

Final Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews

The U.S. Department of Transportation (DOT) is issuing this final guidance on implementing Section 1319 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), *Accelerated Decisionmaking in Environmental Reviews*. Section 1319(a) provides for the preparation of a Final Environmental Impact Statement (FEIS) by attaching errata sheets to the Draft Environmental Impact Statement (DEIS) if certain conditions are met. In addition, Section 1319(b) requires, to the maximum extent practicable, and unless certain conditions exist, that the Department develop a single document that combines the FEIS and Record of Decision (ROD).

The purpose of this guidance is to further assist in implementation of the Section 1319 provisions. This guidance applies to all DOT Operating Administrations (OA)¹ when acting as a lead agency (or joint lead agency) for National Environmental Policy Act (NEPA) reviews of proposed actions that require an EIS, including tiered and programmatic EISs. This guidance is effective upon publication. In addition, DOT Order 5610.1D—the forthcoming revision to the Department’s NEPA implementing procedures— will also discuss the implementation of Section 1319 for the Department.

The Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) released interim guidance on Section 1319 in January 2013; for FHWA and FTA, this final guidance is supplemented by their previously released interim guidance, now attached as Appendix A. Other OAs may also develop additional guidance for their specific actions or revise their existing NEPA implementing procedures, consistent with this guidance, to provide further guidance specific to their programs reflecting the changes made as a result of Section 1319 of MAP-21.

Section 1319(a) Final EIS Errata Sheet Approach

Under Section 1319(a), the use of errata sheets in lieu of rewriting the DEIS is appropriate when comments received on a DEIS are minor and the OA’s responses to those comments are limited to factual corrections or explanations of why the comments do not warrant further response. When applying this provision, the OA must make the errata sheets publicly available to the same extent as the DEIS and ensure continued availability of the DEIS. This documentation should undergo a legal sufficiency review by the appropriate OA counsel (or the Office of the General Counsel for actions by the Office of the Secretary).

The Council on Environmental Quality (CEQ) regulations implementing NEPA currently allow the use of errata sheets attached to the DEIS in lieu of a traditional FEIS (40 CFR 1503.4(c)). The language in Section 1319(a) reflects the CEQ regulations and addresses circulation and filing of a FEIS using errata sheets.

¹ For the purposes of this guidance and consistent with its use in DOT Order 5610.1C, the term Operating Administration also includes the Office of the Secretary.

The errata sheets must include, at a minimum, the following information:

1. A list and explanation of:
 - a. the factual corrections made to the DEIS with references to the relevant page numbers in the DEIS, citing the sources, authorities, or reasons that support the position of the agency; and
 - b. the DEIS comments and the reasoning why the DEIS comments do not warrant additional response by the OA, citing the sources, authorities, or reasons that support the position of the Agency;
2. If appropriate, an indication of the specific circumstances that would trigger the OA's reappraisal or further response, particularly information that could lead to re-evaluation or a supplemental environmental impact statement; and
3. A web address or other indication of where a copy of the DEIS may be obtained.

In addition, each OA may designate, in guidance specific to that OA, additional information that should be contained in the errata sheets for their OA.

Section 1319(b) Single Final EIS and ROD Document

Section 1319(b) directs the Department, to the maximum extent practicable, to expeditiously develop a single document that consists of an FEIS and ROD, unless certain conditions exist. Traditionally, and in accordance with the CEQ Regulations (40 CFR 1506.10(b)(2)), FEIS and ROD documents are issued as separate documents with a minimum 30-day period between the FEIS and ROD. Section 1319(b) directs the lead agency, to the maximum extent practicable, to combine the FEIS and ROD 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 that bear on the proposed action or the impacts of the proposed action.

This provision is applicable to all DOT proposed actions, including combination of a Supplemental EIS and ROD. The applicable requirements for both an FEIS and ROD must be met for issuance of a combined FEIS/ROD document.

Whether combining the FEIS and ROD is practicable is a determination specific to the EIS process for each particular proposed action. In deciding whether the use of a combined FEIS/ROD for a particular action is practicable, the OA should consider the facts and circumstances relevant to the EIS process. At a minimum, an OA must consider whether separately releasing the ROD 30 days after the FEIS would help to alleviate interagency disputes or substantial controversy. Each OA may designate, in guidance specific to that OA's actions and programs, the circumstances and additional considerations relevant for determining whether

a combined FEIS/ROD is practicable for a particular action or program. The FHWA/FTA interim guidance attached as Appendix A provides an appropriate example of such guidance.

