

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[No. DOT-OST-2016-0239]

Update to U.S. Department of Transportation's NEPA Implementing Procedures

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of Availability and Request for Comment.

SUMMARY: The United States Department of Transportation (Department) is issuing a proposed update to its National Environmental Policy Act (NEPA) implementing procedures, DOT Order 5610.1D, Procedures for Considering Environmental Impacts. Consistent with the Council on Environmental Quality's regulations implementing NEPA, the Department is proposing this update and seeking public review and comment on the proposals.

DATES: Submit comments on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure you do not duplicate your docket submissions, please submit them 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, DC 20590-

0001.

Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Amy Coyle, Senior Attorney Advisor, U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590, 202-366-0691, amy.coyle@dot.gov; or Camille Mittelholtz, Environmental Policies Team Leader, U.S. Department of Transportation, Office of the Assistant Secretary for Transportation Policy, 1200 New Jersey Avenue SE, Washington, DC 20590, 202-366-4861, camille.mittelholtz@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Department of Transportation (Department or DOT) is proposing to update its National Environmental Policy Act (NEPA) implementing procedures. The Department last updated its current procedures, DOT Order 5610.1C, Procedures for Considering Environmental Impacts, in 1985 (5610.1C).¹ The proposed Order, DOT Order 5610.1D, Procedures for Considering Environmental Impacts (updated NEPA Order) seeks to achieve the following objectives: (1) ensure a full and fair NEPA process that includes meaningful public involvement

¹ 44 FR 56420, Oct. 1, 1979, available at <https://www.transportation.gov/office-policy/transportation-policy/procedures-considering-environmental-impacts-dot-order-56101c>.

throughout, and the balanced consideration of a reasonable range of alternatives and their impacts on the human environment; (2) improve efficiency and expedite project delivery; (3) provide good customer service to stakeholders through consistent implementation of NEPA across the Department; (4) provide the requisite flexibility for the Department's Operating Administrations (OAs) to apply their NEPA implementing procedures to their specific programs; and (5) balance the needs of all OAs, from those with well-established NEPA programs to those seeking more guidance.

Additionally, the updated NEPA Order addresses relevant project delivery provisions of the Fixing America's Surface Transportation Act (FAST Act) that apply Department-wide, including the following:

- Section 1301 directs the Secretary to align, to the maximum extent practicable, the requirements of Section 4(f) (23 U.S.C. 138/49 U.S.C. 303), Section 106 of the Historic Preservation Act (54 U.S.C. 306108), and NEPA. Section 23 of the updated NEPA Order addresses section 1301.
- Section 1310 amends 49 U.S.C. 304, which was created by section 1314 of the Moving Ahead for Progress in the 21st Century Act (MAP-21). Under 49 U.S.C. 304 provision, one OA may apply the categorical exclusion established in the procedures of another OA for multimodal projects as defined in 23 U.S.C. 139(a)(5). Section 10(d) of the updated NEPA Order addresses section 1310.
- Section 1311 creates 49 U.S.C. 304a, which provides for use of errata sheets for final environmental impact statements (FEISs), directs the Department to issue a combined FEIS and record of decision (ROD) (FEIS/ROD) to the maximum extent practicable, and provides discretionary processes for incorporation by reference and for one OA to adopt

environmental assessments (EAs) and EISs prepared by another OA. Paragraphs 14(b) and 15(c) of the updated NEPA Order address the combined FEIS/ROD. Paragraph 20(g) of the updated NEPA Order addresses adoption. Paragraph 15(b) of the updated NEPA Order addresses errata sheets. The Department does not address incorporation by reference in the updated NEPA Order. However, the Department welcomes comments on whether to add a paragraph to address it.

- Section 1313 creates 49 U.S.C. 310, Aligning Federal Environmental Reviews, which directs the Department to perform several activities: develop a coordinated and concurrent environmental review and permitting process for transportation projects as well as a program to measure and report on progress towards alignment of Federal reviews and reducing permitting and project delivery timelines; develop a checklist to help project sponsors identify potential natural, cultural, and historic resources in the area of a proposed project; and facilitate annual interagency collaboration sessions. While the Department has undertaken efforts to implement this provision, including developing a checklist² and engaging in several interagency collaboration sessions, the Department has not addressed this provision in the updated NEPA Order. In light of the savings provision in 49 U.S.C. 310(g), which makes this section inapplicable to projects subject to 23 U.S.C. 139 (most highway, transit, and railroad projects requiring an EIS), the Department is requesting comment on how it might further implement the provisions of 49 U.S.C. 310 in the updated NEPA Order.

² Available at <https://www.transportation.gov/administrations/office-policy/checklist-environmental-requirements-and-resources-1313-and-appendix>.

- Section 1432 provides for exemptions and expedited procedures for certain environmental review processes during emergencies. Section 19 of the updated NEPA Order references the availability of this provision.
- Section 9001 establishes the National Surface Transportation and Innovative Finance Bureau, known as the Build America Bureau (Bureau). The Bureau streamlines credit opportunities and grants and provides access to the credit and grant programs with more speed and transparency, while also providing technical assistance and encouraging innovative best practices in project planning, financing, delivery, and monitoring. It also administers several transportation financial assistance programs, including the Transportation Infrastructure Finance and Innovation Act (TIFIA) and Railroad Rehabilitation and Improvement Financing (RRIF) credit programs. The Bureau is a Secretarial Office. As the proposed Order explains, a Secretarial Office may in some situations rely on the OA with the most expertise on the potential environmental impacts of a project to conduct the environmental review process on the Secretarial Office's behalf.

