

## ENVIRONMENTAL REVIEW PROCESS GUIDANCE

### Introduction

This guidance provides project sponsors with direction regarding the Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) environmental review process and administering related statutory provisions.<sup>1</sup> In 2005 the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, established supplemental requirements to the National Environmental Policy Act (NEPA) requirements (specific to FHWA/FTA actions) and FHWA/FTA joint environmental procedures, 23 CFR part 771, for all FHWA and FTA environmental impact statement (EIS) processes. This guidance addresses two specific statutory requirements that apply to the environmental review of FHWA/FTA proposed actions:

- 23 U.S.C. 139 (which was created by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users [SAFETEA-LU], Pub. L. 109-59, and amended by the Moving Ahead for Progress in the 21st Century Act [MAP-21], Pub. L. 112-141); and
- Section 1319 of MAP-21 (mandating the combination of the Final Environmental Impact Statement [EIS] and Record of Decision [ROD] into one document under certain circumstances to the maximum extent practicable).

The guidance also reflects updated policy and procedures issued previously that are related to 23 U.S.C. 139 and MAP-21 Section 1319 implementation. These laws and related processes can apply in whole or in part to other NEPA processes, as determined by FHWA or FTA.

In 2012, Subtitle C of MAP-21 amended the provisions in 23 U.S.C. 139. The changes emphasize a framework for setting deadlines for decision-making in the environmental review process, modify the process for issue resolution and referral, and establish penalties for Federal agencies that do not make a timely decision. Also, complex projects stalled in the environmental review process can receive technical assistance with a goal of completing the environmental review process (i.e., issue a record of decision) within four years.

This guidance supersedes the SAFETEA-LU Environmental Review Process Final Guidance issued on November 16, 2006. It does not supersede any other guidance that is consistent with the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 *et seq.*, as amended, 23 U.S.C. § 139, and 23 CFR part 771. The Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500-1508) and the FHWA and FTA joint NEPA regulation (23 CFR part 771) remain in effect to the extent that they are consistent with 23 U.S.C. § 139. Because the size and scope of EISs vary, adjustments to the recommended approaches included in this guidance may be appropriate, but the minimum statutory requirement is always noted in this guidance. A question and answer format is used with additional examples and information provided in the glossary of abbreviations and appendices. The table of contents provides a full list of the questions.

This guidance is divided into three sections:

- Environmental Review Process - Part 1 contains guidance on elements of 23 U.S.C. § 139, including: applicability of this process; project initiation; roles and responsibilities of the project

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<sup>1</sup> Sections 139(c)(1)(A) of title 23, U.S. Code establishes that FHWA/FTA must be the Federal lead agency for the FHWA/FTA environmental review of projects. Section 1.81(a) of title 49 of the CFR delegates this responsibility to FHWA or FTA, as applicable, to matters within FHWA's or FTA's primary responsibility, respectively.

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sponsor and the lead, cooperating, and participating agencies; project purpose and need; analysis of alternatives; and public involvement requirements.

- Process Management - Part 2 addresses the management of the FHWA/FTA environmental review process and includes: coordination and scheduling; public involvement; concurrent reviews; issue resolution; mitigation commitments; adoption and use of documents; and interagency funding.
- Statute of Limitations - Part 3 addresses the statute of limitations provision. FHWA and FTA have slightly different procedures for implementing the statute of limitations provision.

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### **Part 1 Environmental Review Process**

Part 1 covers elements specific to the FHWA/FTA environmental review process that differ from those elements under CEQ's NEPA regulations (40 CFR 1500 – 1508) which are addressed in other guidance. This guidance provides information on 23 U.S.C. § 139 implementation related to:

- Project initiation;
- Roles and responsibilities of the project sponsor and the lead and participating agencies (including as it relates to cooperating agencies);
- Development of project purpose and need;
- Analysis of alternatives;
- Identification and design of the preferred alternative; and
- Opportunities for public involvement.

The FHWA/FTA environmental review process emphasizes the responsibilities of the NEPA lead agencies in determining the final purpose and need for the action and the range of alternatives after considering input from the public and participating agencies. While FHWA or FTA is the Federal lead agency in a NEPA process subject to the FHWA/FTA environmental review process under 23 U.S.C. § 139, the lead agency role can be shared with other governmental entities, as defined by the law. Therefore, unless otherwise specified to indicate an ultimate decision maker, the terms "lead agency" or "lead agencies" throughout the guidance refer to a collaboration among all joint lead agencies when making decisions or performing tasks, regardless of whether they are serving as a joint lead agency under the authority of 23 U.S.C. § 139 or by invitation pursuant to CEQ regulations at 40 CFR parts 1500–1508. The environmental review process should not proceed unless the lead agencies reach agreement on matters under their joint authority. If appropriate, the issue resolution process described in 23 U.S.C. § 139 may be initiated to resolve conflicts. In addition, the lead agencies must collaborate with participating agencies in determining the methodologies to be used and the level of detail required in the analysis of each alternative.

Under CEQ's regulations, cooperating agencies can be any Federal, State, or local agency, or Indian tribal government that has jurisdiction by law or special expertise with respect to any potential environmental impact from a proposed project (40 CFR 1508.5).

In addition to cooperating agencies, the FHWA/FTA environmental review process also includes participating agencies. Participating agencies can include any Federal, State, local, or Indian tribal governmental unit that may have an interest in the proposed project. The intent of a participating agency's role is to enhance interagency coordination, ensure that issues of concern are identified early, and encourage governmental agencies at any level with an interest in the proposed project to be active participants in the NEPA process. Designation as a participating agency does not indicate project support, but does give invited agencies specific opportunities to provide input at key decision points in the process. By definition, any potential cooperating agency has an interest in the proposed project and thus is also considered a participating agency, although not all participating agencies are cooperating agencies. The roles of cooperating and participating agencies are similar in many ways and differ in some ways, with cooperating agencies having more authority, responsibility, and involvement in the environmental review process.

Throughout this guidance, the term "participating agencies" is used to include both "cooperating agencies" and "participating agencies". The term "cooperating agencies" is used only when addressing specific roles under the CEQ's regulations to highlight when the roles of cooperating agencies differ from participating agencies' roles under 23 U.S.C. 139.

#### **GENERAL INFORMATION ABOUT THE FHWA/FTA ENVIRONMENTAL REVIEW PROCESS**

**Question 1: What does the term "transportation project" mean in this guidance?**

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**Answer:** Within this guidance, the term “transportation project” means any highway project or public transportation capital project that involves a FHWA or FTA action, or any multimodal project funded in whole or in part under title 23 U.S. Code, or chapter 53 of title 49, U.S. Code.

### **Question 2: What is meant by the “FHWA/FTA environmental review process”?**

**Answer:** The term “FHWA/FTA environmental review process” refers to the Federal procedures and requirements followed when evaluating a proposed transportation project (e.g., addressing compliance with NEPA, its implementing regulations, and 23 U.S.C. § 139). FHWA/FTA is responsible for ensuring that environmental analysis for a transportation project is prepared and completed in accordance with 23 U.S.C. § 139, 23 CFR part 771, and other applicable Federal laws and regulations. This environmental review process takes into account other applicable Federal laws under the purview of other agencies (e.g., the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act), and the completion of any environmental permit, approval, review, or study required under those other Federal laws. Therefore, FHWA/FTA’s involvement may extend into “post-NEPA” project development activities that encourage timely environmental approvals, permits, or actions, as needed.

### **Question 3: What is meant by a “combined FEIS/ROD document”?**

**Answer:** The term “combined FEIS/ROD document” refers to the single Final EIS (FEIS) and ROD document established pursuant to section 1319(b) of MAP-21. Requirements for both an FEIS and a ROD must be met in order to join the two documents into a single, combined document. Additional guidance on combining an FEIS/ROD is found in FHWA/FTA *Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews* in Appendix C.

### **Question 4: How do the environmental requirements for metropolitan and statewide planning in 23 U.S.C. §§ 134, 135, 168 and 169 and their implementing regulations (23 CFR part 450) relate to the FHWA/FTA environmental review process?**

**Answer:** The transportation planning process provides for actions and strategies that “protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns.” [23 U.S.C. 134(h)(1)(E) and 23 U.S.C. 135(d)(1)(E)] Transportation plans are developed “in consultation with State, tribal, and local agencies responsible for land use management, natural resources, conservation, environmental protection, and historic preservation.” [23 U.S.C. 135(f)(2)(D)(i)] Consultation involves a comparison of transportation plans with available State, tribal, and local conservation plans and maps, and with available natural and cultural/historic resources inventories.

Transportation plans must include a “discussion of types of potential environmental mitigation activities and potential areas to carry out these activities” and the discussion must “be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.” [23 U.S.C. 134(i)(2)(D) and 49 U.S.C. 5303(i)(2)(D)]. In addition, under 23 U.S.C. § 169, as part of the statewide or metropolitan transportation planning process, a State or metropolitan planning organization may develop programmatic mitigation plans or policies to address the potential environmental impacts of future transportation projects, and these may be used by Federal agencies in carrying out their responsibilities under NEPA [23 U.S.C. 169(f)].

Part 450 of 23 CFR (23 CFR 450.212 and 450.318) allows States, metropolitan planning organizations, and public transportation providers to engage in studies at the transportation planning process stage that could be used and relied on during the environmental review process. These studies can produce any of the following to be used and relied upon during the environmental review process: (1) purpose and need or goals and objectives; (2) general travel corridor and/or general mode(s); (3) preliminary screening of alternatives and elimination of

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unreasonable alternatives; (4) basic description of the environmental setting; and/or (5) preliminary identification of environmental impacts and environmental mitigation. CEQ's regulations allow this practice through the use of incorporation by reference (40 CFR 1502.21).

Section 1310 of MAP-21 codifies another method for using and adopting planning products into the environmental review process. Planning products mean "detailed and timely decision, analysis, study, or other documented information that: (1) is the result of an evaluation or decision-making process carried out during transportation planning, including a detailed corridor plan or a transportation plan developed under 23 U.S.C. § 134 or 135 (49 U.S.C. § 5303 or 5304) that fully analyzes impacts on mobility, adjacent communities, and the environment; (2) is intended to be carried into the transportation project development process; and (3) has been approved by the State, all local and tribal governments where the project is located, and any relevant metropolitan planning organization." [23 U.S.C. 168(a)(2)]

[Appendix A to 23 CFR Part 450 – Linking the Transportation Planning and NEPA Processes](#) provides additional information to explain the linkage between the transportation planning and project development process.

For projects administered under the FHWA Federal-Aid program, additional guidance related to transportation planning requirements and their relationship to NEPA approvals is provided in an [informational memorandum issued on January 28, 2008](#), supplemented February 9, 2011.

### APPLICABILITY REQUIREMENTS

#### **Question 5: Which transportation projects must follow the FHWA/FTA environmental review process?**

**Answer:** All FHWA/FTA transportation projects requiring development of an EIS must follow the procedures outlined in 23 U.S.C. § 139 [23 U.S.C. 139(b)(1)]. FHWA/FTA may apply, in whole or in part, certain provisions of 23 U.S.C. § 139 to environmental assessments (EA) and CEs depending on the circumstances of the project.

#### **Question 6: Does 23 U.S.C. § 139 apply to the FHWA Federal Lands Highway projects carried out under 23 U.S.C. 308 that do not propose the use of FHWA/FTA funding?**

**Answer:** Section 139 of 23, U.S Code, does not apply to projects when title 23, U.S. Code, or Chapter 53 of title 49, U.S. Code, funds are not involved in the project and there are no other factors requiring FHWA approval (i.e. interstate access approvals) for the project. For example, highway projects funded by other Federal agencies and carried out by Federal Lands Highway under the authority of 23 U.S.C. 308, with no title 23 or chapter 53 funding or other approval, are not required to follow 23 U.S.C. 139. However, it is recommended that if FHWA/FTA is involved in an EIS process, the section 139 environmental review process be followed. This recommendation is based on the possibility that FHWA funding or approval becomes anticipated during project development. A later decision to seek FHWA funding and/or a required FHWA action would trigger 23 U.S.C. 139 requirements; this possibly results in duplication and/or delay in the NEPA process should any of the FHWA/FTA environmental review process requirements not otherwise have been met.

#### **Question 7: Which transportation projects must use a combined FEIS/ROD?**

**Answer:** To the maximum extent practicable, all transportation projects requiring an EIS under FHWA/FTA procedures shall seek to use a combined FEIS/ROD unless certain conditions apply (See MAP-21 section 1319(b)). To use combined FEIS/ROD documents "to the maximum extent practicable", FHWA/FTA considers factors during development of the Draft and Final EIS. Additional guidance on combining an FEIS/ROD is found in FHWA/FTA *Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews* in Appendix C.

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### **Question 8: Do the provisions in 23 U.S.C. § 139 apply the same to all EIS documents, including Tier 1?**

**Answer:** Yes, the 23 U.S.C. § 139 requirements apply to all EISs, including Tier 1 and project-specific EISs. The same elements, such as determining and inviting participating agencies, providing opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives [23 U.S.C. 139(f)], and collaborating with participating agencies in determining methodologies and the level of detail for the analysis of alternatives [23 U.S.C. 139(f)(4)(C)-(D)], are needed. The level of detail and analysis likely will differ depending on the focus of the EIS and the issues ripe for decision during the environmental review.

### **Question 9a: Must the FHWA/FTA environmental review process be followed for a NEPA review that was started prior to SAFETEA-LU enactment (August 11, 2005) and is being re-scoped or supplemented now?**

**Answer:** The FHWA/FTA environmental review process is not required for projects with an NOI issued prior to August 11, 2005 when:

- i. the proposed Supplemental EIS (SEIS) does not involve the reassessment of the entire action (i.e., the SEIS is of limited scope), or when
- ii. the EISs was under active development during the 8 months prior to August 11, 2005 and was re-scoped between the enactment of SAFETEA-LU and the enactment of MAP-21 (October 1, 2012) due to changes in plans or priorities, even if a revised NOI was published. "Active development" is evidenced by one or more of the following actions: documented meetings with members of the public or other agencies, correspondence with other agencies, or publication of project newsletters.

Generally, limited scope supplementation (see 23 CFR 771.130(f)) of a pre-SAFETEA-LU EIS would not trigger the need to comply with the environmental review process for that supplemental document. In addition, projects that were active within the 8 months prior to August 11, 2005 were covered by a grace period that excepted those projects from the FHWA/FTA environmental review process requirements until the enactment of MAP-21.

The FHWA/FTA environmental review process must be followed in all other cases for pre-SAFETEA-LU EISs when re-scoping (e.g. issuing a revised NOI) or reassessing the entire action through an SEIS or new EIS.

### **Question 9b: Must the FHWA/FTA environmental review process be followed in instances where a NEPA review was started or re-scoped after the date of enactment of SAFETEA-LU (August 11, 2005) but prior to the date of enactment of MAP-21 (October 1, 2012), and is being supplemented now?**

**Answer:** For limited-scope supplemental documents/reviews, the following MAP-21 requirements of the FHWA/FTA environmental review process are not required, but may be used at the discretion of the lead agencies, for projects for which the NOI was published or projects that were re-scoped after the enactment of SAFETEA-LU but prior to the enactment of MAP-21:

- i. Requirement for participating and cooperating agencies to carry out obligations under other applicable law concurrently, and in conjunction, with reviews required under NEPA (See Question 19) Note, even though previously not *required* by law, conducting concurrent reviews is a best practice.
- ii. Requirement for lead agencies to receive concurrence on all schedules included in coordination plans (See Questions 41, 44, 45, 46, and 47).

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The FHWA/FTA environmental review process must be followed when reassessing the entire action through an SEIS or new EIS.