In using a combined FEIS/ROD, it will be important to consider possible effects on the timing of required coordination under other laws and the need for any additional documentation. For example, having a separate FEIS may facilitate meeting requirements under other laws.

Through the interagency coordination process, the OA should notify cooperating agencies as early as possible that they are considering combining the FEIS and ROD, thereby providing agencies the opportunity to express their views about the use of a combined FEIS and ROD for the specific proposed action. This will assist the OA in making a determination whether combining the FEIS/ROD is practicable or whether it is appropriate to issue the documents separately.

After the effective date of this guidance, a DEIS should include a notice on the cover sheet, in accordance with 40 CFR § 1502.11, stating that the agency will prepare a combined FEIS/ROD under Section 1319 unless conditions are present (such as practicability issues) that preclude the use of the combined FEIS/ROD. The notice may use language such as:

"[The OA] will issue a single document that consists of the Final Environmental Impact Statement and Record of Decision pursuant to Pub. L. 112-141, 126 Stat. 405, Section 1319(b) unless it is determined that statutory criteria or practicability considerations preclude issuance of such a combined document."

In situations where an OA is already aware of considerations that will make a combined FEIS/ROD impracticable, it may include a notice on the cover sheet of the DEIS stating that the agency does not intend to prepare a combined FEIS/ROD.

For a DEIS issued prior to the date of this guidance, an OA must determine whether issuance of a combined FEIS/ROD is still practicable, and must notify applicants, project sponsors, and cooperating agencies as early as possible—and, at a minimum, prior to publication of the combined FEIS/ROD—that a combined document will be issued unless conditions exist that either make such issuance impracticable or meet the criteria set forth in Section 1319(b)(1) or (2) (listed above).

In the case of a NEPA review for a rulemaking where the final rule is the Record of Decision, the OA should make the completed FEIS available to the decision maker simultaneously with the final rule, unless it is determined that statutory criteria or practicability considerations preclude issuance of the combined document. However, the OA need not publish the entire content of the FEIS in the Federal Register. The OA should cross-reference the FEIS portion of the document in the final rule and explain where it is available for public access (including online). The Administrator of each OA, (or the Assistant Secretary for Transportation Policy, for OST actions) or his or her designee, is responsible for determining, prior to the publication of the FEIS, whether it is impracticable to use the combined FEIS/ROD process for any particular action. Subsequent OA-specific guidance, procedures, or regulations may delegate this determination to offices within the OA. An OA must issue a combined FEIS/ROD unless the conditions described in the statutory exceptions exist or the Administrator or his/her designee determines that combining the documents is not practicable. Such a determination should be

retained in the administrative record. Additionally, each OA should review any procedural agreements that it has with resource agencies to identify any changes that will be needed to accommodate the use of combined FEIS/ROD documents.

For actions where a combined FEIS/ROD is anticipated, OAs should engage in early coordination with the appropriate HQ Offices (where applicable) and with the appropriate Office of Chief Counsel (or Office of the General Counsel for actions initiated by the Office of the Secretary), to ensure NEPA consistency within the OA and legal sufficiency. A legal sufficiency review is required for all FEISs, including a combined FEIS/ROD.

At a minimum, a combined FEIS/ROD must meet the requirements for both an FEIS and a ROD established in the OA's NEPA implementing procedures and all other relevant laws, regulations, procedures, or guidance, except to the extent those requirements conflict with MAP-21 Section 1319. If a combined FEIS/ROD is issued, an OA need only submit the FEIS portion to EPA in accordance with CEQ regulations (40 CFR § 1506.9). The format of the FEIS/ROD is flexible depending on the complexity of the action and other considerations such as accommodating the needs of cooperating and joint lead agencies. For example, a combined FEIS/ROD document may be issued by attaching a ROD document to an FEIS document or by including the ROD as part of the executive summary of the FEIS (if the ROD is identified in the table of contents for the combined FEIS/ROD). Each OA may designate, in OA-specific guidance, a preferred method of issuing a combined FEIS/ROD.

When a combined FEIS/ROD has been issued, other agencies, including joint lead or cooperating agencies, may adopt the FEIS and issue a separate decision document in accordance with their NEPA procedures, if the other agency determines it is appropriate to do so.

Application of Both Section 1319(a) and (b) to a Single Action

An OA can use the errata sheet and combined FEIS/ROD provisions together, as long as the conditions of both subsections (a) and (b) of Section 1319 are met. When both provisions are used together, the combined final NEPA document would consist of a DEIS, errata sheets, responses to DEIS comments, information required by OA-specific guidance, and ROD.