Consistent with the Council on Environmental Quality's (CEQ's) Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR parts 1500-1508 (CEQ regulations), the Department consulted with CEQ on the preparation of the updated NEPA Order. See 40 CFR 1507.3(a). In accordance with 40 CFR 1507.3(a), the Department is proposing this updated NEPA Order and seeking public review and comment on the proposals. To facilitate this process, the following section summarizes the general updates made throughout the updated NEPA Order and then the changes or additions by section.

The Department requests comments on the updated NEPA Order, which is available in the docket (DOT-OST-2016-0239) at www.regulations.gov. The docket also contains the “Administrative Record to Update Existing and Support New Categorical Exclusions under the National Environmental Policy Act” file (supporting information). DOT will respond to comments received on the proposed NEPA Order revisions in a future Federal Register notice, to be published after the close of the comment period. That notice will also announce the availability of the final NEPA Order, reflecting any changes implemented as a result of comments received, should a final NEPA Order be issued.

II. Section-by-Section Analysis

General Updates

As a general principle, the Department strived to draft the updated NEPA Order at a high level to apply to the Department’s diverse programs and actions, and to the extent possible, avoid creating direct conflicts with existing OA programs and actions. To that end, the Department eliminated the more detailed guidance set forth in Attachment 2 of 5610.1C. Instead, the Department will issue a “Desk Reference” that provides more specific guidance on particular provisions of the updated NEPA Order. This will allow the Department to update the Desk Reference when appropriate without having to update the updated NEPA Order. This approach is consistent with CEQ’s recommendation that agencies issue “explanatory guidance” on their implementing procedures. See 40 CFR 1507.3(a).

Another overall goal of the updated NEPA Order is to improve clarity. This includes rephrasing to make clear who is responsible for taking the actions specified in the updated NEPA Order. To improve readability, the updated NEPA Order uses “OA” as the entity responsible,

and defines “OA” to include a Secretarial Office that carries out its own NEPA responsibilities (as opposed to that office relying on an OA’s expertise to prepare the NEPA document). The updated NEPA Order also updates the names of the relevant offices that have responsibilities, including the Office of Policy and Office of the General Counsel (and relevant subdivisions thereof). Finally, the updated NEPA Order updates terminology to be consistent with modern NEPA practice and the Department’s current operations.

Section 1: Introduction

Section 1 of the updated NEPA Order is a new section added to reflect the historical context of how past transportation decisions impacted communities. The new text further discusses the role of NEPA as a tool to make future transportation decisions that expand opportunity, support socio-economic mobility, and are inclusive of, responsive to, and reflective of communities they impact. It reflects the Department’s intent to engage stakeholders earlier in the NEPA process to achieve better outcomes that serve all users and to improve the efficiency of the project delivery process.

Section 2: Policy and Intent

The Department made significant revisions to 5610.1C section 2, Policy and Intent. This section emphasizes the Department’s goal to achieve an optimal process that equitably considers impacts and provides opportunity for meaningful public involvement throughout the process. Paragraph (a) emphasizes the goals of the updated NEPA Order are to facilitate a collaborative process to achieve optimal outcomes while protecting and enhancing the environment, addressing climate change, and engaging the public, as well as to use the NEPA process as an umbrella to achieve a single environmental review process. Paragraph (b) sets forth the

Department's overarching environmental policy, including the need to connect people to opportunity through a safe, efficient, and accessible transportation system. Finally, paragraph (c) sets forth the goals the Department seeks to achieve through the NEPA process, including meaningful public participation and collaboration and consideration of climate change effects.

Section 3: Definitions

The Department is adding a Definitions section to provide further clarity on the meaning of certain terms used in the updated NEPA Order. The Definitions section incorporates by reference the CEQ regulatory definitions set forth in 40 CFR part 1508, and then supplements those definitions where the Department found additional clarity was needed.

Action: In addition to relying upon the definition of action in 40 CFR 1508.18, the Department includes a list of examples of typical DOT actions. Among these are “policies and plans (including those submitted to DOT by State, tribal, or local agencies, or other public or private applicants, unless otherwise exempted).” This would not include, for example, transportation improvement plans (TIPs) and statewide improvement plans (STIPs) conducted pursuant to 23 U.S.C. 134 and 135, respectively; STIPs and TIPs are specifically statutorily exempted (23 U.S.C. 134(q) and 23 U.S.C. 135(k), respectively). Additionally, the definition clarifies that a proposal is not an action subject to NEPA if it does not allow for agency discretion to consider environmental impacts in decision making or is not subject to DOT control and responsibility.

Administrator: Recognizing that the responsibilities of the Administrator are often delegated, the updated NEPA Order defines the Administrator as the head of an OA or his/her designee.

Applicant: The updated NEPA Order defines applicant broadly to reflect the variety of applicants encountered across the Department. The updated NEPA Order also recognizes that

some OA NEPA implementing procedures (OA Procedures) provide that the applicant will carry out the responsibilities of the OA on its behalf, and therefore could conduct activities under this Order on behalf of that OA.