### PROJECT INITIATION

#### **Question 10: How is the FHWA/FTA environmental review process for a transportation project initiated?**

**Answer:** To initiate the FHWA/FTA environmental review process for a transportation project, the project sponsor must notify FHWA/FTA about the type of work, logical termini, length, and general location of the proposed project. The notification must also provide a list of any other Federal approvals (e.g., Section 404 permits) anticipated to be necessary for the proposed project, to the extent that such approvals are known at the outset [23 U.S.C. 139(e)(1)]. The FHWA/FTA are available to assist the project sponsor prior to notification to ensure it meets the requirements, as well as other project development requirements and policy, necessary to formally begin the NEPA process. The project sponsor may satisfy the project initiation requirement by submitting any relevant documents containing this information, including submittal of a draft notice of intent (NOI) for review and approval by FHWA/FTA for publication in the *Federal Register* announcing the preparation of a NEPA document for the project. Multiple project initiation notifications also may be consolidated (batched) into a multi-project notice of initiation if the lead agencies determine that the resources of the lead agencies and the timing for the projects support such practice.

Project sponsors may propose, and the FHWA/FTA may accept, programmatic approaches to satisfy the project initiation requirements of 23 U.S.C. § 139. In any such proposal, the project sponsor should provide to FHWA/FTA in an approved document: (a) the information about each project (i.e., type of work, termini, length, general location, and the list of other Federal approvals) required for project initiation; and (b) an indication of when the FHWA/FTA environmental review process for each project will commence (i.e., when the staff, consultant services, financial resources, and leadership attention necessary to move the project's FHWA/FTA environmental review process forward will be committed). For example, a State that updates its Statewide Transportation Improvement Program (STIP) annually may propose to use it as the vehicle for project initiation by including in the STIP the project initiation information and the dates that each draft NOI will be delivered to FHWA and/or FTA, as applicable.

#### **Question 11: When should the notification for project initiation occur?**

**Answer:** The project initiation notification is an indication to the FHWA/FTA that the project sponsor is ready to proceed with the NEPA process and complete it in a timely manner. The timing of the notification is flexible, but for EISs, should occur not later than just prior to, or at the same time as, the submittal of the draft NOI. Notification should occur when (1) the proposed transportation project is sufficiently defined to provide the required information, and (2) the project sponsor is ready to complete the NEPA phase of project development by devoting appropriate staff, consultant services, financial resources, and leadership attention to the project. Consultation among the project sponsor, lead agencies, and other appropriate agencies prior to this notification is a good practice.

### LEAD AGENCIES

#### **Question 12: What agencies must serve as lead agencies in the FHWA/FTA environmental review process?**

**Answer:** FHWA/FTA, as appropriate, must serve as the Federal lead agency or a joint Federal lead agency for a transportation project that seeks FHWA or FTA approvals or funding. [23

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U.S.C. §§ 101(b)(4)(B)(i) and 139(c)(1)(A); 49 CFR 1.81(a)(5)]. A State or local government entity that will be a direct recipient of 23 U.S.C. or chapter 53 of 49 U.S.C. Federal funds or approval for the project must serve as a joint lead agency. [23 U.S.C. 139(c)(3); 23 CFR 771.109(c)(2)].

For FHWA, the State Department of Transportation (DOT) is typically the direct recipient of project funds and approval, and therefore must serve as a joint lead agency along with FHWA. A local governmental agency that is the project sponsor but is not a direct recipient of Federal-aid funds may be invited to serve as a joint lead agency.

For FTA, the direct recipients of FTA projects funds are most often local or regional public transportation agencies, but may also include cities, Metropolitan Planning Organizations (MPO), State agencies, and State-owned corporations. The direct recipient serves with FTA, and potentially other Federal agencies, as a joint lead agency.

### **Question 13: Which other agencies may serve as joint lead agencies?**

**Answer:** In addition to the required lead agencies, other Federal, State, or local governmental entities may act as joint lead agencies at the discretion of the required lead agencies in accordance with 40 CFR 1501.5. Agencies that become joint lead agencies by FHWA/FTA invitation assume the roles, responsibilities, and the authority of a lead agency under 23 U.S.C. § 139.

Private entities, acting as sponsors of projects, cannot serve as joint lead agencies, and their role is limited to providing environmental or engineering studies and commenting on environmental documents.

### **Question 14: In the case of a transportation project for which the State DOT will receive and transfer Federal funds to a local governmental agency, which agencies are required to be a lead agency?**

**Answer:** An applicant that is or is expected to be a direct recipient of Federal funds must serve as a joint lead agency with FHWA/FTA. In the example presented in this question, the direct recipient would be the State DOT. Local governmental entities that are sub-recipients of Federal funds, at the discretion of the Federal and non-Federal lead agencies, may be invited to be joint lead agencies, but are not required to serve. A sub-recipient that will actually be designing and constructing the project will normally be asked to serve as a joint lead agency with the FHWA and the State DOT.

When the State DOT and a sub-recipient are both serving with FHWA/FTA as joint lead agencies, the lead agencies must jointly decide which of them has responsibility for hiring needed contractors and managing the day-to-day conduct of the environmental review. Any of the lead agencies may assume this responsibility, with the concurrence of the other lead agencies. This allocation of responsibilities would take into account the capabilities and resources available to each of the lead agencies. When a sub-recipient agency serving as a joint lead agency assumes responsibility for day-to-day management of the FHWA/FTA environmental review process, the role of the State DOT, the direct recipient, is to provide active oversight and supervision of the local governmental agency's work. The State DOT remains legally responsible for the performance of the local governmental agency. Accordingly, FHWA/FTA expects the direct recipient to participate fully in the various decisions relegated to the lead agencies.

### **Question 15: How does the Federal lead agency requirement apply to the FHWA Federal Lands Transportation Program and the Federal Lands Access Program?**

**Answer:** Section 139(c)(1)(A) of title 23, U.S. Code and Section 1.81(a)(5) of title 49 of the CFR establishes that FHWA must be the Federal lead agency for the FHWA environmental review of

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projects. FHWA must be the Federal lead agency or a joint Federal lead agency for any project requiring an EIS and FHWA approval, including Federal Lands Transportation Program and Federal Lands Access Program projects. Federal land management agencies are entitled to be joint lead agencies. FHWA and Federal land management agencies may enter into interagency agreements to clarify roles and responsibilities.

### **Question 16: What are the roles of lead agencies under the FHWA/FTA environmental review process in preparing EIS documents?**

**Answer:** The lead agencies must perform the functions that they have traditionally performed in preparing an EIS in accordance with 23 CFR part 771 and 40 CFR parts 1500-1508. [23 U.S.C. 139(c)(6)]. The lead agencies must also identify and involve participating agencies [23 U.S.C. 139(d)]; develop coordination plans [23 U.S.C. 139(g)]; provide opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives [23 U.S.C. 139(f)]; and collaborate with participating agencies in determining methodologies and the level of detail for the analysis of alternatives [23 U.S.C. 139(f)(4)(C)-(D)].

### **Question 17: Who is the Federal lead agency for a multimodal project that requires approval from an Operating Administration other than FHWA/FTA, in addition to the FHWA/FTA approval?**

**Answer:** When a project requires approvals, including funding approval, from FHWA/FTA and another U.S. DOT Operating Administration, the Operating Administrations together shall reach an agreement on lead, joint lead, and cooperating agency status. Section 139(c)(1)(B) authorizes the Secretary to designate a single Operating Administration to serve as the Federal lead agency.

## **COOPERATING/PARTICIPATING AGENCIES**

### **Question 18: What is a cooperating agency, and what is the difference between a cooperating and participating agency?**

**Answer:** CEQ's regulations implementing NEPA define "cooperating agency" as any Federal agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed project or project alternative. [40 CFR 1508.5]. To establish a cooperating agency status, the Federal lead agency must request the participation of the other Federal agency, and the other Federal agency must accept such designation if it has jurisdiction by law and may accept such designation if it has special expertise. [40 CFR 1501.6]. Additionally, an agency may request the lead agency to designate it a cooperating agency.

A State or local agency of similar qualifications or, when the effects are on lands of tribal interest, an Indian tribal government, may, by agreement with the lead agencies, also become a cooperating agency. [40 CFR 1508.5]<sup>2</sup>

The roles and responsibilities of cooperating and participating agencies are similar, but cooperating agencies have a higher degree of authority, responsibility, and involvement in the

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<sup>2</sup> Inviting an Indian tribal government or agency to become a cooperating agency should not be confused with meeting the Federal agency's responsibilities for government-to-government consultation. The Federal agency must engage with the Indian tribal government in government-to-government consultation if requested by the Indian tribal government regardless of an Indian tribal government agency's status as a cooperating agency or participating agency.

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environmental review process. A distinguishing feature of a cooperating agency is that the CEQ regulations (40 CFR 1501.6(b)(3)) permit a cooperating agency to “assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.” An additional distinction is that, pursuant to 40 CFR 1506.3(c), “a cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.” This provision is particularly important to permitting agencies who, as cooperating agencies, routinely adopt FHWA/FTA environmental documents [such as the U.S. Army Corps of Engineers (USACE) and U.S. Coast Guard].

### **Question 19: What is a participating agency, which agencies must be invited to be participating agencies, and how is this decided?**

**Answer:** Federal, State, tribal, regional, and local government agencies that may have an interest in the project must be invited to serve as participating agencies. [23 U.S.C. 139(d)(2)]. Nongovernmental organizations and private entities cannot serve as participating agencies. Joint lead agencies should identify participating agencies as early as possible during the environmental review process, and should send out invitations at that time (or notification pursuant to a programmatic agreement).

Appropriate practices for inviting participating agencies may vary from project to project. To help identify potential participating agencies, FHWA recommends that each State develop a comprehensive and inclusive list of Federal, State, tribal, regional, and local agencies that have interest in transportation projects and potentially could have, as yet unknown, permitting authority, and/or special expertise. This list may vary depending on the location of proposed projects.

For FTA projects, public transportation agencies other than State DOTs should seek access to the list of agencies developed by the State DOT for the project area. Otherwise, FTA will work with the project sponsor to develop a list of potential participating agencies on a case-by-case basis.

Participating agency status may be established on a programmatic or project-by-project basis.

### **Question 20: What are the roles and responsibilities of participating agencies?**

**Answer:** The roles and responsibilities of participating agencies include, but are not limited to:

- Participating in the NEPA process at the start of the NEPA scoping process when participating agency identification occurs and invitations are sent. Agencies should provide input with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives.
- Carrying out the agencies' obligations under other applicable laws concurrently with the review required under NEPA, unless doing so would impair the ability of the agency to carry out those obligations. (23 U.S.C. 139(d)(7)(A))
- Identifying, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. Participating agencies also may participate in the issue resolution process described later in this guidance, as appropriate.
- Providing meaningful and timely input on unresolved issues.
- Reviewing any proposed project schedule provided by the lead agencies and providing either concurrence and/or comments when a schedule is developed as part of the project's coordination plan or when a schedule is developed as part of enhanced technical assistance (see Questions 38–42; 44).
- Reviewing draft environmental documentation as established in the project coordination plan. (see Part 2: Project Management - Questions 38 – 47).

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Participating agencies must develop and implement administrative policy and procedural mechanisms to enable the agency to ensure completion of the FHWA/FTA environmental review process in a timely, coordinated and environmentally responsible manner. [23 U.S.C. 139(d)(7)(B)].

Accepting the designation as a participating agency does not indicate project support and does not provide an agency with increased oversight or approval authority beyond any applicable statutory authority. Resource constraints may make full participation by a participating agency difficult at times and communication with the lead agencies can address them with the timing and location of meetings, use of conferences calls, and other coordination methods.

### **Question 21: Who sends out the invitations to serve as participating agencies and when should the invitation be sent?**

**Answer:** The FHWA and/or FTA (the Federal lead agency) through collaboration with any other joint lead agencies should invite potential participating agencies. For FTA, project sponsors should consult with the FTA Regional Office as to the process that will be used. Unless there is an agreement between the non-Federal lead agencies and a particular Indian tribal government regarding direct coordination, the Federal lead agency is responsible for inviting Indian tribal governments that may have an interest in the project.

The participating agency invitations should be sent prior to or approximately concurrent with the publication of the Notice of Intent (NOI) to prepare an EIS in the Federal Register, but prior to the initial interagency scoping meeting. Although most participating agencies should be known and identified prior to formally beginning the NEPA process, some participating agencies may be identified by the lead agencies later during the scoping process when their interests become known. As soon as an agency's interest is identified, the lead agencies should invite it to become a participating agency.

### **Question 22: What needs to be included in the invitation sent to potential participating agencies?**

**Answer:** The invitation should be in the form of a hardcopy or email letter and must include a basic project description and map of the project location. The invitation should be tracked to ensure delivery. As with all correspondence, a copy should be placed in the project file. The project description may be included in scoping materials enclosed with the letter, or a more detailed project description and scoping materials may be provided on the project website with a web address provided in the letter. The invitation should clearly request the involvement of the agency as a participating agency and should state the reasons why the project may be of interest to the invited agency. Lead agencies should bear in mind that invited agencies may have obligations under several authorities and the invitation should reflect all areas of jurisdiction of the invited agency. The invitation should identify the lead agencies and describe the roles and responsibilities of a participating agency. The invitation must specify a deadline for responding to the invitation. [23 U.S.C. 139(d)(2)]. The deadline for responses is normally no more than 30 days, as stipulated in 23 U.S.C. § 139. This deadline, or any other related to the environmental review process, may be extended by the lead agency for good cause (in the judgment of the participating agency) or shortened with the agreement of the lead agency, the project sponsor, and all participating agencies. (23 U.S.C. 139(g)(2)(B)). If needed, the issue resolution process is available to address issues related to deadlines. See Appendix C for FHWA/FTA examples of invitation letters.

### **Question 23: What is involved in accepting or declining an invitation to be a participating agency?**

**Answer:** A Federal agency invited to participate is designated a participating agency unless the agency declines the invitation by the specified deadline. [23 U.S.C. 139(d)(3)]. If a Federal

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agency chooses to decline, the agency must do so in writing (electronic or hardcopy), indicating that the agency (1) has no jurisdiction or authority with respect to the project, (2) has no expertise or information relevant to the project, and (3) does not intend to submit comments on the project. [23 U.S.C. 139(d)(3)]. If the Federal agency's response does not state the agency's position in these terms, then the agency will be treated as a participating agency. A State, tribal, or local agency is expected to respond affirmatively to the invitation to be designated as a participating agency. If the State, tribal, or local agency fails to respond by the stated deadline or declines the invitation, regardless of the reasons for declining, the agency will not be considered a participating agency. If a potential cooperating Federal agency declines being a participating agency and indicates items (1) and (2) above in declining the participating agency invitation, that Federal agency does not meet the criteria to be a cooperating agency.

### **Question 24: What happens if an agency declines to be a participating agency, but new information becomes available later in the process that indicates that the agency should become a participating agency?**

**Answer:** Revisions made to 23 U.S.C. § 139 by MAP-21 emphasize that a participating agency shall comply with the requirements in the statute. Therefore, it is incumbent upon the participating agencies to provide meaningful input at appropriate opportunities.

