

Changes to the Environmental Review Process for Surface Transportation Projects in the Infrastructure Investment and Jobs Act

The Infrastructure Investment and Jobs Act, which President Biden is expected to sign into law, contains some important changes to the federal environmental review process for surface transportation projects. Most significantly for complex surface transportation projects, the new infrastructure law codifies some of the principles from President Trump's now-revoked "One Federal Decision" policy by requiring federal agencies to schedule their environmental review processes within an agency average of two years and requiring agencies to complete all federal authorizations for a project within 90 days after issuance of the record of decision. Other significant provisions in the IIJA include generally limiting environmental impact statements to 200 pages, expanding the use of categorical exclusions, streamlining interagency coordination under Section 4(f) of the Department of Transportation Act, and allowing for early utility relocation before completion of the environmental review process.

Section 139

The IIJA contains significant modifications to the streamlined environmental review procedures for surface transportation projects set forth in 23 U.S.C. § 139. These procedures apply to surface transportation projects that receive federal funding or financing or require approval of the U.S. Department of Transportation.

Applicability. The Section 139 procedures apply to surface transportation projects for which an environmental impact statement is prepared under the National Environmental Policy Act. Previously, the Section 139 procedures could also apply to projects for which an environmental assessment is prepared "to the extent determined appropriate" by USDOT. The IIJA provides that a project sponsor must request application of the Section 139 procedures to projects for which an environmental assessment is prepared.

Single Environmental Document. Section 139 generally requires preparation of a single "environmental document" for all federal authorizations and reviews for a project. The IIJA adds a definition to clarify that "environmental document" includes an environmental assessment, finding of no significant impact, notice of intent, environmental impact statement, and record of decision. The IIJA also allows for the lead agency to waive this requirement of a single environmental document if (1) requested by the project sponsor, (2) a cooperating or participating agency's NEPA obligations have already been satisfied for the project, or (3) the lead agency determines that reliance on a single environmental document would not facilitate timely completion of the environmental review process for the project.

Timing. The IIJA makes significant changes to the timing of environmental reviews and authorizations under Section 139:

- The IIJA requires all authorization decisions necessary for construction of a "major project" to be completed within 90 days after issuance of the record of decision. "Major projects" are defined as those projects (1) that require multiple permits, approvals, reviews, or studies under federal laws other than NEPA; (2) for which the project sponsor has identified the reasonable availability of funds sufficient to complete the project; (3) that are not covered projects under Title 41 of the Fixing America's Surface

Transportation Act; and (4) for which the lead agency has determined that an environmental impact statement is required or, if an environmental assessment will be prepared, the project sponsor has requested treatment as a major project. The lead agency may extend this deadline if (1) federal law prohibits an agency from issuing an approval or permit within 90 days, (2) the project sponsor requests a different timeline, or (3) an extension would facilitate completion of the environmental review and authorization process.

- Section 139 requires the lead agency to develop a schedule for completion of the environmental review process for a project. The IJA requires the project schedules for major projects to be consistent with an agency average of not more than two years for the completion of the environmental review process for major projects, to the maximum extent practicable and consistent with applicable federal law. For projects with an environmental impact statement, this time is measured from publication of a notice of intent to the record of decision; for projects with an environmental assessment, it is measured from the date on which the lead agency determines that an environmental assessment is required to publication of the finding of no significant impact.
- Previously, the lead agency could lengthen the environmental review schedule for good cause, and could shorten the schedule with the concurrence of affected cooperating agencies. The IJA changes the conditions under which a schedule may be changed. Under the IJA, a lead agency can lengthen or shorten a schedule for good cause (concurrence of affected cooperating agencies would not be required to shorten the schedule). For major projects, the lead agency may lengthen a schedule for a cooperating agency by not more than one year, and the lead agency may shorten a schedule only if it would not impair the ability of a cooperating agency to conduct necessary analyses or otherwise carry out its relevant obligations for the project. If a cooperating agency fails to meet a deadline that was extended, it must submit to USDOT a report that describes the reasons why the deadline was not met, and USDOT must publish this report online and provide it to Congress.

Page Limits. The IJA sets a 200-page limit for the main body of an environmental impact statement (i.e., discussions of purpose and need, alternatives, affected environment, and environmental consequences), to the maximum extent practicable. However, the lead agency may establish a page limit that exceeds 200 pages.