Class of action: The Department is adopting this term, consistent with its use in 40 CFR 1507.3(b)(2), to mean the level of NEPA review required for a particular action (i.e., a categorical exclusion (CE), an EA, or an EIS).

Council on Environmental Quality (CEQ): The updated NEPA Order makes reference to CEQ on several occasions so the Department is identifying it in the Definitions section.

Cumulative impact: The updated NEPA Order incorporates the definition of cumulative impact from the CEQ regulation with a minor edit to correct an error in the original drafting. This edit was made at the recommendation of CEQ.

Environment: The Department included a definition of environment consistent with the CEQ definition of “human environment” at 40 CFR 1508.14 to emphasize the holistic nature of the term.

Environmental review process: The updated NEPA Order includes this term to emphasize that the Department strives to comply not just with NEPA, but all applicable environmental requirements in a single process to ensure efficient project delivery.

Multimodal project: The updated NEPA Order includes both a broad definition of “multimodal project” as well as a reference to multimodal project as defined in 23 U.S.C. 139, where this term is used in that context, because this narrower definition is not appropriate for all references to multimodal projects in the updated NEPA Order.

NEPA: The updated NEPA Order provides the full statutory citation for NEPA.

NEPA Document: The updated NEPA Order uses the term NEPA Document in lieu of environmental document as used in the CEQ regulations, and defines it more broadly to include an EIS, record of decision (ROD), EA, finding of no significant impact (FONSI), or any documentation that may be prepared in the application of a CE to a proposed action.

Operating Administration (OA): The updated NEPA Order defines OA to mean any agency established within the Department, and lists the current OAs. As noted in General Updates above, to improve readability of the updated NEPA Order, OA would also include a Secretarial Office where that office is carrying out its own NEPA responsibilities.

Shared Use Corridor: The updated NEPA Order defines shared use corridor to provide clarity on its distinction from a multimodal project.

Section 4: Implementation of the Order

This new section addresses the operations of the updated NEPA Order. It updates certain paragraphs from 5610.1C section 1, Background, regarding cancellation and authority, and pulls in the effective date of the updated NEPA Order, which 5610.1C listed separately in section 18.

Paragraph (a)(1) establishes that the updated NEPA Order serves as the overarching procedures for the Department as well as the specific procedures for any Secretarial Office carrying out its own NEPA responsibilities. For example, if the Office of Facilities, which is a Secretarial Office, was constructing a new building, it would rely on the updated NEPA Order for its NEPA implementing procedures. In contrast, if for example, the Federal Railroad Administration (FRA) were delegated or otherwise assigned responsibility to conduct a NEPA

review on behalf of the Build America Bureau on a project applying for a RRIF loan, the FRA's NEPA procedures would guide FRA's work on the environmental review for the Bureau.

Consistent with 40 CFR 1507.3(a), paragraph (a)(2) reminds OAs that the updated NEPA Order supplements rather than supplants the CEQ regulations, and that they must comply with the CEQ regulations, the updated NEPA Order, and their own OA Procedures. Because some OAs have unique statutory authorities that govern the environmental review process, the paragraph also acknowledges that those statutes and their implementing regulations govern any conflicts with the updated NEPA Order.

Paragraph (a)(3) provides that OAs may establish in their own OA Procedures more specific processes and standards than those set forth in the updated NEPA Order. Further OA Procedures may contain more stringent timeframes or standards, but the OA must follow the process set forth in paragraph 30(c) to obtain concurrence from the Office of Policy and Office of the General Counsel.

Paragraph (a)(4) provides clarity on the use of the terms "must" and "should" in the updated NEPA Order. "Must" denotes mandatory activities; "should" indicates that the OA has discretion to determine whether the activity is practicable or appropriate.

Paragraph (b) explains the intended treatment of the term "Office of Policy" as used throughout the updated NEPA Order. In particular, it specifies that whenever an OA must consult or notify the Office of Policy, the Office of Policy must in turn consult or notify the Office of the General Counsel. This streamlined approach means the OAs only need to make one notification and is consistent with the Department's current practice.

Paragraph (c) provides the authority under which the Department is issuing the updated NEPA Order. Paragraph (d) cancels 5610.1C. Finally, paragraph (e) makes the updated NEPA Order effective upon final publication.

Section 5: General Provisions

The updated NEPA Order includes a new section 5, General Provisions, which provides general direction on the NEPA process, irrespective of the class of action. This section updates and builds upon several provisions from 5610.1C, including section 2, Policy and Intent, paragraphs (b), which addresses the purpose and (c), which addresses the administrative record ; and section 7, Preparation and Processing of Draft Environmental Statements, paragraphs (b) Timing of Preparation of Draft Statements and (c) Interdisciplinary Approach and Responsibilities of EIS Preparation.

