CFR 1506.11(b)(1)).

(1) *Waiting period.* When an OA determines, it is not practicable to issue a combined FEIS/ROD pursuant to § 13.27(c), it may not make a decision on the proposed action until 30 days after the publication of EPA's notice of availability of the FEIS. (40 CFR 1506.11(b)(2)).

(2) *Reducing time periods.* If an OA believes it is necessary to reduce the prescribed time periods for EIS processing, it must request the reduction from EPA, which may reduce the prescribed periods based upon a showing of compelling reasons of national policy (40 CFR 1506.11(d)), and notify the Office of Policy of this request.

(3) *Extending time periods.* OAs may grant requests for reasonable extensions of the comment period when warranted by the magnitude and complexity of the proposed action or extent of public interest. When granting an extension, the OA should notify EPA so it may modify its notice of availability.

**§ 13.25 Draft Environmental Impact Statements.**

(a) *Timing of preparation of the DEIS.* Preparation of the DEIS should begin as close as possible to the time a proposal is developed so that the analysis of the environmental impacts and the exploration of alternatives can be meaningfully considered in the decision-making process. For rulemakings, the OA should release the DEIS prior to or concurrent with the issuance of the proposed rule. (See 40 CFR 1502.5).

(b) *Combined FEIS/ROD.* Consistent with 49 U.S.C. 304a(b) or 23 U.S.C. 139(n)(2), as applicable, and § 13.27(c), the DEIS should include a statement of the OA's intent to issue a combined FEIS/ROD and identify a preferred alternative.

- (c) *Circulation and request for comment.* The OA must make the DEIS available with an invitation to comment to:
- (1) The public;
  - (2) All cooperating agencies and other Federal agencies with jurisdiction by law or special expertise with respect to the environmental impacts involved;
  - (3) State, Tribal, or local agencies with authority to develop and enforce environmental standards;
  - (4) Any agency that has requested that it receive statements on actions of the kind proposed;
  - (5) Interested or affected persons, agencies, and organizations;
  - (6) EPA;
  - (7) Federally Recognized Indian Tribes, Alaska Natives, and Native Hawaiians, as appropriate;
  - (8) The applicant, if any; and
  - (9) Other OAs, where appropriate. (*See* 40 CFR 1502.20, 1503.1, and 1506.6).
- (d) *Electronic submission.* OAs must provide for electronic submission of public comments as well as ensure that the comment process is accessible to persons who may be affected by the proposed action(s). (*See* 40 CFR 1503.1(c)).

**§ 13.27 Final Environmental Impact Statements.**

- (a) *Response to comments.* In the FEIS, the OA should make every practicable effort to resolve major, relevant issues identified in comments on the DEIS, the public involvement process, and consultation with cooperating agencies. The FEIS should identify any unresolved major issues, and the consultation and efforts made to resolve those issues. In response to substantive comments on the DEIS, the OA should do one or more of the following and state the response in the FEIS: modify alternatives including the proposed action; develop and evaluate

alternatives not previously given serious consideration by the OA; supplement, improve, or modify its analyses; make factual corrections; or explain why the comments do not warrant further response, citing the sources, authorities, or reasons that support the OA's position, and if appropriate, indicate those circumstances that would trigger the OA's reappraisal or further response. The OA should attach to the FEIS substantive comments received on the DEIS, or summaries of comments where comments are particularly voluminous. (40 CFR 1503.4).

(b) *Errata sheets*. In preparing an FEIS, if the OA makes minor changes to the DEIS in response to comments, and the changes are confined to factual corrections or explanations of why the comments do not warrant further response, the OA may write the changes on errata sheets attached to the DEIS instead of rewriting the DEIS. (See 49 U.S.C. 304a(a) or 23 U.S.C. 139(n)(1), as applicable, and 40 CFR 1503.4(c)). The errata sheets must cite the sources, authorities, and reasons that support the OA's position and, if appropriate, indicate the circumstances that would trigger the OA's reappraisal or further response.

(c) *Combined FEIS/ROD*. Pursuant to 49 U.S.C. 304a(b) or 23 U.S.C. 139(n)(2), as applicable, to the maximum extent practicable, an OA must expeditiously develop a single document that consists of an FEIS and ROD, unless the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or 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. Cooperating agencies must to the extent practicable issue the FEIS/ROD jointly with the lead agency for transportation actions. (See 40 CFR 1501.8(b)(8)).