If an agency declines an invitation in accordance with 23 U.S.C. 139(d)(3) but new information indicates that the agency does indeed have authority, jurisdiction, acknowledged special expertise, or information relevant to the project, then the lead agencies should immediately extend a new invitation in writing to the agency to become a participating agency. The lead agencies also should consider whether this new information affects previous decisions on the project. If the agency agrees to be a participating agency, then the lead agencies should consult with that new participating agency in determining whether the new information substantially affects previous decisions. It may be necessary to reconsider previous decisions if it is probable that the input of the new participating agency would substantially change the decision. An agency that declines an invitation to be a participating agency ("declining agency") might forego the opportunity to provide input on several project issues such as the development of purpose and need, the range of alternatives, and methodologies. The declining agency also might forego the opportunity to consult and concur on the schedule, if included in the coordination plan, for completing the environmental review process for the project, depending on timing of these actions.

If an invited agency declines to be a participating agency but the lead agencies think the invited agency meets the criteria of a cooperating agency, that is, having jurisdiction or authority over the project and will be required to make a decision about the project, or has acknowledged special expertise or information relevant to the project, then the lead agencies should work immediately to resolve the disagreement about participation. If informal procedures prove inadequate to reach a mutually satisfactory agreement on participation, then the lead agencies should elevate the issue within the agencies or pursue the statutory issue resolution process (23 U.S.C. 139(h)).

With the additional information available from the completion of technical studies or the Draft EIS (DEIS) itself, participating agencies may have concerns that were not evident during earlier commenting opportunities. Lead agencies should consider comments on previously considered issues if those comments derive from new information. However, participating agencies should understand that revisiting issues that lead agencies had previously considered resolved will occur only if the new information is at substantial variance with what was presented previously and pertains to an issue of sufficient magnitude and severity to warrant reconsideration.

If an agency declines an earlier invitation to become a participating agency and later wants to participate, then the agency should be invited to become a participating agency, recognizing that previous decisions are unlikely to be revisited.

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### PURPOSE AND NEED

#### **Question 25: Who is responsible for developing the project's NEPA purpose and need?**

**Answer:** The lead agencies are responsible for the development of the project's purpose and need statement. If a participating agency has permit or other approval authority over the project, the lead agencies and that agency should attempt to develop jointly a purpose and need statement that can be utilized for all applicable environmental reviews and other requirements. Per [U.S. DOT guidance on "Purpose and Need" issued July 23, 2003](#), based on [CEQ guidance provided to Secretary Norman Mineta on May 12, 2003](#), other Federal agencies should afford substantial deference to the FHWA/FTA's articulation of the purpose and need for a transportation action.

General direction on developing concise and understandable purpose and need statements is found in [FHWA/FTA Joint Guidance issued on July 23, 2003](#), and the report, "[Improving the Quality of Environmental Documents](#)", developed through a cooperative initiative between FHWA, American Association of State Highway Transportation Officials (AASHTO), and the American Council of Engineering Companies (ACEC).

#### **Question 26: How does the lead agency satisfy the requirement in 23 U.S.C. § 139 for an "opportunity for involvement" by participating agencies and the public in defining the project purpose and need?**

**Answer:** The lead agencies can determine on a case-by-case basis the appropriate way to provide a meaningful opportunity for involvement by participating agencies and the public, taking into account factors such as the overall size and complexity of the project. The form and timing of that involvement is flexible, and the lead agencies should coordinate beforehand and agree on when and in what form the participating agency and public involvement will occur. The opportunity for involvement must be publicized and may occur in the form of public workshops or meetings, solicitations of verbal or written input, conference calls, postings on web sites, distribution of printed materials, or any other involvement technique or medium with agreement of the Federal lead agencies. The project's coordination plan establishes the timing of the involvement opportunities, the form they will take, and the timing of the decision on purpose and need. The level of involvement on projects may also be specified through interagency agreements.

The opportunity for involvement must be provided prior to the lead agencies' decision regarding the purpose and need that will be incorporated into the NEPA document [23 U.S.C. 139(f)(2)]. The lead agencies' decision on purpose and need and their consideration in making that decision should be documented and shared with participating agencies to ensure that any disputes are surfaced as early as possible.

### ALTERNATIVES ANALYSIS

#### **Question 27: Who is responsible for developing the range of alternatives?**

**Answer:** The lead agencies are responsible for the development of the range of alternatives for any document which the lead agency is responsible for preparing for the project. In developing the alternatives, the lead agencies must provide opportunities for the involvement of participating agencies and the public, and must consider the input provided by these groups (23 U.S.C. §

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139(f)(4)). If a participating agency has permit or other approval authority over the project, that agency should provide input on the range of alternatives that can be utilized for all applicable environmental reviews and other requirements. This coordination is especially important for various permits, such as the Clean Water Act Section 404, Coast Guard bridge permits, and other individual permit applications, and ESA Section 7 consultation.

General direction on developing a concise and understandable range of alternatives is found in the report, [“Improving the Quality of Environmental Documents”](#).

### **Question 28: How is the 23 U.S.C. § 139 requirement for an “opportunity for involvement” by participating agencies and the public in defining the range of alternatives satisfied?**

**Answer:** As early as practicable, the lead agencies must give participating agencies and the public the opportunity for meaningful involvement in defining the range of alternatives. Lead agencies determine the level of involvement on a case-by-case basis, taking into account factors such as the overall size and complexity of the project. The form and timing of that involvement is flexible, and the lead agencies should coordinate beforehand and agree on when and in what form the participating agency and public involvement will occur. The opportunity for involvement must be publicized and may occur in the form of public workshops or meetings, solicitations of verbal or written input, conference calls, postings on web sites, distribution of printed materials, or any other involvement technique or medium with agreement of the Federal lead agency or agencies. The project’s coordination plan will establish the timing and form of the required involvement opportunities and the timing of the decision on the range of alternatives to be evaluated in the NEPA document. The required involvement opportunities for purpose and need and range of alternatives may be concurrent or sequential. If the opportunities are concurrent, and if the purpose and need statement is substantially altered as a result of the public and participating agency involvement, then the lead agencies must consider whether an opportunity for involvement in the range of alternatives that derive from the new purpose and need is warranted.

The opportunity for involvement must be provided prior to the lead agencies’ decision regarding the range of alternatives to be evaluated in the NEPA document [23 U.S.C. 139(f)(4)(B)]. The lead agencies’ decision on the range of alternatives and their consideration in making that decision should be documented and shared with participating agencies to ensure that any issues of concern are identified as early as possible.

### **Question 29: What requirements are included in 23 U.S.C. § 139 for developing the methodologies for the analysis of alternatives?**

**Answer:** The lead agencies must determine, in collaboration with the participating agencies (23 CFR 771.109), the appropriate methodologies to be used and the level of detail required in the analysis of alternatives. Accordingly, the lead agencies must work cooperatively and interactively with the relevant participating agencies on the methodology and level of detail to be used in a particular analysis. Consensus is not required, but the lead agencies must consider the views of the participating agencies with relevant interests before making a decision on a particular methodology. Well-documented, widely accepted methodologies that are routine and well established, such as those for noise impact assessment and Section 106 (historic preservation) review, should require minimal collaboration. The project’s coordination plan will establish the timing and form of the required collaboration with participating agencies in developing the methodologies. See Questions 38-47.

The lead agencies should communicate decisions on methodology to the participating agencies with relevant interests or expertise. The lead agencies may define a comment period based on the methodology utilized. At the discretion of the lead agencies, methodologies may be

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developed incrementally. The initial methodology developed during scoping may be refined after further analysis and collaboration. Unless a participating agency objects to the selected, duly communicated methodology, the lead agencies can reasonably assert that comments on methodology received much later in the process (e.g., after issuance of the DEIS) are not timely. Exceptions should be based on significant and relevant new information or circumstances that are materially different from what was foreseeable at the time that the lead agencies made and communicated the decision on methodology.

The collaboration with a participating agency on the methodologies and level of detail can be accomplished on a project-by-project, program, or region-wide basis, or for special classes of projects (e.g., all projects affecting a particular watershed), as deemed appropriate by the lead agencies. If an approach other than project-by-project collaboration is used, however, the participating agencies with an interest in that methodology must be made aware at the outset of the collaboration that the lead agencies intend to develop a comprehensive methodology to be applied to a program or class of projects or to a region. Once a methodology has been determined for a region, program, or class of project, the lead agencies can apply the methodology to qualifying projects without project-specific collaboration if the relevant participating agencies and lead agencies have entered into a programmatic agreement to that effect. If no such agreement is in place, the lead agencies still may apply that methodology to a qualifying project, but project-specific collaboration is necessary. The methodology used by lead agencies should be consistent with any methodology established by statute or regulation under the authority of another Federal agency.

The lead agencies may revise a methodology at any time, but collaboration with the participating agencies with an interest in that methodology is needed if the revision substantively affects the outcome of the analysis. When there is a written programmatic agreement on a methodology that applies to the project, such agreement is binding only on the parties to the agreement. Participating agencies not party to that agreement with an interest in the methodology in question retain the right to collaborate on that methodology for the particular project. The results of the collaboration on methodologies and level of detail should be communicated to participating agencies in written form so that any objections can be raised as early as possible.

After the lead agencies have collaborated with the participating agency on the methodologies and level of detail, the lead agencies will make the decision on the methodology and level of detail to be used while considering the requirements of other environmental laws. The lead agencies' decisions on methodologies and their considerations in making those decisions should be documented and shared with participating agencies to ensure that any issues of concern are raised as early as possible.

### **PREFERRED ALTERNATIVE**

#### **Question 30: When should the preferred alternative be identified?**

**Answer:** FHWA/FTA strongly recommends that the preferred alternative be identified in the DEIS in order to facilitate issuing a combined FEIS/ROD document "to the maximum extent practicable." (See Appendix C for combined FEIS/ROD guidance). Identification of a preferred alternative requires sufficient scoping and analysis of reasonable alternatives to support it. The scoping process is complete when the lead agencies have provided the public and participating agencies with the opportunity to be involved in the development of purpose and need and the range of alternatives, and considered any input or comments received. After completion of scoping and a preliminary analysis of alternatives, the Federal lead agency will decide whether identification of a preferred alternative in the DEIS is appropriate.

#### **Question 31: How is the preferred alternative officially identified?**

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**Answer:** The preferred alternative should be identified by FHWA/FTA in either the DEIS or the FEIS. FHWA/FTA strongly recommend identifying the preferred alternative in the DEIS to the maximum extent practicable in order to comply with the statutory requirements for issuance of a combined FEIS/ROD document. (See Appendix C for combined FEIS/ROD guidance.) In situations where a preferred alternative cannot be identified in the DEIS, FHWA/FTA should provide an opportunity for informed assessment related to impacted resources and environmental concerns of the preferred alternative prior to issuance of a combined FEIS/ROD document. Once a preferred alternative is officially identified, subsequent NEPA documents should disclose that preference.

When the preferred alternative is not identified in the DEIS or through a separate notice, the preferred alternative must be identified in the FEIS in accordance with CEQ regulations (40 CFR 1502.14(e)).

If the lead agencies decide to follow the environmental review process for an EA, then the preferred alternative is identified in the EA or FONSI approved by FHWA/FTA.

### **Question 32: Under what circumstances can a preferred alternative be developed to a higher level of detail than other alternatives being considered?**

**Answer:** Providing a higher level of detail for a proposal or only one alternative (compared to the other alternatives) could run the risk of biasing the environmental analysis or introducing the perception of bias. The CEQ regulations indicate that Federal agencies must devote substantial treatment to each alternative so that reviewers may evaluate their comparable merits. 40 CFR 1502.14. However, 23 U.S.C. 139 (f)(3)(D) permits the development of a higher level of detail for the preferred alternative to (1) facilitate the development of mitigation measures or (2) facilitate concurrent compliance with other applicable laws, as long as the lead agency determines that the development of such higher level of detail will not prevent the agency from making an impartial decision as to whether to accept another alternative being considered.<sup>3</sup> Developing an alternative to a higher level of detail may be necessary for permit discussions, interagency agreements related to environmental requirements, or identifying appropriate mitigation.

### **Question 33: Who can initiate a request for development of a preferred alternative to a higher level of detail than other alternatives under evaluation, and how is that done?**

**Answer:** Normally, the non-Federal lead agency, and if applicable, with the project sponsor, will initiate the request to develop the preferred alternative to a higher level of detail. The request should be made by letter (electronic or hard copy) from the official authorized by the requesting agency to sign the EIS, or that official's authorized delegate, to the FHWA Division Office or FTA Regional Office, and to the appropriate offices of the other lead agencies, if any. The request may be included in a letter requesting the official identification of a preferred alternative, if appropriate.

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<sup>3</sup> The allowance in section 139(f)(3)(D) should not be confused with FHWA's policy on permissible activities during the NEPA process, [FHWA Order 6640.1A, FHWA Policy on Permissible Project Related Activities During the NEPA Process](#). Under FHWA statutes and regulations, project sponsors cannot initiate final design prior to the conclusion of the NEPA process. (23 U.S.C. 112 and 23 CFR 630.109). FHWA Order 6640.1A discusses the permissible project-related activities that may be advanced prior to the conclusion of the NEPA process. These preliminary design actions are allowed because they do not materially affect the objective consideration of alternatives or have adverse environmental impacts. The policy is intended to be read consistent with 23 U.S.C. 139(f)(3)(D).

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The letter should request the concurrence of the other lead agencies in developing the preferred alternative to a higher level of detail. The request should provide the following information:

- Reasons why the agency wants to develop the preferred alternative to a higher level of detail before completion of NEPA review, including the specific Federal laws, impacts, resources, and mitigation measures whose processing would be facilitated by the proposed differential treatment of the alternatives;
- General nature and extent of the work the agency would perform on the preferred alternative if the request is approved; and
- Reasons why greater design detail will not prejudice the lead agencies' consideration of other alternatives.

FHWA/FTA should consider factors that could negatively affect the environmental review process (see Question 35).

### **Question 34: Who decides whether the preferred alternative can be developed to a higher level of detail than the other alternatives?**

**Answer:** It is the Federal lead agency who decides whether the preferred alternative can be developed to a higher level of detail. That decision must ensure that: (1) it will not prevent the lead agencies from making an impartial decision on the appropriate course of action, and (2) it is necessary to facilitate the development of mitigation measures or concurrent compliance with other Federal environmental laws. The lead agencies must agree that a particular alternative is the preferred alternative and that the relevant conditions are met, before developing that alternative in greater detail.

### **Question 35: What considerations might be relevant to the required determination about future impartiality?**

**Answer:** The lead agencies should identify and consider all factors relevant to the project that would prevent them from making impartial decisions about alternatives in the future. The factors will vary from project to project. Considerations that may be relevant to impartiality include the following:

- Whether the information on all alternatives is sufficiently developed to identify important resources and associated potential impacts to enable a reasonably informed choice.
- Whether the early coordination with the public and participating agencies and the collaboration with participating agencies on impact methodologies resulted in general agreement about the level of detail for alternatives to guide continued analysis of the alternatives.
- What the potential impact of the additional financial and time commitments on one alternative is to the overall project costs and schedule if another alternative ultimately is selected.
- What the likelihood is that fair comparisons among alternatives will result despite the development of a preferred alternative to a higher level of detail.
- Whether the development of a preferred alternative might have an unacceptably adverse effect on public confidence in the environmental review process for the project.
- Whether that adverse effect on public confidence could be avoided by delaying the differential development of alternatives until a later point in the environmental review process.
- How the difference in level of detail among the alternatives might affect the presentation of the alternatives in the environmental documents.
- What is the extent to which the results of public and participating agency involvement support the proposed preferred alternative.

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The key question is whether developing the preferred alternative more fully would cause an imbalanced NEPA comparison among alternatives because of time, money, or energy expended. The Federal lead agency must determine that the decision on the choice of alternative is not prejudiced by the additional design work on the preferred alternative.