Paragraph (a) of the updated NEPA Order addresses the timing of the environmental review process, encouraging OAs to begin it as early as possible in the development of the action. It also includes the CEQ regulatory prohibition against taking actions that would have adverse impacts or limit alternatives, including notifying applicants, consistent 40 CFR 1506.1(a)–(b) and 1502.2(f)–(g). Paragraph (b) requires OAs to use an interdisciplinary approach, consistent with 40 CFR 1502.6, and provides that they may use professional services but must have staff with the capacity to evaluate these services and take responsibility for the final content of their NEPA documents, consistent with 40 CFR 1506.5 and 1507.2. Paragraph (c) directs OAs to coordinate all applicable environmental reviews with the NEPA process, and lists the most common examples of other applicable environmental laws, regulations, and Executive Orders for DOT actions. Paragraph (d) sets forth general requirements for NEPA

documents including that they be written in plain language and address impacts in proportion to their significance.

Paragraph (e) reminds OAs of the requirement to consider environmental justice, where appropriate, in their NEPA documents, including compliance with Executive Order (E.O.) 12898 and DOT Order 5610.2(a), Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. It specifically notes the requirement's applicability regardless of NEPA class of action, noting the need to consider whether the proposed action, individually or cumulatively with other past and present infrastructure decisions, would have disproportionately high and adverse effects on minority or low income populations.

Paragraph (f) reminds OAs of the differences between NEPA and Title VI of the Civil Rights Act, and that fulfillment of the NEPA process does not necessarily result in compliance with Title VI. Paragraph (f) also notes that compliance with the updated NEPA Order can sometimes play a role in supporting compliance with Title VI.

Paragraph (g) reminds OAs of their responsibility to maintain an administrative record. Paragraph (h) addresses use of contractors in preparing NEPA documents and sets forth requirements consistent with 40 CFR 1506.5. This provision expands upon language in 5610.1C section 13, Responsibility, to emphasize the responsibility of the OA to use flexibilities to ensure contractors are unbiased and produce quality work. It also expressly notes the requirement that OAs assess contractors' adequacy of performance, taking into account how the work product ensures the process adequately considers impacts.

Paragraph (i) addresses tracking of NEPA documents. Consistent with 23 U.S.C. 139(o) and current DOT policy guidance, all OAs must post information for all infrastructure projects requiring an EA or EIS on the Permitting Dashboard, www.permits.performance.gov. Consistent with 40 CFR 1506.6(e), paragraph (j) identifies where an outside party may request additional information about the environmental process.

Section 6: Planning and Early Coordination

Section 6 of the updated NEPA Order significantly revises 5610.1C section 3, Planning and Early Coordination. Paragraph (a) encourages early and ongoing coordination with all relevant parties including other OAs, Federal, State and local resource and regulatory agencies, stakeholders, and the public. Paragraph (b) directs OAs to consider impacts of a proposed action as early as reasonably possible, preferably during the planning stages of a proposed action. Note that while the updated NEPA Order encourages consideration of environmental impacts during transportation planning, as noted above, this process is explicitly exempted from NEPA pursuant to 23 U.S.C. 134(q) and 135(k). Paragraph (c) encourages reliance on information developed during the planning process so as to avoid duplicating efforts in the NEPA process. Paragraph (d) directs OAs to ensure that their applicants are aware of environmental analysis and review requirements.

Paragraph (e) discusses the scoping process and how it must inform the development of reasonable alternatives. New language emphasizes that the selection of a range of alternatives for further study, where applicable, be thorough and objective, and include reasonable and comparable best estimates of cost, as appropriate. Consistent the CEQ regulations, paragraph (e) notes the selection of a range of alternatives for further study must not predetermine a particular

outcome. Paragraphs (f) and (g) encourage tools to improve early coordination, including Memoranda of Understanding (MOUs) and the use of conflict resolution. Finally, paragraph (h) addresses the requirement in 42 U.S.C. 4332(2)(D) to provide early notice to and solicit the views of State or Federal land management entities when a State's proposed action may have significant impacts on another State or a Federal land management entity.

Section 7: Operating Administration Coordination

The Department is adding this new section to specifically address and improve coordination within the Department. Paragraph (a) requires OAs to coordinate if it is reasonably foreseeable that more than one OA may have an action on the same project. Paragraph (b) encourages OAs to determine their respective roles, though the Office of Policy may resolve any disputes. Finally, paragraph (c) encourages use of conflict resolution to resolve any disputes between OAs.

Section 8: Lead and Cooperating Agencies

Section 8 of the updated NEPA Order revises, but is generally consistent with 5610.1C section 6, Lead Agencies and Cooperating Agencies. This section outlines the responsibilities of lead, joint lead, and cooperating agencies consistent with the CEQ regulations and provides best practices for OAs with respect to working with or serving as a cooperating agency. Finally, paragraph (d) recommends engaging other agencies that do not otherwise meet the definition of a joint lead or cooperating agency to participate in the environmental review process. This is similar to the participating agency role as provided in 23 U.S.C. 139(d).