Appendix A: Supplemental Guidance for FHWA and FTA

Previously issued as interim guidance on January 12, 2013

The Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) are issuing this interim joint guidance on implementing Section 1319 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), *Accelerated Decisionmaking in Environmental Reviews*. Section 1319(a) provides for the preparation of a Final Environmental Impact Statement (FEIS) by attaching errata sheets to the Draft Environmental Impact Statement (DEIS) if certain conditions are met. In addition, Section 1319(b) requires, to the maximum extent practicable, and unless certain conditions exist, that the lead agency will develop a single document that combines the FEIS and Record of Decision (ROD).

The purpose of this interim guidance is to assist FHWA Division and Federal Lands Offices, and FTA Regional Offices in implementation of the Section 1319 provisions, effective on October 1, 2012, for surface transportation projects. This interim guidance applies to FHWA and FTA.¹ At a later date, FHWA and FTA will conduct a rulemaking to propose revising the joint FHWA and FTA National Environmental Policy Act (NEPA) implementing regulations (23 CFR Part 771) to reflect the changes made as a result of MAP-21.

Section 1319(a) "Final EIS Errata Sheet Approach"

The use of errata sheets attached to the DEIS in-lieu of a traditional FEIS is currently allowed under the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR 1503.4(c)). The language in Section 1319(a) reflects the CEQ regulations and addresses circulation and filing of a FEIS using errata sheets. FHWA guidance on an "abbreviated FEIS"—the term that FHWA uses for the approach of preparing an FEIS using errata sheets—is documented in FHWA Technical Advisory T6640.8A, Section VI, Options for Preparing Final EISs.

Under Section 1319(a), the use of an errata sheet is appropriate when comments received on a DEIS are minor, and the lead agency's responses to those comments are limited to factual corrections or explanations of why the comments do not warrant further response. When applying this provision, FHWA/FTA should include the errata sheets and the information required in an FEIS (described below) in an attachment to the DEIS; this documentation must undergo the legal sufficiency review required by 23 CFR 771.125.

The errata sheets should include, at a minimum, the following information:

1. A list of the factual corrections made to the DEIS with references to the relevant page numbers in the DEIS;

¹ This interim guidance only addresses the applicability of Section 1319 to FHWA and FTA. This interim guidance applies to NEPA reviews of proposed projects, including tiered and programmatic EISs, but does not address NEPA reviews for rulemakings. The content of this interim guidance may be supplemented or superseded at a later date.

2. A list and explanation of why the DEIS comments do not warrant further FHWA/FTA response in the FEIS, citing the sources, authorities, or reasons that support the position of the agency; and
3. If appropriate, an indication of the specific circumstances that would trigger FHWA/FTA's reappraisal or further response, particularly information that could lead to a re-evaluation (23 CFR 771.129) or supplemental environmental impact statement (23 CFR 771.130).

In addition, the errata sheets should contain a separate section that includes the following information, as outlined in 23 CFR 771.133 and in section VI(C) of FHWA Technical Advisory T6640.8A:

1. Identification of the preferred alternative and a discussion of the reasons why it was selected;
2. Final 23 U.S.C. § 138/49 U.S.C. § 303 (Section 4(f)) evaluation, if applicable;
3. Findings, including any on wetlands, floodplains, and Section 106 effects, as applicable;
4. List of commitments for mitigation measures for the preferred alternative;
5. Copy or summary of comments received on the DEIS and public hearing and responses (and identification of any coordination activities that have taken place since issuance of the DEIS); and
6. Identification of any other findings to be made in compliance with all applicable environmental laws, regulations, Executive Orders, and other related requirements (with associated agency consultation documentation) where there is reasonable assurance that full compliance will occur after issuance of the FEIS (23 CFR 771.133).

Section 1319(b) "Single Final EIS and ROD Document"

Section 1319(b) directs the lead agency, to the maximum extent practicable, to expeditiously develop a single document that consists of an FEIS and ROD, unless certain conditions exist. Traditionally, and in accordance with the CEQ Regulations (40 CFR 1506.10(b)(2)), FEIS and ROD documents are issued as separate documents with a minimum 30-day period between the FEIS and ROD. Section 1319(b) directs the lead agency, to the maximum extent practicable, to combine the FEIS and ROD into a single document unless:

1. The FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or
2. There are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action.