### **Question 36: Should the development of the preferred alternative to a higher level of design detail affect the presentation of the alternatives in the NEPA document?**

**Answer:** Section 139 of 23 U.S.C. does not change the standard practices relating to the evaluation and presentation of alternatives. This includes disclosing the rationale for the identification of a preferred alternative. When the preferred alternative is developed at a higher level of detail, the lead agencies should take particular care to ensure that the evaluation of alternatives reflects the required rigorous and objective analysis (40 CFR 1502.14(a)). Each reasonable alternative must be explored at a sufficient level of detail to support a reasoned choice. As always, the comparison of alternatives must be done in a fair and balanced manner. If there are substantial differences in the levels of information available for the alternatives, it may be necessary to apply assumptions about impacts or mitigation to make the comparisons fair.

For example, if mitigation is designed only for the preferred alternative, then assumptions that comparable measures can be taken to mitigate the impacts of the other alternatives should be included in the comparative analysis of the alternatives even though those other alternatives are not designed to the same level of detail. This comparison of mitigation across alternatives will ensure that the preferred alternative is not presented in an artificially positive manner as a result of its greater design detail. The NEPA document should disclose the additional design work and the changes in impacts arising out of that design detail.

### **Question 37: Are there limitations on how far a preferred alternative can be developed before a NEPA determination?**

**Answer:** In accordance with Section 139 of 23 U.S.C., the development of the preferred alternative to a higher level of detail than other NEPA alternatives may not proceed beyond that level necessary to develop mitigation or to comply with other applicable environmental laws. The degree of additional development needed and allowable will depend on the specific nature of the impact being mitigated or resource being protected, or the level of information required to comply with other applicable laws.

## **Part 2 Process Management**

Part 2 of the guidance focuses on sections of 23 U.S.C. § 139 that address logistics of managing the environmental review process. It includes guidance on developing coordination plans and schedules, requesting additional technical assistance available for complex projects, undertaking concurrent reviews, identifying and resolving issues of concern, ensuring compliance with mitigation commitments, adopting and using environmental documents, and providing or receiving funding for activities related to the environmental review process.

To eliminate repetitive discussions of the same issues between relevant Federal agencies and State resource agencies, State Departments of Transportation, and Indian Tribal governments, the use of programmatic approaches to conduct environmental reviews is encouraged. Programmatic approaches that have been implemented previously by FHWA/FTA include, but are not limited to:

- Section 404/NEPA Interagency agreements;
- Programmatic agreements that address process related to consultation, coordination and decision-making;

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- Review of individual impacts of a particular resource at a regional/national level for certain categories of projects for reference in subsequent project-level environmental reviews; or
- Resource-focused agreements (e.g., mitigation for wetland, water quality, and endangered species impacts).

A coordination plan addresses public and agency participation, and may include a schedule for conducting the FHWA/FTA environmental review process. This guidance identifies the factors that should be considered in developing the coordination plan and establishing a schedule. The section on coordination and schedules is closely related to other sections of the guidance, particularly the questions on participating agencies, purpose and need, the range of alternatives, and analysis methodologies, all of which should be read in conjunction with each other.

On the topic of concurrent reviews, 23 U.S.C. § 139 indicates that each Federal agency participating in the environmental review process shall carry out its obligations under other applicable laws concurrently, and in conjunction with the review required under NEPA unless, in the agency's judgment, doing so would impair the ability of the Federal agency to carry out its statutory obligations. Each Federal agency also must develop and implement the necessary tools and procedures to ensure that environmental reviews of transportation projects are undertaken by the agency in a timely, coordinated, and environmentally responsible manner.

Section 139 of 23 U.S.C., also addresses how the Federal agencies involved in a project should identify and resolve issues of concern. Lead agencies, for example, must make adequate information available to participating agencies so that they can identify potential issues of concern as early as practicable. If any issue that may delay completion of the environmental review process or result in denial of a permit cannot be resolved among the lead and participating agencies, 23 U.S.C. § 139 provides procedures for resolution of that issue. These procedures include two processes: (1) convening of a meeting not later than 30 days after the closure of the DEIS public comment period with all parties to ensure project deadlines will be met, and (2) escalating unresolved issues that could delay project environmental review. 23 U.S.C. § 139 also prescribes financial penalties for Federal agencies with jurisdiction that fail to make approvals or decisions under any Federal law relating to the project. (23 U.S.C. 139(h)(6))

Finally, 23 U.S.C. § 139 describes the circumstances under which a State agency may provide Federal funding to agencies involved in the environmental review process. This provision also specifies that when State agencies provide Federal funds to Federal agencies, they must establish the projects and priorities to be addressed by the use of those funds. Additional information related to coordination and funding can be found in [U.S. DOT Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities](#).

### **COORDINATION AND SCHEDULE**

#### **Question 38: Who is responsible for developing the coordination plan for public and agency participation?**

**Answer:** Section 139(g) of Title 23, U.S. Code requires that the lead agencies establish a plan for coordinating public and agency participation and comment during the environmental review process. Lead agencies are encouraged to consult with the participating agencies on the coordination plan because key elements of the coordination plan could set expectations that require a commitment of resources by the participating agencies.

#### **Question 39: When should the coordination plan be developed?**

**Answer:** Coordination plans are developed early in the scoping phase of the environmental review process after project initiation. The initial coordination plan may be revised by the lead agencies as needed (e.g., additional participating agencies are identified, issues become clear). Many elements of a coordination plan may be re-utilized from project to project; or those

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elements may be addressed programmatically in a separate agreement (and referenced in the coordination plan) for greater efficiency. The coordination plan may be incorporated into a memorandum of understanding. A coordination plan for an individual project may be established separately from any programmatic coordination plan, or it may incorporate one or more programmatic coordination plans established by the lead agencies to govern coordination with one or more participating agencies. The coordination plan must be made available to the public and participating agencies to provide transparency and allow for any issues of concern to be raised as early as possible.

### **Question 40: What should be included in a coordination plan?**

**Answer:** The coordination plan should outline the following: (1) how the lead agencies have divided the responsibilities for compliance with the various aspects of the FHWA/FTA environmental review process; and (2) how the lead agencies will provide the opportunities for input from the public and other agencies, in accordance with applicable laws, regulations, and policies (including the use of electronic communications and social media, as appropriate). It should not be used as the means to provide an opportunity for public and agency input into the project purpose and need and alternatives considered. The plan may include a project schedule and also should identify coordination points, such as:

- Scoping activities;
- Development of purpose and need;
- Identification of the range of alternatives;
- Collaboration on methodologies;
- Completion of the DEIS;
- Identification of the preferred alternative and the level of design detail;
- Completion of the combined FEIS/ROD or completion of the FEIS and the ROD as separate coordination points only for those unusual situations where the Federal lead agency does not pursue a combined FEIS/ROD; and,
- Completion of applications, permits, licenses, or approvals occurring prior to and after the ROD.

### **Question 41: Are the lead agencies required to develop a project schedule as part of the coordination plan?**

**Answer:** Section 139(g)(1)(B) of title 23, U.S. Code encourages, but does not require, the inclusion of a project schedule in the coordination plan. CEQ regulations (40 CFR 1501.8) also encourage the establishment of timeframes. Project schedules generally aid in expediting environmental review process, improve project management, and force expectations for all parties involved.

Project schedules are optional for FTA projects, but are frequently used to help manage the environmental process. Project schedules for FTA projects are normally not included in the coordination plan to allow for greater flexibility in developing and revising those schedules.

The FHWA expects the development of a schedule for all EA and EIS projects processed under the environmental review process. When the lead agencies include a project schedule in the coordination plan, that schedule must be prepared in consultation with, and with the concurrence of, the participating agencies and the project sponsor. A project schedule that is not included in the coordination plan for FHWA projects, should still be prepared in consultation with each participating agency, the project sponsor (if not the lead agency), and the State, even though concurrence in this schedule by the participating agencies is not required. Any schedule, whether included as part of the coordination plan or not, should be made available to the public and participating agencies.

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### **Question 42: What level of detail and factors should be considered when creating a schedule as part of a coordination plan?**

**Answer:** The schedule that will be part of the coordination plan should include decision-making dates for each agency approval, such as permits, licenses, and other final decisions, consistent with statutory and regulatory requirements, in order to encompass the full FHWA/FTA environmental review process. In addition, the coordination plan should specify all anticipated opportunities for review and comment by the public and participating agencies. Section 139 of title 23, U.S. Code allows the lead agencies to determine how detailed the schedule should be and whether to use specific dates or durations. Establishing a schedule involves consideration of the following factors:

- Responsibilities of participating agencies under applicable laws;
- Resources available to the participating agencies;
- Overall size and complexity of the project;
- Overall schedule for, and cost of, the project;
- Ability to have reviews occur concurrently
- Sensitivity of the natural and historic resources that could be affected by the project; and,
- Development of a combined FEIS/ROD to the maximum extent practicable, including seeking to identify a Preferred Alternative in the DEIS when possible.

The schedule needs to allow adequate time to complete appropriate impact assessments and engineering studies, gather and consider public and participating agency comments and balance this input in the decision-making process. Other factors that the schedule should accommodate include public controversy and the extent to which relevant information about the project or its impacts are already known and need to be refined or updated.

### **Question 43: How should the lead agencies obtain concurrence from the participating agencies on the schedule to be included in the coordination plan?**

**Answer:** If a project schedule is being developed for inclusion in the coordination plan, the lead agencies should engage all appropriate resource and regulatory agencies (those that have a regulatory decision to be made or have special expertise that is required) in discussions regarding the timeframes needed for their agencies' statutory required reviews and decisions on approvals, permits or licenses.

FHWA/FTA may establish a schedule as part of the coordination plan only with the concurrence of the project sponsor and all participating agencies [23 U.S.C. 139(g)(1)(B)(i)]. The appropriate participating agencies must be provided a schedule for their concurrence if the schedule is developed for the coordination plan. [23 U.S.C. 139(g)]. One possible process for doing so would involve the lead agencies providing the draft schedule to participating agencies for up to 30 days for review and comment (23 U.S.C § 139 (g)(2)(B)), taking comments into account, and providing the project schedule that results to the participating agencies for concurrence. The lead agencies would then notify the participating agencies that a lack of response within the concurrence time frame will be interpreted by FHWA/FTA as concurrence with the project schedule. The joint lead agencies will ensure the participating agencies receive the proposed schedule. Another approach would be for the lead agencies to call a meeting, in person or through webinars or other technology, to collaborate on developing a schedule that would then be sent around for a short, set period of time for any participating agency to voice an objection.

If any agency has concerns about the schedule timeframes, they need to make them known and discuss them with the lead agencies as soon as possible. The final schedule should reflect all agreed upon changes by all agencies involved.

### **Question 44: What deadlines have been established under the FHWA/FTA environmental review process for the public and participating agencies to submit comments?**

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**Answer:** The DEIS comment period must not exceed 60 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating agencies, or the Federal lead agency extends the deadline for good cause. [23 U.S.C. 139(g)(2)]. The DEIS comment period begins on the date that the Environmental Protection Agency (EPA) publishes the notice of availability of the DEIS in the *Federal Register*.

For any other point within the FHWA/FTA environmental review process at which the lead agencies seek comment by the public or participating agencies, the lead agencies must establish a deadline for comment of not more than 30 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating agencies. [23 U.S.C. 139(g)(2)]. If a shorter comment period is appropriate based on the volume and complexity of the materials to be reviewed, then a less than 30-day comment period may be provided. The comment period is measured from the date the materials are available. If a longer comment period is appropriate, the Federal lead agency has the authority to extend the deadlines for good cause.

### **Question 45: If a schedule is established as part of the coordination plan, can it be modified?**

**Answer:** The lead agencies may modify the schedule that has been established as part of the coordination plan. The lead agencies may lengthen the schedule for good cause. The schedule may be shortened only with the concurrence of the participating agencies. Any changes in the schedule and/or necessary concurrences should be documented.

### **Question 46: How and to whom must the lead agencies make available the schedule as part of the coordination plan?**

**Answer:** If a project schedule is prepared and is included in the coordination plan, that schedule must be provided to all participating agencies and the project sponsor, and must be made available to the public. [23 U.S.C. 139(g)(1)(E)]. The method by which the schedule is made available to the public is flexible. It may be posted on a project web site, distributed to recipients on a well-advertised project mailing list, or handed out at public and agency coordination meetings. If the schedule is modified, then the modified schedule must be shared with the public and other participants as described above. [23 U.S.C. 139(g)(1)(E)].

### **Question 47: What is the consequence of not adhering to the schedule established as part of the coordination plan?**

**Answer:** Failure by the lead agencies to adhere to the schedule may invalidate the original schedule and require a revised schedule to be developed. In that case, the lead agencies should propose a revised schedule and allow sufficient time (but not more than 30 days except for good cause) for review and comment. The lead agencies should take comments into account and provide the revised project schedule to the participating agencies for concurrence. Lead agencies should allow sufficient time (but not more than 30 days except for good cause) for this concurrence. Lead agencies must notify the participating agencies that a lack of response within the concurrence time frame will be interpreted by FHWA/FTA as concurrence with the project schedule.

Failure to meet schedule deadlines by participating agencies for decisions is a trigger for the issue resolution process under 23 U.S.C. 139(h). (See question 54 and answer for more information.)

## **ENHANCED TECHNICAL ASSISTANCE FOR COVERED PROJECTS**

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### **Question 48: What projects are eligible for enhanced technical assistance under 23 U.S.C. § 139(m)?**

**Answer:** Projects eligible for enhanced technical assistance under 23 U.S.C. § 139 are referred to as “covered” projects. A covered project is a project with an ongoing EIS process and for which at least 2 years have elapsed since the publication of the NOI and for which a ROD has not been issued. Enhanced technical assistance for covered projects was effective as of October 1, 2012, but it can apply to those projects with NOIs published prior to October 1, 2012. At any time after October 1, 2012, if the NOI for a project is at least two years old, the project sponsor or Governor may request assistance under this provision.

### **Question 49: What enhanced technical assistance is available, upon request, for a covered project?**

**Answer:** At the request of a project sponsor or Governor of a State in which a covered project is located, FHWA/FTA is required to provide enhanced technical assistance for any outstanding issues and project delay. This assistance may include:

- a) Providing additional staff, training, and expertise;
- b) Facilitating interagency coordination;
- c) Promoting more efficient collaboration; and
- d) Supplying specialized onsite assistance.

### **Question 50: What are the requirements for a schedule set for the completion of a covered project that receives enhanced technical assistance?**

**Answer:** FHWA/FTA must establish a scope of work that describes what actions will be taken to resolve outstanding issues and project delays for covered projects that receive enhanced technical assistance under 23 U.S.C. 139. [23 U.S.C. 139(m)(3)]. Additionally, FHWA/FTA must establish and meet a project schedule for the completion of any permit, approval, review, or study required for the covered project by a date that is not later than four years after the date on which the NOI for the covered project was issued. [23 U.S.C. 139(m)(3)(B)]. This schedule must be concurred upon by CEQ, all participating agencies for the project, and the State in which the covered project is located or the project sponsor, as appropriate. In any instance where it is impracticable to set a date for a permit, approval, review, or study of less than four years after the NOI for the covered project, then the lead agencies, with concurrence of the parties just noted, will set a schedule for completion as soon as practicable.

### **Question 51: What is the consequence of not adhering to the schedule established as part of the request for enhanced technical assistance?**

**Answer:** Failure by the lead agencies to adhere to the schedule may invalidate the original schedule and require a revised schedule to be developed. If a revised schedule is needed, FHWA/FTA should follow the coordination and concurrence process described in Question 43.