Section 9: Class of Action Determination

Section 9 of the updated NEPA Order builds upon section 4, Environmental Processing Choice, while moving and expanding the paragraphs on CEs and EAs to their own sections. Paragraph (a) sets forth the standard for determining the appropriate class of action, which is the significance of the impacts on the human environment, including consideration of their context and intensity. See 40 CFR 1508.27. Paragraph (b) requires OAs to establish the scope of the action, consistent with 40 CFR 1508.25, in order to determine the appropriate class of action. Paragraph (c) expands on the issue of scope to ensure that the proposed action has independent utility or significance; does not restrict consideration of alternatives for other reasonably foreseeable actions; and where applicable, connects logical termini or is of sufficient length to address environmental impacts on a broad scope. Paragraph (d) requires OAs to consider potential impacts of the proposed action on the human and natural environment. This includes consideration of the potential for the proposed action, either individually or cumulatively with other actions, including the impacts of other past or present Federal, State or local actions, to significantly affect communities protected by E.O. 12898 and DOT Order 5610.2(a). Paragraph (d) also reminds OAs that they may engage the public to help identify potential impacts. Finally, paragraph (d) reiterates the requirement to consider extraordinary circumstances before determining a CE is the appropriate class of action.

Section 10: Categorical Exclusions (CEs)

Section 10 is a new section that updates 5610.1C paragraph (c), Categorical Exclusions, within section 4, Environmental Processing Choice. CEQ's guidance, Establishing, Applying,

and Revising Categorical Exclusions Under the National Environmental Policy Act,³

recommends that agencies periodically review their existing CEs to ensure they remain current and appropriate. The Department undertook such a review. Paragraph 10(c) provides the results of this review of the list of categories of actions that DOT has determined do not normally individually or cumulatively have a significant effect on the human environment, and therefore normally do not require the preparation of an EA or EIS. Consistent with CEQ's guidance, the Department also developed an Administrative Record to document its conclusions to remove, revise, or establish new CEs. This document is available for public review in the docket.

Paragraph (a) provides the definition of CEs, consistent with 40 CFR 1508.4, as well as the requirement to consider whether extraordinary circumstances are present requiring the preparation of an EA or EIS. Paragraph (a) instructs OAs to conduct environmental studies to determine whether application of the CE is appropriate or whether the OA must prepare an EA or EIS when significant environmental effects could exist.

Paragraph (b) provides a list of extraordinary circumstances that OAs must consider before applying a CE listed in this Order. Among such circumstances are the potential for the action to be inconsistent with applicable Federal, State, Tribal, or local requirements relating to protection of the environment; the potential to have impacts on protected species, lands or other resources; and the potential to have disproportionately high and adverse impacts on minority and low-income populations. This list is only applicable to the CEs listed in the updated NEPA Order. However, when updating OA Procedures, OAs must consider whether any of the extraordinary circumstances provided in paragraph (b) are appropriate to add to their list.

³ 75 FR 8045, Apr. 9, 2010, available at https://ceq.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf.

Paragraph (c) provides the list of CEs. Based on its review, the Department proposes to add 10 new CEs, modify five of the existing CEs, and eliminate one CE and part of a CE no longer deemed useful or appropriate. Modifications to existing CEs provide clarity and reflect DOT experience with these activities.

Of the new proposed new CEs, DOT has identified routine operational activities including training and educational activities (c)(3); leasing of space in existing buildings (c)(6); remodeling existing facilities (c)(7); landscaping and landscape maintenance that does not cause introduction or spread of invasive species (c)(8); hearings and public meetings (c)(12); and Administrative actions and proceedings (c)(13).

Paragraph (c)(5) updates existing CE 5 in 5610.1C, which incorporates by reference CEs identified in OA Procedures, and would now allow one OA to apply the CE of another OA. In order to effectively apply the CE of an OA to an action being administered by another OA, the OA making the CE determination must ensure the application of the CE is appropriate and that the action to which the CE is being applied was contemplated when the CE was established. Therefore, the Department has revised 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 provide expertise in reviewing the action being categorically excluded."

Over the last decade, the Department has seen a number of new programs and projects that go beyond the bounds of a particular OA. This updated CE will 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 CE to the project is appropriate because it is contemplated within that category of action and no extraordinary circumstances are present such that preparation of an EA or EIS is required. The Department does not intend for this CE to be used to apply a CE to an action that the OA never contemplated when establishing the CE. The Department plans to issue guidance to the OAs to ensure efficient and effective use of this CE.

DOT proposes two new CEs relating to rulemaking and policy activities. The first is 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 ((c)(10)). A second is 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 ((c)(11)). Finally, DOT proposes to list 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 ((c)(14)).

Paragraph (d) recognizes the process created in 49 U.S.C. 304 for the application of another OA's CE for projects that meet the "multimodal project" definition in 23 U.S.C. 139(a). The Department is working on an update to its existing guidance on this provision.

Finally, paragraph (e) reminds OAs that they are responsible for complying with all other applicable environmental requirements related to a proposed action when processing the action as a CE. It also cross references to paragraph 5(c), which lists many of the most common requirements.

Section 11: Environmental Assessments (EAs)

Section 11 is a new section to address the preparation of environmental assessments; it updates paragraph (d) of 5610.1C section 4, Environmental Processing Choice, which sets forth situations where the Department must prepare an EA or an EIS. In the updated NEPA Order, paragraph (a) provides the definition of an EA and addresses the requirement to independently evaluate the EA when an applicant prepares it. Paragraph (b) sets forth when an OA must prepare an EA, but paragraph (d) notes that an OA need not prepare an EA if it has determined to prepare an EIS. Paragraph (c) provides examples of typical classes of actions that normally require an EA, consistent with 40 CFR 1507.3(b)(2)(iii). Paragraph (e) addresses public notice and paragraph (f) addresses public involvement for EAs. Paragraph (g) provides the required elements for an EA consistent with 40 CFR 1508.9. Paragraph (h) addresses the alternatives analysis for EAs. To avoid any indication of bias toward a particular alternative where there is more than one alternative, paragraph (h) emphasizes the need to objectively evaluate each alternative at comparable levels of detail and to include, where appropriate, best estimates of costs using consistent methodologies. Paragraph (i) notes that EAs should reflect compliance or plans for compliance with other applicable environmental requirements. Paragraph (j) provides OAs the discretion to solicit public comments on an EA, but requires them to address comments received. Finally, paragraph (k) cross-references to section 18, which addresses re-evaluation and supplemental EAs.