- (d) *Compliance with other requirements.* To the fullest extent possible, in accordance with 40 CFR 1502.24 and § 13.13(a), the FEIS should reflect compliance or plans for compliance with the requirements of other applicable environmental laws, regulations, and orders, such as those listed in Appendix C of this part. If such compliance is not possible by the time of FEIS preparation, the FEIS should reflect consultation with the appropriate agencies and provide reasonable assurance that the OA can meet the requirements.
- (e) *Internal review and approval.* The Administrator or Secretarial Officer (or their designee) of the lead agency may approve an FEIS. OAs must ensure that EISs are evaluated for technical sufficiency consistent with this part and OA Procedures. The Chief Counsel of the OA, or designee, must review all FEISs for legal sufficiency. OGC's Office of Operations must review FEISs prepared by Secretarial offices for legal sufficiency.
- (f) *Office of Policy notification.* For FEISs on actions involving novel or emerging technology, methodology, or science; actions opposed on environmental grounds by a Federal, State, Tribe, or local government or agency; or, actions opposed by a substantial number of the persons affected by such action or actions, the OA must notify the Office of Policy that the FEIS is under development. OAs should notify the Office of Policy as early as possible, and, where practicable, provide at least two weeks' notice before approving the FEIS.
- (g) *Circulation.* After the FEIS is finalized, the OA must publish the FEIS (or combined FEIS/ROD). The OA must furnish the entire FEIS to any Federal agency with jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards; the applicant; and any Federal, State, Tribal, and local agencies, and private organizations and

individuals that commented substantively on the DEIS or requested copies of the FEIS, as well as the entities to which the OA was required to distribute the DEIS. (*See* 40 CFR 1502.20, 1503.1, and 1506.6).

**§ 13.29           Records of Decision.**

- (a) In accordance with § 13.27(c), to the maximum extent practicable, an OA must develop a single document consisting of a combined FEIS and ROD or issue the FEIS and ROD simultaneously, pursuant to 49 U.S.C. 304a(b) or 23 U.S.C. 139(n)(2), as applicable. When an OA determines, it is not practicable to issue a combined FEIS and ROD, the waiting period set forth in § 13.23(j)(1) applies. In such cases, and when the proposal requires action by multiple Federal agencies, the OA should issue a single ROD with the other Federal agencies. An OA may integrate the ROD into any other record or decision document, such as a final rule.
- (b) The ROD must state the OA's decision, identify all alternatives the OA considered in reaching its decision, specifying the environmentally preferable alternative(s); identify and discuss all factors, including essential considerations of national policy, that the OA balanced in making its decision and state how those considerations entered into its decision; state whether the OA has adopted all practicable means to avoid or minimize environmental harm from the selected alternative and, as necessary, explain why not; and adopt and summarize any monitoring and enforcement program where applicable for any mitigation. (*See* 40 CFR 1505.2(a)).
- (c) The ROD must provide a certification by the decisionmaker that the agency has considered all the alternatives, information, analysis, and objections submitted by State, tribal and local governments and public commenters for consideration by the lead and cooperating agencies in developing the EIS. This certification

establishes a presumption that the agency has considered the submitted alternatives, information, and analyses including the summary in the FEIS. (*See* 40 CFR 1505.2(b)).

- (d) The ROD should not repeat analysis contained in the EIS but rather incorporate it by reference in the OA's decision; and briefly document compliance with all environmental laws applicable to the action, or the procedures and expected timeframe for completion of such compliance. Consistent with 40 CFR 1505.3, the ROD should also include, as appropriate, any required mitigation commitments and describe the monitoring measures being implemented.
- (e) The ROD may discuss preferences among alternatives based on relevant economic, technical, or other factors, as well as OA mission and authority.

**§ 13.31 Adoption.**

- (a) If an OA is a cooperating agency for an EIS, it may adopt without publishing the lead agency's original EIS after conducting an independent review of the statement and concluding that its comments and suggestions have been satisfied. (*See* 40 CFR 1506.3(b)(2)). In the case of an FEIS, the OA may issue a ROD simultaneous with the adoption.
- (b) If an OA is not a cooperating agency, but the action covered by the original EIS and the proposed action are substantially the same, the OA is not required to publish it except as an FEIS. (*See* 40 CFR 1506.3(b)(1)). To the maximum extent practicable, the OA must issue a combined FEIS and ROD consistent with 49 U.S.C. 304a(b) or 23 U.S.C. 139(n), as applicable, and § 13.27(c).
- (c) If an OA is not a cooperating agency and the OA's proposed action and the action covered by the original EIS are not substantially the same, the OA may adopt the EIS or a portion thereof as a draft and, after making all necessary revisions to the document, publish it. (40 CFR 1506.3(b)). If the OA intends to issue a combined

FEIS/ROD, the recirculation should include a statement of the OA's intent to issue a combined document.