Failure to meet schedule deadlines by participating agencies decisions is a trigger for the issue resolution process under 23 U.S.C. 139(h). (See question 54 and answer for more information.) Failure by a Federal agency to render a required decision by an applicable deadline may result in financial penalties in accordance with 23 U.S.C. 139(h)(6). (See question 56 and answer for more information.)

## **CONCURRENT REVIEWS**

### **Question 52: How must each Federal agency carry out its obligations under other Federal laws in relationship to the FHWA/FTA environmental review process?**

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**Answer:** Section 139(d)(7) of title 23, U.S Code, directs each Federal participating and cooperating agency to carry out its obligations under other Federal laws concurrently and in conjunction with the FHWA/FTA environmental review process, unless doing so would impair the ability of the Federal agency to conduct needed analysis or otherwise carry out those obligations. Other Federal laws include Section 404 of the Clean Water Act, National Historic Preservation Act, and the Endangered Species Act that may include developing mitigation measures and/or facilitating concurrent compliance with these environmental laws with a higher level of design if a Preferred Alternative has been officially identified by FHWA/FTA. (See question 32 and answer for more information.) Additionally, all participating and cooperating agencies will formulate and implement mechanisms to ensure the completion of the FHWA/FTA environmental review process in a timely, coordinated, and environmentally responsible manner. For example, this higher level of design could facilitate a NEPA/404 merger agreement concurrence point where a preliminary Least Environmentally Damaging Preferred Alternative determination is made by USACE prior to the FHWA NEPA determination. Another example would be the U.S. EPA completing their CAA Section 309 review prior to issuance of the FHWA/FTA combined FEIS/ROD.

The current [Memorandum of Agreement \(MOA\) between the U.S. Coast Guard \(USCG\) and the FHWA](#) is an example of a concurrent environmental review process implemented to facilitate bridge planning and permitting.

### ISSUE RESOLUTION

**Question 53: What happens when an issue arises that needs resolution in order to proceed with the FHWA/FTA environmental review process?**

**Answer:** When there is disagreement on important issues of concern, FHWA/FTA will decide whether the most effective approach would be to work out the disagreement in either a formal or informal way. In 2006, U.S. DOT issued revised guidance to facilitate the resolution of interagency disputes at lower levels of decision-making. The methods presented in that guidance, developed by FHWA and the U.S. Institute for Environmental Conflict Resolution (USIECR) on behalf of U.S. DOT, [Collaborative Problem Solving: Better and Streamlined Outcomes for All](#), remain valid and should be considered by the lead agencies when appropriate. FHWA/FTA support the implementation of the principles and practices identified in the [Memorandum on Environmental Collaboration and Conflict Resolution](#), issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) on September 7<sup>th</sup>, 2012.

Section 139(h) of Title 23 U.S. Code provides a formal process for resolving issues that may delay the FHWA/FTA environmental review process, or may result in denial of approvals required for the project under other applicable laws. [23 U.S.C. 139(h)]

**Question 54: What is the accelerated issue resolution and referral process in 23 U.S.C. 139(h)?**

**Answer:** The accelerated issue resolution and referral section of 23 U.S.C. 139(h) describes two distinct issue resolution processes:

- One to accelerate interim decision-making (section 139(h)(4)); and
- One that involves a revised issue resolution and referral process (section 139(h)(5)).

Under section 139(h)(4), FHWA/FTA may convene a meeting no later than 30 days after the DEIS public comment period closes with the project sponsor, lead agency, resource agencies, and any relevant State agencies to ensure all parties are on schedule to meet deadlines for decisions on the project (compared to either the schedule developed as part of the coordination plan or other deadlines set by the lead agencies in consultation with the project sponsor and other relevant agencies). [23 U.S.C. 139(h)(4)(B)]. If the relevant agencies cannot provide

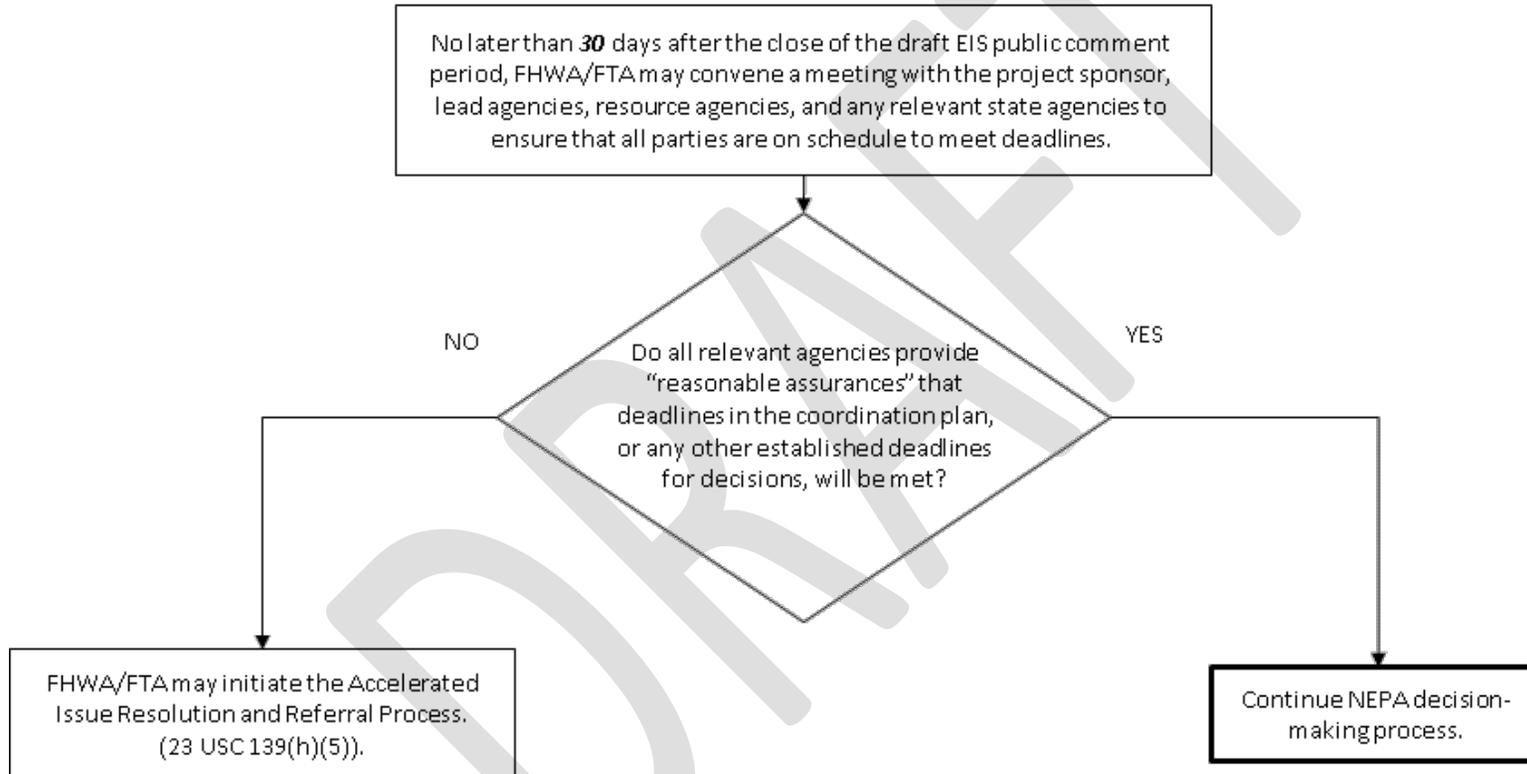
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reasonable assurances that deadlines will be met, FHWA/FTA may initiate the issue resolution and referral process under section 139(h)(5) at that time or at any time during the environmental review process.

Section 139(h)(5) establishes an issue resolution and referral process that progressively escalates unresolved issues from a Federal agency of jurisdiction, project sponsor, or Governor, to FHWA/FTA (Federal lead agency), to the Secretary, to the CEQ, and finally to the President, as necessary. The scope of the process is limited to issues that could delay completion of the environmental review process or result in denial of any approvals required for the project under applicable laws. [23 U.S.C. 139(h)(5)(A)(ii)]. The issue resolution and referral process is distinct from the interim decision-making process; the Section 139(h)(4) process is not a precondition for the initiation of the Section 139(h)(5) issue resolution process. See below for flowcharts that show the 23 U.S.C. 139(h)(4) and 139(h)(5) processes.

DRAFT

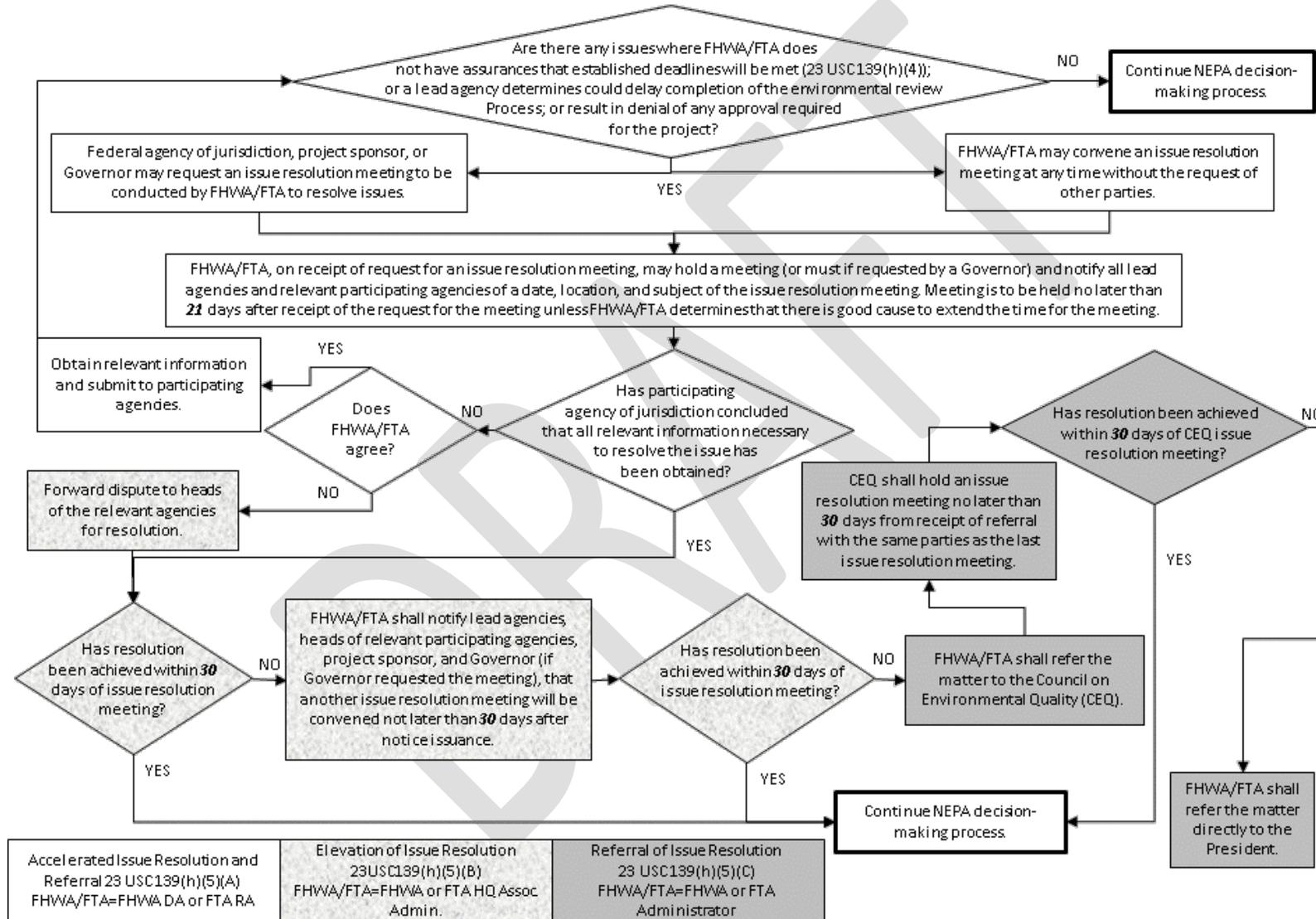
### Interim Decision on Achieving Accelerated Decision-making 23 USC 139(h)(4)



(continued)

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Accelerated Issue Resolution and Referral  
23 USC 139(h)(5)



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### **Question 55: Who can initiate the Section 139(h)(5) issue resolution process?**

**Answer:** A Federal agency of jurisdiction, a project sponsor, or the Governor of a State in which the project is located may request an issue resolution meeting to be conducted by the Federal lead agency (FHWA/FTA). The Federal lead agency also may initiate the Section 139(h)(5) issue resolution process.

### **Question 56: What are the financial penalties for Federal agencies that do not make decisions on transportation projects within 180 days of a signed FHWA / FTA ROD or receipt of a complete application, or scheduled developed under the enhanced technical assistance section(under 23 U.S.C. 139)?**

**Answer:** Section 139(h)(6) establishes financial penalties for Federal agencies of jurisdiction that fail to make a decision on an approval required for a project by the latter of (1) 180 days after the date on which the application for the permit, license, or approval, is complete, or (2) 180 days after the date on which the Federal lead agency issues a decision on the project under NEPA, whichever is later. FHWA/FTA issued separate [guidance with questions and answers](#) on the financial penalty provisions in 23 U.S.C. 139(h)(6).

### **Question 57: How does the issue resolution and referral process in 23 U.S.C. 139(h)(5) relate to the CEQ referral process in 40 CFR part 1504?**

**Answer:** The pre-decision referral process in 40 CFR part 1504 applies to disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. The 23 U.S.C. 139(h)(5) issue referral process is intended to resolve any issues that could (1) delay the completion of the environmental review process or (2) result in the denial of any approval required for the project under applicable laws. The section 139(h)(5) issue resolution process is broader than the issue resolution process under part 1504.

## **FUNDING ADDITIONAL AGENCY RESOURCES**

### **Question 58: May a State use Title 23 U.S.C. or Chapter 53 of Title 49, U.S. Code, funds to provide additional resources to an agency or tribe to expedite and improve delivery of the projects within the State?**

**Answer:** Section 139(j) of title 23, U.S. Code authorizes States to provide funds to Federal agencies, State agencies, and/or federally recognized Indian tribes that are participating in the FHWA/FTA environmental review process for one or more transportation projects in the State. Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that State. Examples include transportation planning activities and the development of programmatic agreements.

Federal or State agencies or federally recognized Indian tribes that receive Federal-aid highway or Federal transit funds from a State can only use the funds to pay for the additional resources FHWA/FTA determine necessary to meet the time limits established for environmental reviews of transportation projects. [23 U.S.C. 139(j)(4)]. Those time limits must be less than the customary time necessary for such reviews. [23 U.S.C. 139(j)(5)]. Where a State wishes to fund activities that are not project-specific, such as process improvements or development of programmatic agreements, the criteria relating to environmental review time limits will be deemed satisfied so long as the efforts are designed to produce a reduction in the customary time for environmental reviews. Additional information related to coordination and funding can be found in [U.S. D.O.T. Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities](#).

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### Question 59: What is the additional requirement for using Title 23 U.S.C. or Chapter 53 of Title 49, U.S. Code, funding for Federal agency staffing?

**Answer:** Section 139(j)(6) of 23 U.S. Code requires that prior to funding approved staffing in an affected Federal agency, such as a liaison position, the State and Federal agencies must enter into a MOU to establish the projects and priorities to be addressed by the funding and position. If the existing agreement does not already specify the projects and priorities to be addressed by the use of the title 23 or Chapter 53 of title 49 funds, then the MOU should list specific projects and priorities, when known, or the process to identify or change projects and/or priorities in the revised and/or renewed agreement. Previously, MOUs were not formally required under 139(j) to specify projects and priorities. Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery of projects. MOUs may also include performance measures to be used for the evaluation of the expediting effects of the funding. Additional information can be found [in U.S. D.O.T. Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities](#) and the [Section 1307 Q&A section](#) of the FHWA MAP-21 website.