This provision is applicable to all FHWA/FTA proposed projects for which an FEIS is issued on or after October 1, 2012. Until FHWA and FTA complete a rulemaking including this provision in their NEPA implementing regulations or until final guidance is issued, FHWA Division and Federal Lands Offices and FTA Regional Offices should consult with their respective Headquarters staff prior to implementing the provisions. The applicable requirements for both an FEIS and ROD must be met for issuance of a combined FEIS/ROD document, and all applicable guidance should be followed.² These requirements include that the project must be in the fiscally constrained Metropolitan Transportation Plan (MTP) and Transportation Improvement Program (TIP), or from a fiscally constrained Statewide Transportation Planning Program (STIP) (23 CFR Part 450), and, in air quality nonattainment and maintenance areas, comply with conformity regulations under the Clean Air Act and EPA requirements (42 U.S.C. § 7506(c) and 40 CFR Part 93).

Whether combining the FEIS and ROD is practicable is a determination specific to the EIS process for a particular proposed project. In light of the statutory purposes of MAP-21 provisions on expediting project delivery, including the Section 1319 purpose of accelerating environmental reviews and decisionmaking, FHWA and FTA will consider the facts and circumstances relevant to the EIS process when deciding whether the use of a combined FEIS/ROD process for a particular project is practicable. This could include consideration of the following:

1. Are there any coordination activities that are more effectively completed after the FEIS is available? For example, if there is a need to develop a more detailed mitigation plan, or if a joint lead or cooperating agency requests separate FEIS and ROD documents in order to accommodate its decisionmaking requirements, then FHWA/FTA may determine that a separate FEIS and ROD provides a more effective and efficient decisionmaking process.
2. Are there any unresolved interagency disagreements over issues that need identification in the FEIS under 23 CFR 771.125(a)(2)? In these situations, it may be necessary to keep the FEIS and ROD as separate documents, so that FHWA/FTA can continue to work towards issue resolution prior to issuance of a ROD. For example, if the publication of a separate FEIS will sharpen the issues and rationale for a proposed resolution, then separate FEIS and ROD documents will provide FHWA/FTA a better opportunity to resolve such disagreements.
3. Is there a substantial degree of controversy? FHWA/FTA may decide not to combine an FEIS and ROD in these situations if the agencies believe that issuing the FEIS as a separate document could help to resolve the controversy. For example, the opportunity to review additional comments submitted after the FEIS may assist FHWA/FTA to develop additional mitigation commitments that could be included in the ROD to address the controversy.

² For information on these requirements, see 23 CFR Part 771. Additional resources are available online at <http://www.fhwa.dot.gov/environment/> and http://www.fta.dot.gov/13835_5222.html.

4. Does the DEIS identify the preferred alternative from among the comparatively evaluated reasonable alternatives?³ If the DEIS does not identify the preferred alternative, then FHWA/FTA should provide agencies and the public with an opportunity after issuance of the FEIS for an informed assessment related to impacted resources and environmental concerns of the preferred alternative. Whenever possible, FHWA/FTA should work with project applicants and appropriate participating agencies to identify the preferred alternative prior to issuing the DEIS.

5. Are there compliance issues with substantive requirements that must be resolved before issuance of the ROD, or that FHWA/FTA want to resolve before signing the ROD, but that do not merit deferring issuance of the FEIS? Section 1319 does not alter the compliance timing requirements under substantive environmental laws. If FHWA/FTA determines there are reasonable assurances of compliance so that FHWA/FTA can issue the FEIS pursuant to 23 CFR 771.125(a)(1) and 771.133, and the agency believes there are important benefits to the overall decisionmaking process if the FEIS is issued before such compliance matters are fully resolved, then FHWA/FTA may decide that it should not combine the FEIS and ROD. In such cases, FHWA/FTA can publish the FEIS using the reasonable assurances provisions in Sections 771.125(a) and 771.133, and can update compliance status in the ROD. For example, if FHWA/FTA cannot sign the ROD until conforming amendments are made to planning documents due to the need for a new Clean Air Act conformity determination, it may be beneficial for purposes of both transparency and the overall project timeline to issue the FEIS separately. This provides the agencies and the public access to the FEIS information while the amendments are being made to the planning documents.

Section 1319 does not alter requirements under other environmental laws. In using a combined FEIS/ROD, it will be important to consider possible effects on the timing of required coordination under other laws and the need for any additional documentation. For example, having a separate FEIS may facilitate meeting requirements under other laws (given the reasonable assurance noted above).

Through the interagency coordination process, FHWA/FTA should notify agencies as early as possible that FHWA/FTA is considering combining the FEIS and ROD, thereby providing agencies the opportunity to express their views about the use of a combined FEIS and ROD for the specific proposed action. This will assist FHWA/FTA in making a determination whether combining the FEIS/ROD is practicable or whether it is appropriate to issue the documents separately.