Section 12: Findings of No Significant Impact (FONSIs)

Section 12 updates 5610.1C section 5, Finding of No Significant Impact, continuing to focus on the CEQ regulatory requirements for a FONSI set forth in 40 CFR 1508.13, 1501.7(a)(5), 1506.6, and 1501.4(e). It also addresses mitigated FONSIs, consistent with CEQ guidance, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.⁴ Paragraph (c) sets forth the basic requirements for relying on a mitigated FONSI, including identifying the mitigation measures necessary to reduce the potential impacts below 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.

Section 13: Environmental Impact Statements (EISs)

Sections 13 through 15 address the requirements for EISs. To improve clarity, the Department includes the requirements that apply to both draft and final EISs in Section 13, and then addresses those requirements specific to draft environmental impact statements (DEISs) in Section 14, and FEISs in Section 15. Generally, these sections articulate the requirements from the CEQ regulations, including those in part 1502, as well as those set forth in 5610.1C 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, as noted

⁴ 76 FR 3843, Jan. 21, 2011, available at https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

above, some of these paragraphs are now addressed in General Provisions where the concepts apply more broadly than to EISs only.

Section 13, paragraph (a) sets forth when NEPA requires an EIS, as well as the requirement to prepare a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Consistent with 40 CFR 1507.3(b)(2)(i), paragraph (b) provides examples of typical classes of actions that normally require an EIS. Paragraph (c) sets forth scoping requirements pursuant to 40 CFR 1501.7 and emphasizes that project scoping includes opportunities to receive input from the public, Federal agencies, State and local governments, and tribes on issues, including alternatives to be evaluated in the EIS. Paragraph (d) addresses the format and content of EISs, including purpose and need, alternatives, affected environment, environmental consequences, and mitigation. Paragraph (d)(2)(a) emphasizes the requirement that the alternatives analysis describe criteria used to identify the range of alternatives and how public and agency input was considered to determine which alternatives to evaluate and which to eliminate. The paragraph also notes that alternatives should be evaluated fully at comparable levels of detail, except where legally permitted to develop a preferred alternative to a higher level of detail, and, where appropriate, include best estimates of cost that are reasonable, comparable, and developed using consistent methodologies. Paragraph (d)(2)(b) addresses the need for the EIS to include information regarding the process used to eliminate alternatives. Paragraph (e) addresses public notice and notice of availability requirements consistent with 40 CFR 1506.6. Paragraph (f) addresses review of EISs prepared pursuant to NEPA Section 102(2)(D). Paragraph (g) sets forth the requirement to file EISs with the Environmental Protection Agency (EPA) pursuant to 40 CFR 1506.9 and notes EPA's guidance on filing. Paragraph (h) sets forth the timing requirements, including the ability to reduce or extend time periods.

Section 14: Draft Environmental Impact Statements (DEISs)

As noted above, Section 14 only addresses those requirements specific to the preparation of DEISs. Paragraph (a) encourages early preparation of the DEIS to ensure the decision maker can meaningfully consider the analysis in the decision-making process. Paragraph (b) encourages OAs to indicate in the DEIS when they intend to issue a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Finally, paragraph (c) sets forth the specific circulation and request for comment requirements for DEISs.

Section 15: Final Environmental Impact Statements (FEISs)

As noted above, Section 15 only addresses those requirements specific to the preparation of FEISs. Consistent with 40 CFR 1503.4, paragraph (a) provides guidance on responding to comments on the DEIS in the FEIS. Paragraph (b) provides 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). Paragraph (c) sets forth the 49 U.S.C. 304a(b)/23 U.S.C. 139(n) requirement 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. Paragraph (d) directs the FEIS to reflect compliance or plans for compliance with other environmental requirements. Paragraph (e) reiterates existing delegations for approval of FEISs. Paragraph (f) sets forth requirements to notify the Office of Policy for certain FEISs (e.g., highly controversial actions). Finally, paragraph (g) addresses circulation requirements for the FEIS.

Section 16: Record of Decision

This new section sets forth the topics to be addressed in the ROD, including alternatives, factors balanced in decision making, and mitigation measures. Paragraph (b) sets forth the 30-day waiting period required by 40 CFR 1506.10(b)(2) in those instances where the OA determines it is not practicable to issue a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Finally, paragraph (c) provides that OAs may develop a single ROD for multimodal actions.