- (d) An OA may adopt, in whole or in part, another Federal agency's draft or final EA if the OA determines, based on an independent evaluation, that the document meets the applicable standards for an EA in 40 CFR parts 1500 through 1508, this part, and its OA Procedures. The OA must notify the public consistent with 40 CFR 1506.6.
- (e) An OA may adopt a CE determination of another agency when the action in the original CE determination and the proposed action are substantially the same. When doing so, the OA must document the adoption. (*See* 40 CFR 1506.3(d)).
- (f) Before adopting all or a portion of another Federal agency's EIS or EA that is more than five years old, an OA must re-evaluate the relevant portion of the other agency's EA or EIS in accordance with § 13.33.
- (g) When an OA adopts and publishes an EIS, it must file it with EPA in accordance with EPA filing guidance. (40 CFR 1506.10). When an OA adopts an EIS without republishing, it must notify EPA.
- (h) An OA may adopt a DEIS, EA, or FEIS of another OA in accordance with 49 U.S.C. 304a(c)(2).

**§ 13.33 Re-evaluation and supplementation.**

- (a) *Re-evaluation.* Consistent with 40 CFR 1502.9(d)(4), when an action is not complete and a decision remains to occur, a re-evaluation is a process that OAs should use to evaluate an existing CE determination, EA, or EIS to determine whether it remains adequate, accurate, and valid, or whether a supplemental NEPA analysis is needed.
  - (1) An OA should engage in a re-evaluation, consistent with its OA Procedures, where applicable, when, prior to the OA's completion of an action, there are

changes in the proposed action that are relevant to environmental concerns; or there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) An OA must re-evaluate in writing a DEIS if the OA has not issued an FEIS within five years from the circulation date of the DEIS. An OA must re-evaluate in writing an FEIS if major steps toward implementation have not commenced within five years from the date of approval of the FEIS or FEIS supplement.

(b) *Supplemental EAs and EISs.* OAs must prepare a supplemental EA or EIS when, prior to the OA's completion of an action, there are substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. (40 CFR 1502.9(d)(1)). In addition, an OA may voluntarily prepare a supplemental EA or EIS when the OA determines, consistent with its OA Procedures and 40 CFR 1502.9(d)(2), that the purpose of NEPA will be furthered by doing so. An OA must prepare, publish, and file a supplemental EA or EIS as an EA or DEIS and FEIS unless CEQ approves alternative procedures. (40 CFR 1502.9(d)(3)). Where there are compelling reasons to follow alternative procedures, the OA must consult CEQ for approval and notify the Office of Policy.

**§ 13.35            Emergency actions.**

(a) *Emergency circumstances.* Emergency circumstances may require immediate actions that prevent following standard NEPA procedures. For example, immediate threats to human health or safety, or immediate threats to valuable natural resources may make it necessary to take an action with significant environmental impact without following standard NEPA procedures. OAs (which

should consult with CEQ) must limit such alternative arrangements to the actions necessary to control the immediate impacts of the emergency. When time permits, OAs should prepare environmental documentation. Alternative arrangements for NEPA compliance are permitted for emergency actions. (*See* 40 CFR 1506.12 and Fixing America's Surface Transportation Act, Pub. L. 114-94, sec. 1432).

(b) *Significant impacts.* When emergency circumstances make it necessary to take an action with significant or potentially significant environmental impacts, without observing provisions of this part, OA Procedures, or 40 CFR parts 1500 through 1508, the OA should consult with CEQ. (*See* 40 CFR 1506.12). OAs should notify the Office of Policy of the consultation and where time allows, provide an opportunity for the Office of Policy to review any alternative arrangements. The alternative arrangements should be limited to actions necessary to control the immediate impacts of the emergency.

(c) *Non-significant impacts.* When the expected environmental impacts of the proposed action are not considered significant and the action cannot be categorically excluded, to the extent practicable, the OA should prepare a focused EA that complies with this part, OA Procedures, and 40 CFR parts 1500 through 1508.