Beginning on October 1, 2012, FHWA/FTA may prepare a combined FEIS/ROD for a project. A DEIS issued after the effective date of this guidance should include on the cover page a notice stating that FHWA/FTA will prepare a combined FEIS/ROD under Section 1319 unless

³ Pursuant to 40 CFR 1502.14(e), agencies must "identify [their] preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference."

conditions are present (such as practicability issues) that preclude the use of the combined FEIS/ROD. The notice may use language such as:

"[FHWA/FTA] will issue a single Final Environmental Impact Statement and Record of Decision document pursuant to Pub. L. 112-141, 126 Stat. 405, Section 1319(b) unless [FHWA/FTA] determines statutory criteria or practicability considerations preclude issuance of the combined document pursuant to Section 1319."

In those situations where FHWA/FTA published a notice of availability for the DEIS prior to the date of this guidance, FHWA/FTA should provide notification as early as possible to all project sponsors and participating agencies that FHWA/FTA will issue a combined document unless one or more conditions exist that prevent issuance of a combined document. While at a minimum notification should be made prior to publication of a combined FEIS/ROD, FHWA/FTA emphasize the importance of letting these parties know about the possibility of a combined FEIS/ROD as soon as reasonably possible.

In accordance with normal FHWA/FTA NEPA decisionmaking procedures, each FHWA Division and Federal Lands Office and/or FTA Regional Office is responsible for determining whether it is practicable to use the combined FEIS/ROD process for any particular project. They can use the interagency coordination process to advise cooperating and other participating agencies that a decision has been made to use, or not to use, the combined FEIS/ROD. FHWA/FTA will issue a combined FEIS/ROD unless the FHWA Division or Federal Lands Office and/or FTA Regional Office determines, as described above, that combining the documents is not practicable; or if the FEIS makes substantial changes relevant to environmental or safety concerns; or there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts. Such a determination should be retained in the project file and made available in the same manner as other documents that are part of the NEPA decisionmaking process.

Projects proposed for processing under this provision should include early coordination with the FHWA HQ Office of Project Development and Environmental Review or FTA HQ Office of Planning and Environment), as appropriate, and with the appropriate Office of Chief Counsel, to ensure NEPA consistency within the agency and legal sufficiency.

A legal sufficiency review is required for a combined FEIS/ROD. FHWA Division and Federal Lands Offices, and FTA Regional Offices should follow the existing process for submitting FEISs to their respective Office of Chief Counsel in order to obtain a legal sufficiency review of a proposed combined FEIS/ROD document.

At a minimum, a combined FEIS/ROD must meet the requirements in 23 CFR Part 771 for both an FEIS and a ROD, except to the extent those requirements conflict with MAP-21 Section 1319. For FHWA, the documentation for a combined FEIS/ROD should also be consistent with the FEIS and ROD guidance in the FHWA Technical Advisory (T6640.8A), except to the extent those provisions conflict with MAP-21 Section 1319. The format of the FEIS/ROD is flexible depending on the complexity of the project and other considerations such as accommodating the needs of cooperating and joint lead agencies. One possible approach to creating a combined FEIS/ROD document is to attach a ROD document to an FEIS document, or to include the ROD

as part of the executive summary of the FEIS, identifying the ROD in the table of contents for the combined FEIS/ROD.

A decision by FHWA/FTA to issue a combined FEIS/ROD for a proposed project does not prevent a joint lead or cooperating agency from adopting the FEIS and issuing a separate ROD in accordance with its NEPA procedures, if that agency determines it is appropriate to do so.

Application of Both Section 1319(a) and (b) to a Single Project

Errata sheets and the combined FEIS/ROD provisions can be utilized together, as long as the conditions of both subsections (a) and (b) of Section 1319 are met. When both provisions are used together, the combined final NEPA document would consist of a DEIS, errata sheets, responses to DEIS comments, information required in an FEIS, and ROD.

Further Assistance

FHWA/FTA HQ is available to provide additional technical assistance on using the FEIS/ROD provision. If your staff or you have specific questions pertaining to specific project situations, please contact the FHWA HQ Office of Project Development and Environmental Review or FTA HQ Office of Planning and Environment.

For FHWA-specific questions related to MAP 21 Section 1319, please contact Neel Vanikar, Project Development Specialist, at (202) 366-2065. For FHWA legal questions related to MAP-21 Section 1319, please contact Diane Mobley at (202) 366-1366.

For FTA-specific questions related to MAP 21 Section 1319, please contact Elizabeth Patel at (202) 366-0244. For FTA legal questions related to MAP-21 Section 1319, please contact Dana Nifosi at (202) 366-4011.