### **Part 3 Statute of Limitations**

Section 139(l) of Title 23, U.S. Code, establishes a 150-day statute of limitations (SOL) on claims<sup>4</sup> against FHWA/FTA and other Federal agencies for certain environmental and other approval actions. The SOL can apply to a permit, license, or approval action by a Federal agency if:

1. The action relates to a transportation project (as defined above); and
2. A SOL notification is published in the *Federal Register* (FR) announcing that a Federal agency has taken a final agency action on a transportation project.

If no SOL notice is published in the FR, then the applicable statutory or regulatory period for filing claims applies. For example, 28 U.S.C. 2401(a) imposes a 6-year statute of limitation for every civil action brought against the U.S. unless there is another law that create a specific statute of limitations period.

Because FHWA and FTA programs differ, FHWA and FTA have developed slightly different processes for implementing the SOL provision. Part 3A covers the FHWA process, and Part 3B covers the FTA process. Appendix D, which contains detailed guidance on implementing the SOL provisions, applies only to FHWA and projects for which it is the Federal lead agency.

The Federal lead agencies are expected to publish all SOL notices under 23 U.S.C. § 139. On intermodal projects, FHWA and FTA typically will issue separate SOL notices, although there may be situations where a single notice is appropriate (i.e., when there is a joint ROD).

Despite the differences in the implementation procedures between the FTA and FHWA, the agencies note that they interpret the scope and intent of the 23 U.S.C. § 139 SOL provision in the same way and

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<sup>4</sup> FTA uses the term “Limitation on Claims” notices and the corresponding acronym (LOC).

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that their implementation decisions are based solely on administrative differences between the FHWA and FTA programs.

### **PART 3A: FHWA Process for Implementing the Statute of Limitations**

This part discusses publication of SOL notices for Federal agency actions on Federal-aid highway projects.

The SOL provision is intended to expedite the resolution of issues affecting transportation projects. Whether a SOL notice is needed or is the best way to achieve such resolution on a project is a risk management decision. A determination should include consideration of the nature of the Federal laws under which decisions were made for the project, the litigation risk, and the potential effects if litigation were to occur several years after the FHWA NEPA decision or other Federal agency decisions. The FHWA's Office of Chief Counsel provides advice on these considerations to assist the Division Offices to determine if a SOL notice is appropriate for a particular project. Division Offices must coordinate with FHWA field counsel when preparing the SOL notice. In addition, the Office of Chief Counsel must review all SOL notices for legal sufficiency. Interagency coordination on the notices is critically important. FHWA Division should work with their counterparts in other Federal agencies to ensure that there is agreement on which decisions are complete and ready for inclusion in the notice.

An SOL notice can be used for a highway project regardless of the type of process or documentation used for compliance under NEPA (e.g., CE, EA/FONSI, FEIS/ROD). FHWA publishes notices for most EIS projects and many EA projects. It is very rare for FHWA to issue SOL notices to be used for projects that are CEs under 23 CFR 771.117(c). The notice may be appropriate in limited circumstances for documented CE projects under 23 CFR.771.117(d).

FHWA encourages efforts to help stakeholders and the public to understand this law. For that reason, FHWA believes that it is useful to include a statement summarizing the SOL provision in NEPA documents.

Appendix D provides more detailed guidance on FHWA's process for handling SOL notices.

### **Part 3B: FTA Process for Implementing the Statute of Limitations**

This part discusses publication of SOL notices for Federal agency actions on federally funded public transportation projects.

FTA uses rolling publication of FR notices announcing its environmental approvals. An SOL notice (Limitation of Claims (LOC) notice), can be used for a public transportation project regardless of the type of process or documentation used for compliance under NEPA (e.g., CE, EA/FONSI, FEIS/ROD).

In addition, FTA or the project sponsor posts the FTA approval document (combined FEIS/ROD, ROD, FONSI, etc.), including any attachments, on the Internet. The FR notice directs any interested party to the web site where the FTA approval document of interest is posted. The FR notice also names an FTA contact person who can provide a copy of any FTA approval document, upon request.

**APPENDICES**

**Appendix A**

**Abbreviations**

**Appendix B**

**Sample Cooperating/Participating Invitation Letters**

**Appendix C**

**FHWA/FTA Interim Guidance on MAP-21 Section 1319 Accelerated Decision-making in Environmental Reviews**

**Appendix D**

**FHWA Guidance on SOL Notices, 23 U.S.C. 139(*l*)**

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**Appendix A – Abbreviations**

FHWA/FTA environmental review process	Environmental Review Process, codified at 23 U.S.C. § 139
CE	categorical exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DEIS	draft environmental impact statement
DOT	Department of Transportation
EA	environmental assessment
EIS	environmental impact statement
EPA	United States Environmental Protection Agency
FEIS	final environmental impact statement
FHWA	Federal Highway Administration
FONSI	finding of no significant impact
FR	Federal Register
FTA	Federal Transit Administration
MAP-21	Moving Ahead for Progress in the 21 <sup>st</sup> Century
MOU	Memorandum of Understanding
MPO	Metropolitan Planning Organizations as defined in 23 CFR part 450
NEPA	National Environmental Policy Act of 1969
NOI	Notice of Intent
ROD	Record of Decision
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SEIS	Supplemental Environmental Impact Statement
SOL	Statute of Limitations
STIP	Statewide Transportation Improvement Program
TPE	FTA Office of Planning and Environment
U.S.C.	United States Code

**Appendix B – Sample Cooperating/Participating Invitation Letters**

Sample letters of invitation to a potential participating or cooperating agency are provided separately for FHWA and FTA below.

**FHWA Sample Letter of Invitation**



Insert Division Address

[Insert Date]

[Insert Agency Representative]  
[Insert Agency Address]

Dear [Agency Representative]:

Re: Invitation to Become Participating Agency [and Cooperating Agency, if applicable] on [Insert Project Name]

The Federal Highway Administration (FHWA), in cooperation with the [Insert State Name] Department of Transportation [Insert Abbreviation] is initiating a [Insert Type of Environmental Document] for proposed [Insert Project Name]. The project limits are [Insert Project Description, including general map location]. The purpose of the project, as currently defined, is to [Insert Basic Statement of the Project's Purpose and Need].

Your agency has been identified as an agency that may have an interest in the project [Insert why the agency may have an interest]. With this letter, we extend your agency an invitation to become a participating agency [and cooperating agency, if applicable] with the FHWA in the development of the [Type of Environmental Document] for the subject project. This designation does not imply that your agency either supports the proposal or has any special expertise with respect to evaluation of the project.

[FHWA also request the participation of the [Insert Agency Name] as a cooperating agency in the preparation of the DEIS and FEIS, in accordance with 40 CFR 1501.6 of the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Provision of the National Environmental Policy Act.]

Pursuant to 23 United States Code (U.S.C) section 139, participating agencies are responsible to identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project. We suggest that your agency's role in the development of the above project should include the following as they relate to your area of expertise:

1. Provide meaningful and early input on defining the purpose and need, determining the range of alternatives to be considered, and the methodologies and level of detail required in the alternatives analysis.

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2. Participate in coordination meetings and joint field reviews as appropriate.
3. Timely review and comment on the pre-draft or pre-final environmental documents to reflect the views and concerns of your agency on the adequacy of the document, alternatives considered, and the anticipated impacts and mitigation.

Please respond to FHWA in writing with an acceptance or denial of the invitation no later than *[Insert Deadline]* (*Deadline - No More Than 30 days from the Date of Letter*). If your agency declines, the response should state your reason for declining the invitation. Pursuant to 23 U.S.C. Section 139, any Federal agency that chooses to decline the invitation to be a participating agency must specifically state in its response that it:

- Has no jurisdiction or authority with respect to the project;
- Has no expertise or information relevant to the project; and
- Does not intend to submit comments on the project.

If you have any questions or would like to discuss in more detail the project or our agencies' respective roles and responsibilities during the preparation of this *[Insert Type of Document]*, please contact *[Insert Contact Name and Phone Number]*.

Thank you for your cooperation and interest in this project.

Sincerely,

Division Administrator

Enclosure *Attach Project NOI if applicable*

cc:

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### FTA Sample Letter of Invitation



U.S. Department  
of Transportation  
**Federal Transit  
Administration**

*[Insert Date]*

*[Insert Agency Representative]*

*[Insert Agency Name and Address]*

Re: Invitation to Participate in the Environmental Review Process for [Insert Project Name]

Dear *[Agency Representative]*:

The Federal Transit Administration (FTA), in cooperation with *[Insert Sponsoring Transit Agency]* is initiating the preparation of an Environmental Impact Statement for the proposed *[Insert Project Name]*. The proposed project is *[briefly describe action]* in *[describe project location]*. The purpose of the project, as currently defined, is to *[insert preliminary statement of the project's purpose and need]*. The enclosed scoping information packet [or link to a project website] provides more details. A preliminary coordination plan and schedule *[if available]* are also enclosed.

23 United States Code (U.S.C.) Section 139 establishes an enhanced environmental review process for certain FTA projects, increasing the transparency of the process, as well as opportunities for participation. The requirements of this section apply to the project that is the subject of this letter. As part of the environmental review process for this project, the lead agencies must identify, as early as practicable, any other Federal and non-Federal agencies that may have an interest in the project, and invite such agencies to become participating agencies in the environmental review process. Your agency has been identified preliminarily as one that may have an interest in this project, because *[give reasons, such as adverse impacts, resources affected, etc., why agency may be interested]*; accordingly, you are being extended this invitation to become actively involved as a participating agency in the environmental review process for the project.

As a participating agency, you will be afforded the opportunity, together with the public, to be involved in defining the purpose of and need for the project, as well as in determining the range of alternatives to be considered for the project. In addition, you will be asked to:

- Provide input on the impact assessment methodologies and level of detail in your agency's area of expertise;
- Participate in coordination meetings, conference calls, and joint field reviews, as appropriate;
- Review and comment on sections of the pre-draft or pre-final environmental documents to communicate any concerns of your agency on the adequacy of the document, the alternatives considered, and the anticipated impacts and mitigation; and
- If prepared as a part of the coordination plan, concur on a project schedule.

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*<Insert one of the following two paragraphs, for invitations to Federal and non-Federal agencies, respectively.>*

### *Federal agencies:*

Your agency does not have to accept this invitation. If, however, you elect not to become a participating agency, you must decline this invitation in writing, indicating that your agency has no jurisdiction or authority with respect to the project, no expertise or information relevant to the project, and does not intend to submit comments on the project. The declination may be transmitted electronically to *[insert e-mail address]*; please include the title of the official responding. In order to give your agency adequate opportunity to weigh the relevance of your participation in this environmental review process, written response to this invitation are not due until after the interagency scoping meeting scheduled for *[insert date/time]* at *[insert location]*. You or your delegate is invited to represent your agency at this meeting. Your agency will be treated as participating agency unless your written response declining such designation as outlined above is transmitted to this office not later than *[insert date not more than 30 days later unless FTA determines there is good cause]*.

### *Non-Federal agencies:*

If you elect to become a participating agency, you must accept this invitation in writing. The acceptance may be transmitted electronically to *[insert e-mail address]*; please include the title of the official responding. In order to give your agency adequate opportunity to weigh the relevance of your participation in this environmental review process, written responses to this invitation are not due until after the interagency scoping meeting, scheduled for *[insert date]* at *[insert location]*. You or your delegate is invited to represent your agency at this meeting. Written responses accepting designation as participating agencies should be transmitted to this office not later than *[insert date not more than 30 days later unless FTA determines there is good cause]*.

Additional information will be forthcoming during the scoping process. If you have questions regarding this invitation, please contact *[insert name and telephone number]*.

Sincerely,

*[Insert FTA Regional Planning Director, Deputy Regional Administrator, Regional Administrator, etc.]*

Attachments: Scoping Information Packet

Draft Coordination Plan

Draft Schedule

cc: *[Sponsoring Transit Agency]*

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**Appendix C – FHWA/FTA Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Review**



U.S. Department  
of Transportation

**Federal Highway  
Administration**

**Memorandum**

**SUBJECT:** Information: Interim Guidance on MAP-21  
Section 1319 Accelerated Decisionmaking in Environmental  
Reviews

Date:  
January 14 , 2013

**FROM:** Original Signed By:  
Gloria M. Shepherd  
Associate Administrator for Planning Environment, and Realty,  
FHWA

Reply to:  
HEP-1, FHWA  
TPE-1, FTA

Lucy Garliauskas,  
Associate Administrator for Planning and Environment, FTA

**TO:** Directors of Field Services, FHWA  
Division Administrators, FHWA  
Federal Lands Highway Division Engineers  
FTA Regional Administrators

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 21<sup>st</sup> 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.<sup>5</sup> 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.

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<sup>5</sup> 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.

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### 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;
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

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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.<sup>6</sup> 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.
4. Does the DEIS identify the preferred alternative from among the comparatively evaluated reasonable alternatives?<sup>7</sup> 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

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<sup>6</sup> For information on these requirements, see 23 CFR Part 771. Additional resources are available online at [www.fhwa.dot.gov/environment/](http://www.fhwa.dot.gov/environment/) and [www.fta.dot.gov/13835\\_5222.html](http://www.fta.dot.gov/13835_5222.html).

<sup>7</sup> 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.”

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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 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

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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.

**Appendix D: FHWA Guidance on the Statute of Limitations (SOL) provision under 23 U.S.C. Section 139(I)**

Although the SOL provision in 23 U.S.C. 139(I) also applies to FTA, this guidance, which addresses FHWA procedures, only applies to FHWA and its recipients. The SOL provision can expedite project delivery, which includes avoiding delayed or unexpected litigation. FHWA Divisions must work closely with their FHWA field legal counsel to determine whether and when to publish a SOL notice, and to determine the content of SOL notices for each project. A FHWA template SOL notice follows the questions and answers in this appendix. This template can be used for a single project SOL notice, with endnotes to address a multiple projects SOL notice, a post-ROD action SOL notice, and a tier 1 SOL notice.

**Question D-1: What is the "limitations on claims" provision in 23 U.S.C. 139(I)?**

**Answer:** The limitations on claims provision in 23 U.S.C. 139(I) prohibits Federal courts from having jurisdiction to hear legal claims for the review of a permit, license, or approval issued by a Federal agency for a highway project if the claims are filed more than 150 days after the publication of an SOL notice in the *Federal Register* (FR). The law provides certainty and predictability in the transportation decision-making process and program implementation. The SOL notice must declare that there have been final Federal agency actions (decisions) taken with regard to one or more Federal-aid highway projects.

**Question D-2: What happens if no SOL notice is published in the FR?**

**Answer:** If the claim is for review of a Federal action under NEPA, then the limitation period found in [28 U.S.C. §2401 applies to the final agency action\(s\)](#). That law provides a claims period of six (6) years. Other time periods for limitations on claims can vary under other Federal laws.

**Question D-3: Which Federal agency actions are included under the "permit, license, or approval" language of 23 U.S.C. §139(I)?**

**Answer:** An SOL notice can be used for any final action by a Federal agency that is required for a highway project and is subject to judicial review. Examples of these decisions include those by other Federal agencies that apply to the project, such as Clean Water Act Section 404 permits by the U.S. Army Corps of Engineers or the final Biological Opinion through FHWA's Section 7 Consultation under the Endangered Species Act. It also includes Federal agency decisions that FHWA considers when making its own decisions in accordance with NEPA.