**§ 13.37 Environmental Impact Statements for legislative proposals.**

(a) *Preparation.* An OA must prepare and publish a legislative EIS (LEIS) for any legislative proposal for which DOT has primary responsibility and involves significant environmental impacts. Procedures for preparing an LEIS are found at 40 CFR 1506.8. The OA originating the legislation must prepare the LEIS. Except as provided by 40 CFR 1506.8(c)(2), an OA does not need to prepare both a draft and final LEIS.

(b) *Processing*. The Office of Policy and OGC must concur on the LEIS. OGC's Office of Legislation will submit the LEIS to the Office of Management and Budget for circulation in the normal legislative clearance process. The LEIS is part of the formal transmittal of a legislative proposal to Congress. However, the LEIS may be transmitted up to 30 days after the formal transmittal (40 CFR 1506.8(b)).

**§ 13.39 International actions.**

- (a) Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions" (Jan. 4, 1979), applies to major Federal actions having significant environmental impacts outside of the United States and its territories and possessions. If an EIS is required under E.O. 12114, section 2-4(a)(i), the OA must prepare it in compliance with this part and the OA Procedures.
- (b) If an OA anticipates communication with a foreign government concerning agreements and other arrangements related to environmental studies or documentation, the OA must coordinate such communication with the U.S. Department of State, in consultation with the Office of Policy and the Office of the Assistant Secretary for Aviation and International Affairs (*See* E.O. 12144, sec. 3-2).

## **Appendix A to Part 13 – List of Departmental Categorical Exclusions**

1. Routine procedural, administrative, financial, and management actions necessary to support the normal conduct of DOT business. Routine procurements and contract actions for goods and services including general supplies, equipment, utility services, contractor services, and personnel services.\*
2. Personnel actions including recruiting, hiring, promotions, processing, paying, and recordkeeping.\*
3. Training, technical assistance, and educational and informational programs and activities.\*
4. Operating or maintenance subsidies or agreements, such as operating subsidies to transit agencies or air carriers under the Essential Air Service program, when the subsidy or agreement will not result in a change in the effect on the environment.
5. Actions categorically excluded in OA Procedures<sup>6</sup> where the action is administered by another OA. The OA with the CE must provide a written determination that the CE applies to the action proposed by the other OA and must provide expertise in reviewing the action being categorically excluded. The extraordinary circumstances provided in the OA Procedures where the CE is listed should be considered in lieu of the extraordinary circumstances provided in § 13.17(b). This CE is not applicable to actions that meet the definition of multimodal project in 23 U.S.C. 139(a); instead, an OA may follow the process in § 13.17(c).
6. Leasing of space in existing buildings or facilities.
7. Remodeling existing buildings or facilities including maintenance, reconstruction, rehabilitation, retrofit, or upgrades of existing buildings, facilities, or systems, such as

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<sup>6</sup> See Appendix B to part 13.

- electrical and plumbing systems, replacement of siding, roof rehabilitation, resurfacing, or reconstruction of paved areas.
8. Gardening, landscaping, and maintenance of existing landscaping that does not cause or promote the introduction or spread of invasive species that would harm the native ecosystem.
  9. Investigations, research activities, and studies including data collection and analysis, information gathering, document preparation, and information dissemination.\*
  10. Promulgation, modification, or revocation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents that are administrative, organizational, or procedural in nature, or are corrective, technical, or minor.\*
  11. Promulgation, modification, revocation, or interpretation of safety standards, rules, and regulations that do not result in a substantial increase in emissions of air or water pollutants, noise, or traffic congestion, or increase the risk of reportable release of hazardous materials or toxic substances in any mode of transportation.
  12. Hearings, meetings, and public outreach activities.\*
  13. Administrative actions and proceedings, such as rendering decisions on petitions for rulemaking and petitions for reconsideration.\*
  14. Financial assistance to an applicant solely for the purpose of refinancing outstanding debt, where the debt funds an action that is already completed.\*
  15. Agreements with foreign governments, foreign civil aviation authorities, international organizations, or U.S. Government departments or agencies calling for cooperative activities or the provision of technical assistance, advice, equipment, funds, or services to those parties, and the implementation of such agreements; negotiations

and agreements to establish and define bilateral safety relationships with foreign governments and the implementation of such agreements.\*