Section 17: Tiering and Programmatic Approaches

While 5610.1C section 7(g) addresses tiering, the Department finds tiering and programmatic approaches expedite project delivery, and therefore is devoting a separate section of the updated NEPA Order to this topic. Paragraph (b) defines tiering and emphasizes when use of tiering may be appropriate. Paragraph (c) addresses when programmatic EAs or EISs might be helpful. Finally, paragraph (d) encourages the use of Programmatic Agreements to streamline routine actions or environmental requirements, developing them as broadly as possible to cover the actions of multiple OAs.

Section 18: Re-evaluation and Supplementation

Section 18 updates and clarifies the existing practice for re-evaluation outlined in 5610.1C section 19, Time in Effect of Statements. 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. Additionally, the Department is revising its dates for re-evaluation from 3 to 5 years to be consistent with Question 32 of the Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (Forty

Questions).⁵ Paragraph (a) encourages the use of re-evaluation when there are changes to the proposed action or new circumstances or information relevant to environmental concerns.

Additionally, it encourages OAs to re-evaluate in writing DEISs if the OA has not issued an FEIS within 5 years of circulation of the DEIS, and FEISs if major steps toward implementation have not commenced within 5 years of FEIS approval. Paragraphs (b)(1) and (b)(2) address the CEQ regulatory criteria for a supplemental EIS, as well as the discretion to supplement.

Paragraph (b)(3) addresses the process for preparing a supplemental EA or EIS.

Section 19: Emergency Actions

The Department added a separate section regarding emergency actions to address the CEQ regulation on emergencies, 40 CFR 1506.11, and guidance, Memorandum for Heads of Federal Departments and Agencies regarding Emergencies and the National Environmental Policy Act,⁶ as well as section 1432 of the FAST Act. This builds on the existing paragraph (c) in 5610.1C section 17, Timing of Agency Action, which details the internal process for consulting with CEQ. The updated NEPA Order addresses generally emergency situations in paragraph (a) and then provides mechanisms for NEPA compliance where the OA anticipates significant impacts in paragraph (b) or non-significant impacts in paragraph (c). In both instances, the updated NEPA Order provides the internal coordination process for such compliance.

Section 20: Adoption of EISs and EAs

⁵ 46 FR 18026, Mar. 23, 1981, available at <https://ceq.doe.gov/nepa/regs/40/40p3.htm>.

⁶ Available at https://ceq.doe.gov/ceq_regulations/Emergencies_and_NEPA_Memorandum_12May2010.pdf.

The Department added this new section to 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). Paragraphs (a) through (c) outline the same requirements set forth in 40 CFR 1506.3 for the adoption of EISs. Where the OA was not a cooperating agency, paragraphs (b) and (c) direct the OA to issue a combined FEIS/ROD consistent with the directive in 49 U.S.C. 304a/23 U.S.C. 139(n). Paragraph (d) sets forth the adoption process for EAs. Consistent with Question 32 of the Forty Questions, paragraph (e) requires OAs to reevaluate an EA or EIS that is more than 5 years old before adopting another Federal agency's EA or EIS. Paragraph (f) addresses the notification process. Finally, paragraph (f) acknowledges the discretionary adoption process under 49 U.S.C. 304a(c)(2). The Department intends to issue guidance on the application of this provision, which it will incorporate into the Desk Reference.

Section 21: Mitigation and Monitoring

The Department added this new section to address generally mitigation and monitoring in the NEPA process. Consistent with the approach in 5610.1C, the updated NEPA Order continues to reference mitigation in the context of specific NEPA documents (e.g., EAs, FONSI, EISs, RODSs). This section is based on the CEQ regulations and guidance, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.⁷ Paragraph (a) describes the purpose of mitigation and paragraph (b) encourages early development of mitigation measures. Paragraph (c) addresses appropriate documentation of mitigation measures and paragraph (d) addresses mitigation

⁷ 76 FR 3843, Jan. 21, 2011, available at https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

commitments. The goal of these provisions is to document the mitigation that the OA both considered and adopted in the NEPA analysis and decision. Due to the importance of ensuring implementation of mitigation measures, the Department has included provisions on ensuring the implementation of mitigation measures, and related monitoring provisions in paragraphs (e) and (f).

Section 22: Responsible Official for Secretarial Office Actions

Because the updated NEPA Order serves as the NEPA implementing procedures for Secretarial Offices that may undertake their own NEPA review for actions where they are not relying on the NEPA expertise of an OA, Section 22 provides that the office director serves as the responsible official for approving NEPA documents. Section 22 also provides that the Office of Policy, in conjunction with the Assistant General Counsel for Operations within the Office of the General Counsel, is responsible for general oversight and advice on environmental matters. This section maintains the responsible official set forth in 5610.1C section 21, Responsible Office for Office of the Secretary Actions, but provides clarity that this only applies when the Secretarial Office is serving as the lead agency.

Section 23: Determinations Under Section 4(f) and Integration with NEPA

Section 23 updates 5610.1C's guidance in section 12, Determinations Under Section 4(f) of the DOT Act. This section reflects the current statutory language for protection of certain parklands, refuges, recreation areas, and historic sites under Section 4(f) (49 U.S.C. 303/23 U.S.C 138). Because the Department intends to issue separate DOT-wide guidance or regulations for implementation of Section 4(f) to further reflect current policy and practice in

implementing Section 4(f), and because Attachment 2 of 5610.1C would be eliminated, some of the detailed guidance would no longer be part of the updated NEPA Order.