**Question D-4: How does FHWA determine whether a decision is "final" within the meaning of the SOL provision?**

**Answer:** Generally, a Federal agency action is considered final if the agency has completed its decision-making process under the relevant law and the action is one that determines rights or obligations, or is an action from which legal consequences will flow. The FHWA's signing of a FEIS/ROD or a ROD, for example, is the final action in FHWA's decision-making process under NEPA with respect to issues such as project alternatives, potential environmental effects of the project, and the avoidance and minimization of impacts. Under Section 139(I), "final" includes decisions in Tier 1 EIS proceedings that the deciding agency does not expect to revisit during Tier 2

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proceedings in the absence of substantial new and relevant information that may affect the outcome of the agency's decision. (See Question D-11).

In most instances, staff at the FHWA Division Office will be able to determine finality for purposes of the SOL provision based on their knowledge of the project and its coordination/ consultation efforts with other Federal agencies. If questions arise in this area, the Division Office should raise this issue with the FHWA Office of Chief Counsel in their coordination on the SOL notice.

### **Question D-5: What is required for the SOL notice to apply to claims under Federal laws other than NEPA?**

**Answer:** SOL notices should list or describe all permits, licenses, and approvals by Federal agencies that relate to and are within the scope of the project and are final as of the date of the notice. The SOL notice should include the key laws under which the Federal agencies took final action. The FHWA may issue more than one SOL notice for one project if there are permit, license, or approval decisions that occur at different times (See Question D-18 and D-19).

### **Question D-6: What kind of coordination or concurrence is required in order for FHWA to publish a notice that covers another Federal agency's decision?**

**Answer:** Interagency coordination on the notices is critically important. FHWA Divisions should work with their counterparts in other Federal agencies to ensure that there is agreement on which decisions are complete and ready for inclusion in the notice. Formal concurrence is not required, but the other Federal agency making the permit, license, or approval decision should clearly acknowledge that the decision is final within the meaning of the SOL provision. For Tier 1 EIS notices, this means that the deciding agency does not plan to revisit the issue later in the Tier 2 environmental review process, unless substantial new information arises that is material to the agency's decision. (See Question D-11).

A deciding agency may acknowledge that it has made a final decision within the meaning of the SOL provision by means of interagency discussions or through e-mail. However, it is recommended that lead agencies obtain the acknowledgement in the deciding agency's comments on the project to track and verify the acknowledgement later. Failure to gain this acknowledgement, however, should not affect the SOL validity.

### **Question D-7: Can another Federal agency publish an SOL notice for a project that has no Federal funding but requires decisions by FHWA as part of its permitting or review process?**

**Answer:** Yes, another Federal agency may publish an SOL notice but only if there is a legal requirement for approval of the project by FHWA and the project is a highway or public transportation capital project. A Federal lead agency for NEPA would be the agency that determines whether to publish a SOL notice for such project.

### **Question D-8: Does the limitations on claims provision apply to all NEPA classes or action?**

**Answer:** The process can be used for any NEPA class of action that results in a decision. These projects include CEs, EAs, and EISs. Before deciding to publish a notice, the FHWA Division Office, in consultation with the State and FHWA field legal counsel, should consider whether publication is justified. This justification assessment is discussed below.

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### Question D-9: How does the project's NEPA class of action (CE, EA, EIS) affect whether the SOL notice should be issued?

**Answer:** The likely benefits of the SOL notice, as well as the risk and potential effects of litigation, generally are different for each NEPA class of action. The FHWA anticipates that all EIS projects will merit use of the SOL notice. EIS projects typically are substantial in size and complexity and the potential effects of delay due to litigation will be the greatest. EA projects also may be likely candidates for an SOL notice, depending upon the nature of the project, the types of issues decided, the estimated likelihood of litigation, and the potential effects of litigation. For example, publication of an SOL notice might be appropriate if an EA is used on a project involving an action that is listed in 23 CFR 771.115(a) as normally requiring an EIS. By contrast, the use of an SOL notice for a CE should be relatively rare. The FHWA does not expect SOL notices to be used for projects that are CEs under 23 CFR 771.117(c). It is FHWA's view that the notice would be more appropriate for CE projects under 23 CFR 771.117(d).

### Question D-10: What kinds of risk management factors should be considered when deciding whether to publish a SOL notice?

**Answer:** It is important to consider the context, scope, and level of controversy surrounding the project, among other factors, when deciding whether to publish an SOL notice. The FHWA Division Office determines whether publication of the SOL notice is the best course in light of all factors affecting the project. FHWA Division Offices must work with their field legal counsel when making these determinations, including discussion of risk management issues. Risk management discussions should consider the interplay among applicable laws; the source, level, and nature of project opposition; and other important conditions or factors. Important questions to consider include:

- Will publication of the SOL notice trigger unnecessary litigation? For example, is there an ongoing effort to resolve project disputes that is likely to eliminate the possibility of future litigation? In such a situation, the publication of an SOL notice might cause project opponents to file "protective" litigation in case the discussions fail to reach a satisfactory conclusion.
- Is the project ready to proceed to construction within the next year? If not, then publication of an SOL notice may well be premature and may generate unnecessary litigation. What would be the impacts on the project if publication of the SOL notice were delayed until dispute resolution efforts are complete, or until funding for construction is available? In some situations, SOL notices have been filed for projects that lack funding to proceed to construction, resulting in FHWA defending lawsuits over projects not likely to be built in the near future.
- How likely is it that there are opponents committed to suing? What is the nature and intensity of any controversy over issues like natural resource or community impacts, sources of funding, or other "hot button" issues?
- Are there non-FHWA approvals, licenses, or permits yet to be obtained and/or public or political dynamics affecting the project that are likely to trigger litigation later after another final Federal agency project decision? If so, then publication of an SOL notice could be premature, may generate unnecessary litigation, and be an unnecessary expenditure of FHWA funds should another SOL notice be published.
- Is an SOL notice necessary or useful? Are other defenses available and more effective in these circumstances?
- What is the risk to FHWA from an adverse decision? What issues might be litigated? How important are those issues to FHWA's program? How likely is it that litigation would result in an adverse precedent for the Federal-aid Highway or Federal Lands Highway Program?

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- Is defense of this project in litigation a good expenditure of FHWA resources?
- Has litigation on the project started? Would the notice help in identifying all potential plaintiffs and ensure timely filing of claims against the project?

An SOL notice may be useful in cases where there are no known potential litigants, but where there is a desire to ensure that the project can move into implementation in the short-term without the risk of unexpected claims against it. An SOL notice will define the time period during which "newly" interested parties must act on their views. If a project has no substantial known or likely opposition, or if the timeline for implementation does not require the protection afforded by the SOL notice, then there may be little benefit from publication of an SOL notice.

### **Question D-11: Can the limitations on claims process be used for programmatic, or Tier 1, NEPA processes?**

**Answer:** Yes, the SOL notice provision can apply to a Tier 1, or programmatic, NEPA process to the extent that the Tier 1 results in final decisions. Because Tier 1 proceedings decide a narrower range of issues than a project-specific NEPA process, it is important that the NEPA determination clearly describe which decisions are being made that are considered final within the meaning of the SOL provision in 23 U.S.C. §139(f). Among the decisions that might be made in Tier 1 processes, and could be covered by an SOL notice, are corridor location, modal choice, alternatives eliminated from further analysis, alternatives to be carried forward for Tier 2 analysis, and jurisdictional determinations made under Federal law.

The Tier 1 SOL notice may refer generally to the Tier 1 NEPA documentation for detailed discussions of the decisions made. However, because of the "phased" nature of tiered processes, the notice also should include information on the specific decisions covered by the Tier 1 SOL notice. The objective is to identify issues that will not be open for further analysis or discussion in the Tier 2 process(es) absent substantial changes in the proposed action or significant new and relevant information. For example, it is appropriate to list the Tier 1 alternatives eliminated from the Tier 2 analysis.

### **Question D-12: How does the SOL notice provision apply to supplemental NEPA determinations?**

**Answer:** The [SOL provision in 23 U.S.C. 139\(f\)](#), makes it clear that a supplemental NEPA determinations requires a separate SOL notice. An SOL notice published for earlier NEPA documents or for earlier Federal agency decisions would not suffice for matters contained in the supplemental NEPA process or for decisions made based on the supplemental NEPA process.

### **Question D-13: Can SOL notices for several projects be consolidated for publishing as a single notice in the FR to save time and cost?**

**Answer:** Yes. This approach may be cost effective if FHWA is publishing several notices in the same timeframe. To help readers identify the key laws involved with each project, FHWA suggests that each individual project description reference the primary laws applicable to that project.

### **Question D-14: Who decides whether an SOL notice gets published in the FR? Can agencies other than FHWA publish the SOL notice, especially when there is a considerable amount of time between the FHWA NEPA determination and the other agency's action?**

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**Answer:** The decision whether to use the SOL notice process is one that the FHWA Division Office will make in consultation with the other lead agencies. For Federal Lands Highway projects, consultation should take place with the lead agency for NEPA, if it is an agency other than FHWA. If Federal Lands Highways has assumed joint lead agency responsibilities, the two agencies will decide together.

Federal agencies other than FHWA may publish the notices. However, as a practical matter it is preferable for FHWA, as a Federal lead agency, to handle the publication for all affected Federal agencies regardless of the amount of time that may pass between the FHWA NEPA determination and the last Federal agency decision.

As discussed in Question D-6, the FHWA Division Office should ensure that there is coordination with other Federal agencies whose decisions are covered by an SOL notice. It is important for those agencies to be aware of the intention to publish a notice, especially if the notice directs readers to those other agencies for information about their actions on the project. Such coordination also is important because it allows FHWA to confirm that there are no other pending actions or proceedings at the other Federal agency that might affect that agency's project decision.

### **Question D-15: What information should be included in an SOL notice?**

**Answer:** The notice is to provide enough information to give the public reasonable notice of the general nature and location of the project and of the fact that there has been action by one or more Federal agencies that is final and subject to the 150-day limitation period. The notice should specify that claims will be barred at the end of the 150-day period, and state the legal authority for agency action and for the 150-day limitation.

The FHWA's notices often will cover actions by several Federal agencies and a number of agency decisions, rather than just the FHWA's NEPA action. In such cases, the SOL notice should state that it applies to the actions of those other Federal agencies and to all laws under which Federal agencies took action. It is not necessary to list in the SOL notice every agency whose decision is covered, so long as the project documents that are referenced in the notice contain the information about the individual agencies and their decisions. However, it makes sense to specifically name those agencies that made major decisions covered by the notice, and to direct the reader's attention to the records of that agency that relate to the agencies' decisions. For example, by including the U.S. Army Corps of Engineers explicitly in the SOL notice when it covers a Section 404 permit decision. The notice should refer readers to project records for detailed information on Federal actions and related laws.

Another factor to consider in drafting a notice is how best to direct readers to one or more sources for detailed information about the project and the decisions made by the Federal agencies. The SOL notice contains only very abbreviated information about the project and the Federal actions. The burden is placed on the readers to seek detailed information. For these reasons, the instructions for obtaining detailed information are important. Web sites are an excellent resource for this purpose, although alternative means for obtaining information still will be important for those who do not have easy access to the Internet. Contact information for other Federal agencies that made a project decision may be included in the notice, but is not required as long as the information about the decisions of those Federal agencies is available from the FHWA or State contacts.

The SOL notices must comply with FR technical requirements, as discussed in FHWA guidance at [www.environment.fhwa.dot.gov/guidebook/fedRegDocs.asp](http://www.environment.fhwa.dot.gov/guidebook/fedRegDocs.asp) and in the "Federal Register Document

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Drafting Handbook," available online at [www.archives.gov/federal-register/write/handbook/ddh.pdf](http://www.archives.gov/federal-register/write/handbook/ddh.pdf). The FHWA sample template reflects the necessary format. Some important points to remember:

1. An FHWA official with appropriate delegated authority must sign the notice. The "issuance date" must be the same date as when the notice actually is signed. Pre- and post-dating are not acceptable.
2. The person whose name is inserted in the signature block must be the person who signs the notice. It is not permissible to sign for another person.
3. The signatory must sign three (3) originals of the notice.
4. There should not be a page number on the first page of the notice.
5. There should be two spaces between the period at the end of one sentence and the first letter at the beginning of the next sentence.
6. The notice should be double spaced.

### **Question D-16: How is the SOL FHWA sample template used?**

**Answer:** The sample template that follows these questions and answers includes instructions (in bold and bracketed text) for inserting project information into the notice. When using the sample template, professional judgment is needed to adapt the template to meet the needs of the project and decisions addressed by the SOL notice. Field legal counsel should be consulted when questions arise about the appropriate content for a particular SOL notice and all SOL notices are to be reviewed by field legal counsel prior to issuance.

One example of the judgment required is in completing the section that lists the primary Federal laws under which the Federal agencies have made final decisions on the project. The purpose of the notice is to advise the public that actions have been taken that trigger the limitation period. The list of laws is intended to inform readers about the matters decided by the Federal agencies. It is *not* intended to be an all-inclusive list of the laws relevant to Federal agency decision-making. However, for many projects, it may be appropriate to list only the key laws under which Federal agencies took their actions, such as the Federal-aid Highway Act, NEPA, Section 4(f), Section 106, and the Clean Air Act. In some situations, a more extensive list may be useful if other laws create the authority (or the obligation) for decisions that are potentially controversial, or are of high interest to major stakeholders or the general public. As a resource in preparing an SOL notice with applicable laws, FHWA has a summary [list of laws that affect transportation](#).

### **Question D-17: How much detail should be included in the SOL notice's description of the project?**

**Answer:** The description of the project should be brief and contain only the information that is critical to a reader's comprehension of the general nature of the project. It is not necessary to describe the project history or details about how or why decisions were made. The project's geographic location and overall project scope, such as whether it is new alignment and its length, termini, and roadway type with number of lanes and access information, is usually adequate.

### **Question D-18: How should publication of SOL notices be timed if Section 404 or other permits or approvals remain outstanding as of the date of the FHWA ROD, FONSI, or CE?**

**Answer:** An SOL notice will not be effective unless the Federal agency action covered by the notice qualifies as "final" within the meaning of the SOL provision in 23 U.S.C. 139(f). The best time to publish the SOL notice is when all Federal agency permits, licenses, and approvals are in place. However, this timing may not be practicable in all cases. For example, it may make sense to proceed

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with publication of the SOL notice immediately after FHWA issues its NEPA determination if the remaining Federal decisions are not expected to occur within a reasonable period of time. Another reason not to wait might be if the remaining Federal decisions pertain to noncontroversial matters that no one is likely to litigate. Once the other Federal agencies have completed their decision-making processes, a decision can be made whether to publish an additional SOL notice. If more than one SOL notice is published for a project, the 150-day claims period will run separately for the Federal agency actions covered by each SOL notice.

**Question D-19: If a later SOL notice is published for a separate permit (such as a Section 404 permit) or for supplemental NEPA determinations, and someone files a lawsuit challenging that permit or supplemental NEPA determinations, will that lawsuit open up the previous FHWA NEPA document for review even though an earlier SOL notice covered it?**

**Answer:** To date courts have found that a challenge to a permit or supplemental NEPA determination submitted after the expiration of the SOL for the original NEPA determination does not reopen that original NEPA determination. Thus, FHWA's position is that NEPA decisions not affected and revisited by the subsequent NEPA decision are not subject to further review since they are not being altered by the subsequent reviews and decisions. This interpretation is consistent with the language in the SOL provision and policy stated in MAP-21 section 1301 to accelerate project delivery and reduce delay.