16. The following actions relating to economic regulation of airlines:

- a. Actions approving an agreement between an air carrier and a foreign air carrier; acquisition of control, merger, consolidation, or interlocking relationship;\*
- b. Finding a U.S. or foreign air carrier fit under 49 U.S.C. chapters 411 or 413;\*
- c. Approving or setting carrier fares or rates;\*
- d. Making a determination on the reasonableness of a fee imposed by an airport proprietor on a U.S. or foreign air carrier;\*
- e. Route awards involving turboprop aircraft having a capacity of 60 seats or less and a maximum payload capacity of 18,000 pounds or less;
- f. Route awards that do not involve supersonic service and will not result in an increase in commercial aircraft operations of one or more percent;
- g. Determinations on termination of airline employees;\*
- h. Actions relating to consumer protection, including regulations;\*
- i. Authorizing carriers to serve airports already receiving the type of service authorized, which does not result in significant air quality, noise or other adverse environmental consequences;
- j. Granting temporary or emergency authority;
- k. Registration of an air taxi operator pursuant to 14 CFR part 298; and
- l. Granting of charter authority to a U.S. or foreign air carrier under 49 U.S.C. chapters 411 or 413.

“\*” indicates an undocumented CE

## **Appendix B to Part 13 – List of Categorical Exclusions in Operating Administration**

### **Procedures**

This list identifies the location of categorical exclusions (CEs) currently established in each of the Department's OA Procedures. These CEs are incorporated by reference and may require additional approval by the relevant OA. These CEs are subject to review for the extraordinary circumstances contained in the relevant OA procedures. The Department will update the citations contained in this list as necessary.

- (a) CEs for the Federal Aviation Administration (FAA) are located in FAA Order 1050.1F, Paragraph 5-6 (80 FR 44208, July 24, 2015).
- (b) CEs for the Federal Highway Administration (FHWA) are located at 23 CFR 771.117.
- (c) CEs for the Federal Motor Carrier Safety Administration (FMCSA) are located at FMCSA Order 5610.1, Appendix 2 (69 FR 9680, March 1, 2004).
- (d) CEs for the Federal Railroad Administration (FRA) are located in 23 CFR 771.116(c).
- (e) CEs for the Federal Transit Administration (FTA) are located in 23 CFR 771.118.
- (f) CEs for the Maritime Administration (MARAD) are located at Maritime Administration Order No. 600-1, Appendix 1 (50 FR 11606, March 22, 1985).
- (g) CEs for the Saint Lawrence Seaway Development Corporation (SLSDC) are located at SLSDC Order 10-5610.1C, Paragraph 6b (46 FR 28795, May 28, 1981).

## **Appendix C to Part 13 – Environmental Requirements for Integration with the NEPA Process**

As noted in § 13.13(a), Operating Administrations should coordinate and integrate all relevant environmental reviews, authorizations, and consultations into the NEPA process. The following is a non-exhaustive list of authorities under which these may be conducted (subject to further amendment, repeal, rescission, revocation, or other change):

1. Section 4(f), 23 U.S.C. 138 and 49 U.S.C. 303.
2. Section 176 of the Clean Air Act, as amended, 42 U.S.C. 7506, and its implementing regulations: 40 CFR part 51, subpart T and part 93, subpart A (Transportation Conformity) or 40 CFR part 51, subpart W and part 93, subpart B (General Conformity).
3. Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306108 (Section 106).
4. Section 7 of the Endangered Species Act, as amended, 16 U.S.C. 1536.
5. Section 404 of the Federal Water Pollution Control Act (Clean Water Act), as amended, 33 U.S.C. 1344.
6. Migratory Bird Treaty Act, as amended, 16 U.S.C. 703–712.
7. Bald and Golden Eagle Protection Act, as amended, 16 U.S.C. 668–668d.
8. Section 307 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1456.
9. Section 2 of the Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 662.
10. Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. 1855.
11. Fish and Wildlife Conservation Act, as amended, 16 U.S.C. 2901–2912.
12. Section 9 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 401.
13. The General Bridge Act of 1946, 33 U.S.C. 525(a)–(b), 528, 530, and 533.

14. Executive Order 11988, *Floodplain Management* (May 24, 1977) as implemented by the Department through DOT Order 5650.2.
15. Executive Order 11990, *Protection of Wetlands* (May 24, 1977) as implemented by the Department through DOT Order 5660.1A.
16. Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions* (Jan. 4, 1979).
17. Executive Order 12372, *Intergovernmental Review of Federal Programs* (July 14, 1982).
18. Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994), as implemented by the Department through DOT Order 5610.2(a).
19. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 6, 2000).