Paragraph 23(a) revises the discussion of findings required by Section 4(f) previously provided in 5610.1C section 12. It no longer provides that an action having more than a minimal effect on lands protected under Section 4(f) normally requires an EIS because DOT experience has shown that use of Section 4(f) lands is not necessarily a significant impact.

Paragraph 23(b) provides that an OA may approve the use of Section 4(f) property if it determines that the proposed action, including any measures to minimize harm, would have a de minimis impact on the property. In addition, pursuant to section 1301 of the FAST Act, the revisions in paragraph 23(c) note opportunities to integrate requirements for Section 4(f) with those for NEPA and Section 106 of the National Historic Preservation Act. DOT seeks public comment on the opportunities identified in paragraph 23(c) and also seeks comment on additional opportunities for integration of Section 4(f), NEPA, and Section 106.

Section 24: Review of NEPA Documents Prepared by Other Agencies

Section 24 revises 5610.1C section 9, Review of Environmental Statements Prepared by Other Agencies. The level of detail provided in 5610.1C is no longer necessary because the OAs have decades of experience with these reviews. Therefore, the Department streamlined this section to summarize its general responsibilities and internal coordination process.

Section 25: Public Involvement

Section 25 greatly expands upon 5610.1C section 14, Citizen Involvement Procedures, to give the Department additional guidance on the purpose of public involvement in the NEPA

process (paragraph (a)) and provide a variety of mechanisms (paragraph (b)) to achieve the goal of promoting meaningful public involvement early in the process to ensure an efficient project delivery process that meets the needs of stakeholders. Paragraph (c) states the OAs' obligation to comply with E.O. 12372, Intergovernmental Review of Federal Programs, and the implementing regulations in 49 CFR part 17, when applicable. Paragraph (d) updates 5610.1C section 14(e) regarding the requirements for public hearings and public meetings consistent with 40 CFR 1506.6(c). Finally, paragraph (e) requires posting of NEPA documents online where appropriate and practicable.

Section 26: Conflict Resolution

This new section promotes the use of both informal conflict resolution as well as environmental collaboration and conflict resolution (ECCR) consistent with the September 7, 2012 CEQ/OMB joint Memorandum on Environmental Collaboration and Conflict Resolution.⁸ Because the Department has a separate, more detailed Order on conflict resolution, DOT Order 5611.1a, U.S. Department of Transportation National Procedures for Elevating Highway and Transit Environmental Disputes,⁹ the updated NEPA Order only provides a high-level overview of informal conflict resolution and ECCR, with a cross-reference to that Order.

Section 27: Pre-Decision Referrals to the Council on Environmental Quality

Section 27 of the updated NEPA Order revises 5610.1C section 10, Pre-decision Referrals to the Council on Environmental Quality. This section addresses the internal process for addressing or making referrals to CEQ. Overall, the process remains the same, but the

⁸ Available at https://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2012.pdf.

⁹ Available at https://www.environment.fhwa.dot.gov/strmlng/dot5611_order.asp.

Department revised this section to provide clarity consistent with the general updates discussed above.

Section 28: Proposal for Legislation

Section 28 of the updated NEPA Order addresses the requirements for legislative EISs consistent with 40 CFR 1506.8. The updated NEPA Order revises 5610.1C section 15, Proposal for Legislation, for clarity consistent with the general updates discussed above.

Section 29: International Actions

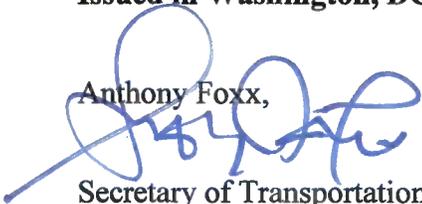
Section 29 of the updated NEPA Order addresses the implementation of E.O. 12114, Environmental Effects Abroad of Major Federal Actions. Section 29 streamlines 5610.1C section 16, International Actions, by cross referencing to the E.O. rather than repeating the E.O.'s applicability criteria. It also provides that OAs must prepare any required EIS consistent with the updated NEPA Order and OA Procedures. Finally, this section reflects edits for clarity consistent with the general updates discussed above.

Section 30: Operating Administration Implementing Procedures

Section 30 updates and supplements 5610.1C section 20, Implementing Instructions. Consistent with the Department's existing procedures, Section 30(a) of the updated NEPA Order requires OAs to either issue their own implementing procedures (OA Procedures) or rely upon the NEPA Order, but issue supplemental guidance. In addition to setting forth the basic requirements for OA Procedures, consistent with 40 CFR 1505.1 and 1507.3, Section 30 also details the relationship between the updated NEPA Order and existing OA Procedures. Consistent with paragraph (d), once the Department finalizes the updated NEPA Order, OAs

must evaluate their existing procedures to determine whether they are consistent with the updated NEPA Order. If not, the OAs must develop a plan and schedule to make revisions and obtain concurrence from the Office of Policy and Office of the General Counsel on the plan and schedule. In the interim period, paragraph (e) provides that OAs may continue to follow their existing OA Procedures, but have the discretion to rely on new provisions in the updated NEPA Order. Finally, paragraph (f) sets forth the internal review and concurrence process for establishing or updating OA Procedures, and paragraph (g) directs the Office of Policy to maintain them on a DOT website.

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