For supplemental NEPA determinations and SOL notices associated with those determinations, the effect of a SOL notice on decisions covered by a SOL notice published for an earlier NEPA determination will depend on the circumstances. Litigation of earlier decisions that are unrelated to topics addressed by the supplemental NEPA determination would be foreclosed by the expiration of the 150-day period after the publication of the SOL notice covering those earlier decisions.

**Question D-20: Should a reference to the SOL provision be included in NEPA documents?**

**Answer:** FHWA recommends that all NEPA documents include a statement setting forth the SOL provisions so that readers of the NEPA documentation are aware of the statutory provision and its effects. A sample SOL statement appears below.

*A Federal agency may publish a notice in the Federal Register, pursuant to 23 U.S.C. §139(l), indicating that one or more Federal agencies have taken final action on permits, licenses, or approvals for a transportation project. If such notice is published, claims seeking judicial review of those Federal agency actions will be barred unless such claims are filed within 150 days after the date of publication of the notice, or within such shorter time period as is specified in the Federal laws pursuant to which judicial review of the Federal agency action is allowed. If no notice is published, then the periods of time that otherwise are provided by the Federal laws governing such claims will apply.*

**Question D-21: Does the SOL provision affect how a project's administrative record is compiled?**

**Answer:** No. However, the limitations on claims provision highlight the importance of good documentation and of tracking of agency decisions. It also is important to ensure that copies of the decisions and supporting documents for actions taken by other Federal agencies are included in the FHWA project documents, even if those agencies acted after the FHWA NEPA decision, because the SOL notice will direct readers to FHWA or the State for information on all of the decisions relating to the project. For this reason, it is important that both agencies have project documents readily available for public inspection as of the date of the publication of the SOL notice.

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### Question D-22: How is publication in the FR handled?

**Answer:** The publication of the SOL notice should follow the same process used for authorization and publication of a notice of intent under NEPA. This applies regardless of a State's participation in the Section 326 or 327 environmental review assignment programs. The FHWA must handle publication of the notice in the FR because of Government Printing Office requirements.

### Question D-23: Who pays for the notices?

**Answer:** Until a system is in place for State reimbursement of the costs of publishing SOL notices as an eligible project cost, FHWA will pay for the publication of the notices. Notices should use billing code 4910-RY, as shown on the FHWA sample template.

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FHWA Sample Template

(Note: see the endnotes for specific template language to use for specified projects in their SOL Notice.)

DEPARTMENT OF TRANSPORTATION

[4910-RY]

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in *[fill in state name]*

**AGENCY:** Federal Highway Administration (FHWA), DOT

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by *[fill in Federal Agency(ies), if applicable: if FHWA, use FHWA abbreviation since already defined above and spell out other Federal Agency names with an abbreviation for its use later in the SOL]*

**SUMMARY:** This notice announces actions taken by the *[fill in Federal Agency(ies) listed in the ACTION section above]* that are final within the meaning of 23 U.S.C. §139(l)(1). The actions relate to a proposed highway project, *[fill in highway name/number and starting and ending cities or other points]* in the County *[fill in county name(s)]*, State of *[fill in state name]*. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. §139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before [Insert date 150 days after publication in the Federal Register] *[previous phrase must be included as written, including the brackets, since it is an instruction to the Federal Register]*. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** For FHWA *[if FHWA is the Federal lead agency, i.e. NEPA is not assigned to the State]: [fill in FHWA contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail]*. For *[fill in name of Federal agency, as applicable]: [fill in Federal agency contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail]*. For *[fill in name of state*

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**agency]: [fill in State contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail].**

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that **[insert Federal agencies with final agency action decisions included in this SOL]** have taken final agency action(s) subject to 23 U.S.C. 139(f)(1) by issuing licenses, permits, and approvals for the following highway project in the State of **[fill in state name]: [Fill in brief description of project (target is no more than 3-5 sentences): project location, project/construction type, length of project, general purpose, FHWA project reference number]**. The actions by the agencies, and the laws under which such actions were taken, are described in the **[fill in last NEPA document: Final Environmental Impact Statement (FEIS), Supplemental Final Environmental Impact Statement (FEIS), Environmental Assessment (EA), Revised Environmental Assessment (EA), or Categorical Exclusion (CE)]** for the project, approved on **[fill in date]**, in the **[fill in FHWA or applicable agency] [fill in NEPA decision document: Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)]** issued on **[fill in date]**, and in other documents in the project records. The **[fill in last NEPA document]**, **[fill in NEPA decision document]**, and other project records are available by contacting **[fill in "FHWA or" if FHWA is the Federal lead agency (i.e. NEPA is not assigned to the State): the [fill in name of State agency]** at the addresses provided above. The **[fill in last NEPA document: Final Environmental Impact Statement (FEIS), Supplemental Final Environmental Impact Statement (FEIS), Environmental Assessment (EA), Revised Environmental Assessment (EA), or Categorical Exclusion (CE)]** and **[fill in NEPA decision document: Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)]** can be viewed and downloaded from the project Web site at **[fill in the link]**, or obtained from any contact listed above. The **[fill in name of Federal agency, if applicable]** decision and **[fill in Federal agency action, e.g. permit] [fill in permit reference]** are available by contacting **[fill in name of Federal agency, if applicable]** at the address provided above, and can be viewed and downloaded from **[fill in the link to Federal agency or project web site, or delete this electronic availability text if not applicable]**, or obtained by contacting the individuals listed above.

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This notice applies to all Federal agency decisions that are final as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to ***[Insert the key laws and Executive Orders under which Federal agencies have made final, documented decisions about the project; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final should not be listed. Below is a sample list and their citations of potentially applicable laws and Executive Orders]:***

1. ***General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321-4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].***
2. ***Air: Clean Air Act [42 U.S.C. 7401-7671q].***
3. ***Land: Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303; 23 U.S.C. 138]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].***
4. ***Wildlife: Endangered Species Act [16 U.S.C. 1531-1544 and Section 1536]; Marine Mammal Protection Act [16 U.S.C. 1361-1423h]; Fish and Wildlife Coordination Act [16 U.S.C. 661-667d]; Migratory Bird Treaty Act [16 U.S.C. 703-712].***
5. ***Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470f]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470aa-470mm]; Archeological and Historic Preservation Act [16 U.S.C. 469-469c]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001-3013].***
6. ***Social and Economic: American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201-4209].***
7. ***Wetlands and Water Resources: Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251-1387]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601-4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300f-300j-26]; Rivers and Harbors Act of 1899 [33 U.S.C. 401-406]; Wild and Scenic Rivers Act [16 U.S.C. 1271-1287]; Emergency Wetlands Resources Act, [16 U.S.C. 3901, 3921]; Wetlands Mitigation [23 U.S.C. 119(g) and 133(b)(14)]; Flood Disaster Protection Act, 42 U.S.C. 4012a, 4106].***

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- 8. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.**

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. §139(l)(1)

Issued on: **[Date Signed]**

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**[Signatory Name]**

**[Signatory Title]**

**[City]**

**Endnotes**

1. **Supplemental EIS NEPA Decision included in SOL Notice:** For the “SUMMARY”, “DATES”, and “Authority” sections of the Federal Register SOL notice, use the template below. Also, use the same authority citation (“23 U.S.C. §139(l)(1)-(2)”) that is shown in the dates section below for the citation at the end of the “SUPPLEMENTARY INFORMATION” section.

**SUMMARY:** This notice announces actions taken by the **[fill in Federal Agency(ies) listed in the ACTION section above]** that are final within the meaning of 23 U.S.C. §139(l)(1)-(2). The actions relate to various proposed highway projects in the State of **[fill in state name]**. Those actions grant licenses, permits, and approvals for the projects.

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**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. §139(l)(1)-(2). A claim seeking judicial review of the Federal agency actions regarding the listed highway project(s) will be barred unless the claim is filed on or before [Insert date 150 days after publication in the Federal Register] ***[previous phrase must be included as written, including the brackets, since it is an instruction to the Federal Register]***. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

**SUPPLEMENTARY INFORMATION:** ***[After description of the project but before the list of laws include the following statement]:*** This notice of limitation on claims pertains to final permit, license, and approval decisions made as part of the Supplemental ***[NEPA Decision (e.g., EIS, EIS/ROD, EA)]***. The limitations on claims for final permit, license, and approval decisions made under the previous notice remain unaltered by this subsequent notice.

Authority: 23 U.S.C. §139(l)(1)-(2)

\*\*\*\*\*

2. **Post-ROD Decision SOL Notice:** For the "SUPPLEMENTARY INFORMATION" section of the Federal Register SOL notice, use the following template section:

**SUPPLEMENTARY INFORMATION:** On ***[fill in date]***, the FHWA published a "Notice of Final Federal Agency Actions on Proposed Highway in ***[fill in state name]***" in the Federal Register at ***[fill in FR reference]*** for the following highway project: ***[fill in brief description of project from the previous SOL notice that addresses: project location, project/construction type, length of project, general purpose, FHWA project reference number, type(s) of FHWA NEPA document(s), and date(s) issued]***. Notice is hereby given that, subsequent to the earlier FHWA notice, the ***[fill in name of Federal agency(ies)]*** has taken final agency actions within the meaning of 23 U.S.C. §139(l)(1) by ***[fill in final Federal agency action, e.g. issuing permits]*** and approvals for the highway project. The action(s) by the ***[fill in name of Federal agency(ies)]***, associated final actions by other Federal agencies, and the

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laws under which such actions were taken, are described in the **[fill in name of Federal agency(ies)]** decisions and its project records, referenced as **[fill in any reference information, if applicable such as permit number(s)]**. That information is available by contacting the **[fill in name of Federal agency(ies)]** at the address provided above.

Information about the project and project records also are available from the **[fill in name of any applicable Federal agency, e.g. FHWA]** and the **[fill in name of State agency]** at the address(es) provided above. The **[insert references to FHWA NEPA documents, such as FEIS and ROD or EA and FONSI]** and **[insert decision(s) that are the subject of this SOL notice]** can be viewed and downloaded from the project Web site at **[fill in the link]** or obtained from any contact listed above. This notice applies to all Federal agency final actions taken after the issuance date of the FHWA Federal Register notice described above. The laws under which actions were taken include, but are not limited to **[Insert the key laws and Executive Orders under which Federal agencies have made final, documented decisions about the project since the date of the first §139(I) notice; ; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final should not be listed.]:**

1. **[insert laws and Executive Orders in numbered list here per sample template above]**
2. **[Insert additional projects into the numbered list with information listed in #1 above]**
3. **[Repeat until all projects to be addressed by the SOL notice are listed.]**

\*\*\*\*\*

3. **Multiple Projects SOL Notice:** For the “SUPPLEMENTARY INFORMATION” section of the Federal Register SOL notice, use the following template section:

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of **[fill in state name]** that are listed below. The actions by the Federal agencies on a project, and the laws under which such actions were taken, are described in the categorical exclusion (CE), environmental assessment (EA), environmental impact statement (EIS), or supplemental EIS (SEIS)

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issued in connection with the project **[delete here, and elsewhere, references to any document types that are not included in this notice]**, and in other project records. The CE, EA, FEIS, Findings of No Significant Impact (FONSI), Record of Decision (ROD), or SEIS, and other project records for the listed projects are available by contacting the **[fill in FHWA, if applicable, i.e. NEPA is not assigned to the State agency]** or the **[fill in name of State agency]** at the address(es) provided above. For some of the projects, the FEIS, SEIS, EA, ROD, and/or FONSI documents **[delete references to any document types that do not apply to projects in this notice]** can be viewed and downloaded from the project Web site **[fill in the link]**. The **[fill in name of Federal agency, if applicable]** decision and **[fill in Federal agency action, e.g. permit] ([fill in permit reference])** are available by contacting **[fill in name of Federal agency, if applicable]** at the address provided above, and can be viewed and downloaded from **[fill in the link to Federal agency or project web site, or delete this electronic availability text if not applicable]**, or obtained by contacting the individuals listed above.

This notice applies to all Federal agency decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken. The laws under which Federal agency decisions were made on the projects listed in this notice include, but are not limited to **[insert the key laws and Executive Orders under which a Federal agency made a final, documented decision for at least one (or more) of the projects covered by this notice; any law or Executive Order that does not apply to at least one of the projects, or for which the Federal agency decision is not final should not be listed. Include abbreviated forms of reference for each law listed in this section (e.g., Section 404, Section 106) to facilitate cross-referencing the laws within the project description below.]**:

1. **[Insert laws and Executive Orders in numbered list here per sample template above]**
2. **[Insert additional projects into the numbered list with information listed in #1 above]**
3. **[Repeat until all projects to be addressed by the SOL notice are listed.]**

The projects subject to this notice are:

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1. Project location: **[fill in city name, county name, highway number]**. Project reference number: **[fill in FHWA project reference number]**. Project type: **[fill in brief description of project (target is no more than 3-5 sentences): project location, project/construction type, length of project, general purpose,]**. Final actions taken under: **[fill in the references to the key laws (listed above) under which Federal agencies have taken final action on this project; in the case of a nationwide Section 404 permit, include the permit number]**. FHWA NEPA documents: **[fill in NEPA document type and ROD/FONSI (if applicable), date of issuance, and Web address location if applicable]**.
2. **[Insert additional projects into the numbered list with information listed in #1 above]**
3. **[Repeat until all projects to be addressed by the SOL notice are listed.]**

\*\*\*\*\*

4. **Tier 1 SOL Notice:** For the “SUMMARY” and “SUPPLEMENTARY INFORMATION” section of the Federal Register SOL notice, use the following template section:

**SUMMARY:** This notice announces actions taken by the FHWA and other Federal Agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project corridor **[fill corridor location description or highway name/number, including starting and ending cities or other points]** in the County **[fill in county name(s)]**, State of **[fill in state name]**. The Federal decisions of a tiered environmental review process under the National Environmental Policy Act, 42 U.S.C. 4321-4351 (NEPA), and implementing regulations on tiering, 40 CFR 1502.20 and 40 CFR 1508.28, determined certain issues relating to the proposed action. Those Tier 1 decisions will be used by Federal agencies in subsequent proceedings, including decisions whether to grant licenses, permits, and approvals for highway project(s).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA has issued a Tier 1 Record of Decision (ROD) in connection with a proposed highway project in the State of **[fill in state name]**: **[fill in brief description of project (target is no more than 3-5 sentences): corridor area or project location, general purpose, FHWA project reference number and decisions made in Tier 1 NEPA**

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***process such as mode, general location, alternatives being carried forward, Section 4(f), and ROW acquisition; any decisions to be finalized in Tier 2 NEPA processes should not be included***].

The Tier 1 final Federal agency decisions, and the laws under which such actions were taken, are described in the Tier 1 Final Environmental Impact Statement (FEIS), approved on ***[fill in date]***, in the Record of Decision (ROD) issued on ***[fill in date]***, and in other documents in the project records. The FEIS, ROD, and other documents in the project file are available by contacting the ***[fill in FHWA, if applicable, i.e. NEPA is not assigned to the State agency]*** or the ***[fill in name of State agency]*** at the addresses provided above. The FEIS and ROD can be viewed on the project Web site at ***[fill in the link]***, or obtained by contacting the individuals listed above.

This notice applies to all Federal agency decisions that are final within the meaning of 23 U.S.C. 139(l)(1) as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to: ***[Insert the key laws and Executive Orders under which Federal agencies have made final, documented decisions about the project; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final within the meaning of 139(l) should not be listed.]***:

1. ***[Insert laws and Executive Orders in numbered list here per sample template above]***
2. ***[Insert additional projects into the numbered list with information listed in #1 above]***
3. ***[Repeat until all projects to be addressed by the SOL notice are listed.]***