Categorical Exclusions

The IJA contains a few provisions to expand the use of categorical exclusions.

Adoption of USDOT Categorical Exclusions by Other Agencies. The IJA requires USDOT to identify existing categorical exclusions for the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration that would accelerate project delivery if they were available to other federal agencies. USDOT must provide other agencies with existing documentation and substantiating information about those categorical exclusions. Within one year, other agencies must publish proposed rules to establish those categorical exclusions that are applicable to the agency and meet the criteria for categorical exclusions in the Council on Environmental Quality's NEPA regulations.

Projects of Limited Federal Assistance. Prior surface transportation bills required USDOT to adopt a categorical exclusion for projects of limited federal assistance, which are currently defined as (1) projects that receive less than \$5 million of federal funds, or (2) projects with a total estimated cost of not more than \$30 million and federal funds comprising less than 15% of the total estimated project cost. These dollar thresholds are adjusted annually to reflect inflation since 2012. The IJA raises these thresholds to \$6 million and \$35 million, respectively, and continues to require annual inflation adjustments (seemingly continuing to use 2012 as the base year).

Section 4(f)

The IIJA makes some revisions to streamline the interagency review process under Section 4(f) of the Department of Transportation Act. The IIJA requires USDOT to provide a Section 4(f) evaluation to the Departments of the Interior, Housing and Urban Development, and Agriculture for a 30-day comment period. If comments are not received within 15 days after the comment deadline, USDOT "shall assume a lack of objection and proceed with the action." Currently, under FHWA, FTA, and FRA regulations (23 C.F.R. § 774.5(a)), the operating administrations must give these other cabinet departments a minimum 45-day comment period, and the operating administrations "may" (not "shall") assume a lack of objection and proceed with the action if comments are not received within 15 days after the comment deadline. Although substantially similar provisions of Section 4(f) are codified at both 23 U.S.C. § 138 and 49 U.S.C. § 303, the IIJA amends only the Title 23 provision. As a result, these changes apparently apply only to projects eligible for assistance under Title 23 (primarily highway projects), and not to projects eligible for assistance under Title 49 (public transportation or rail projects).

Early Utility Relocation

The IIJA allows states to relocate utilities before completing the environmental review process for a highway project eligible for federal assistance. Federal funding can be used to reimburse a state for costs incurred for early utility relocation for a highway project if USDOT finds that certain conditions are met, including:

- The early utility relocation is necessary to accommodate the highway project.
- Before commencing early utility relocation activities, the state completes an environmental review for the utility relocation and finds that the utility relocation would not result in significant adverse environmental impacts and would comply with other applicable federal environmental requirements.
- The early utility relocation did not influence the environmental review process for the highway project, the decision relating to the need to construct the highway project, or the selection of the highway project design or location.
- The environmental review process for the project is completed before the utility relocation cost reimbursement is approved.
- The highway project is approved for construction.

NEPA Assignment

Surface Transportation Project Delivery Program. The IIJA makes some changes to the surface transportation project delivery program (codified at 23 U.S.C. § 327), which allows states to assume USDOT's responsibilities for complying with NEPA and other federal environmental laws for certain surface transportation projects in the state:

- The IIJA provides that states are deemed to be federal agencies for purposes of the Equal Access to Justice Act, which allows plaintiffs who prevail in litigation against federal agencies to recover their attorney fees and costs. As a result, if a state with NEPA assignment loses a lawsuit brought under NEPA or other federal laws, the state could be liable for the plaintiff's attorneys' fees and costs. The IIJA also allows states with NEPA assignment to use funds from the Surface Transportation Block Grant Program to pay attorney fee awards under the Equal Access to Justice Act.

- Under existing law, states and USDOT can enter into assignment agreements with a term of up to five years, and USDOT is required to conduct an annual audit. The IIJA provides that after a state has participated in the NEPA assignment program for at least 10 years, assignment agreements will have a term of 10 years. And, for agreements with a term greater than five years, an audit will cover the first five years of the agreement term instead of taking place annually.

Categorical Exclusion Assignment Program. The IIJA also allows for longer assignment agreements under the categorical exclusion assignment program (codified at 23 U.S.C. § 326), which allows states to assume FHWA's responsibilities for determining whether certain highway projects in the state qualify for a categorical exclusion and FHWA's responsibilities for complying with other federal environmental laws applicable to those projects. Currently, states and FHWA can enter into categorical exclusion assignment agreements with a term of up to three years. The IIJA provides that after a state has participated in the categorical exclusion assignment program for 10 years, agreements will have a term of five years.

Programmatic Categorical Exclusion Agreements With Tribes. In addition to these assignment programs, FHWA has authority to enter into programmatic agreements with states to allow states to determine, on behalf of FHWA, whether a highway project in the state qualifies for a categorical exclusion under NEPA. The IIJA expands this authority to include Native American tribes. Specifically, it authorizes USDOT and the Department of the Interior to enter into programmatic agreements with Native American tribes to allow tribes to make categorical exclusion determinations for projects eligible for assistance under the Tribal Transportation Program.

Federal Lands Transportation Program and Federal Lands Access Program

The IIJA includes several provisions to streamline the environmental review process for the Federal Lands Transportation Program and Federal Lands Access Program:

- The IIJA allows FHWA to prepare an environmental document pursuant to FHWA's NEPA regulations if requested by the federal land management agency that is the project sponsor. FHWA's environmental document for the project must address all areas of analysis required by the project sponsor. The project sponsor would not be required to independently evaluate and determine the adequacy of FHWA's environmental document for the project.
- The IIJA also allows a federal land management agency to use an environmental document previously prepared by FHWA for a project addressing the same or substantially the same action to the same extent that the federal land management agency could adopt or use a document previously prepared by another federal agency.
- In addition, the IIJA allows a federal land management agency that is a project sponsor to use FHWA's categorical exclusions if (1) the project sponsor determines, in consultation with FHWA, that the categorical exclusion applies to the project, (2) the project satisfies the conditions for a categorical exclusion under NEPA, and (3) the use of the categorical exclusion does not otherwise conflict with the project sponsor's NEPA regulations (except the project sponsor's own list of categorical exclusions).
- Finally, the IIJA requires FHWA to assist the federal land management agency with all design and mitigation commitments made jointly by FHWA and the project sponsor in any environmental document prepared by FHWA.

Interagency Infrastructure Permitting Improvement Center

The IIJA creates a new Interagency Infrastructure Permitting Improvement Center within USDOT, with an executive director reporting to the under secretary of transportation for policy. The center will be focused on

improving the efficiency and effectiveness of the environmental review and permitting process for major transportation projects while achieving better outcomes for communities and the environment. The center's responsibilities include developing online and other technology tools to track project schedules, developing and tracking metrics for timeliness of environmental reviews and permitting decisions by federal agencies, developing best practices for innovative project delivery and efficient permitting and environmental reviews, identifying appropriate methods to assess environmental impacts, developing "innovative methods for reasonable mitigation," and providing technical assistance to project sponsors and staff at USDOT and other federal agencies.

Reporting

The IIJA adds new reporting requirements intended to improve transparency and accountability:

- USDOT must submit an annual report to Congress on all projects or activities carried out with USDOT funds that are more than five years behind schedule or for which the total amount spent on the project is at least \$1 billion more than the original cost estimate.
- USDOT (and states that have assumed USDOT's responsibilities under the surface transportation project delivery program) must submit an annual report to Congress on the NEPA process. Specifically, the annual reports must include the number of categorical exclusions, environmental assessments, and environmental impact statements issued during the prior year and pending at the time the report is submitted, as well as the length of time that it took to complete each environmental assessment and environmental impact statement.

Implications

The IIJA continues a trend in recent infrastructure bills and executive orders over the past couple decades (beginning with the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users in 2005) of establishing special procedures and requirements intended to streamline the environmental review process for surface transportation and other infrastructure projects. While these new requirements could speed up the NEPA process, they can also create more burdens on project sponsors and federal agencies. Agencies may struggle to meet project schedules with limited existing resources for project delivery. Agencies will need to increase staffing and provide adequate training to support more rapid and coordinated action on environmental reviews and permitting. Agencies also will need to reconcile streamlining procedures with underlying legal requirements of NEPA and other environmental laws, which remain unchanged; environmental reviews that are rushed or abbreviated due to permitting schedules or page limits could be more vulnerable to legal challenges. Finally, NEPA is just one piece in the project delivery puzzle; there are often many other factors that can cause project delays, such as agency staffing resources, project funding, and politics.

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