

**1997-98 SESSION  
COMMITTEE HEARING  
RECORDS**

Committee Name:

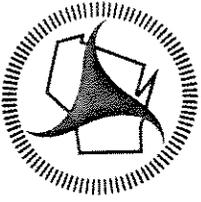
*Joint Committee for  
Review of  
Administrative Rules  
(JCR-AR)*

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR\_RCP\_pt01a
- 97hrAC-EdR\_RCP\_pt01b
- 97hrAC-EdR\_RCP\_pt02

- Appointments ... Appt
- 
- Clearinghouse Rules ... CRule
- 97hr\_JCR-AR\_CRule\_98-131\_pt02
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- Committee Hearings ... CH
- 
- Committee Reports ... CR
- 
- Executive Sessions ... ES
- 
- Hearing Records ... HR
- 
- Miscellaneous ... Misc
- 
- Record of Comm. Proceedings ... RCP
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98-131-TRANS 400 - LOIS. ENVIR.  
POLICY ACT



# Wisconsin Department of Transportation



Tommy G. Thompson  
Governor

Charles H. Thompson  
Secretary

OFFICE OF GENERAL COUNSEL  
P. O. Box 7910  
Madison, WI 53707-7910

October 29, 1998

The Honorable Brian Rude  
President, Wisconsin State Senate  
Room 301  
119 MLK Jr. Blvd.  
Madison, Wisconsin 53707

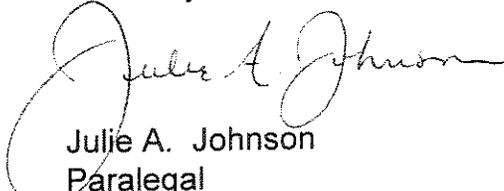
The Honorable Scott Jensen  
Speaker, Wisconsin State Assembly  
Room 315 North, State Capitol  
Madison, Wisconsin 53707

RE: Proposed Administrative Rule **TRANS 400**  
Notification of Legislative Standing Committees  
**CLEARINGHOUSE RULE 98-131**

Gentlemen:

Enclosed is a copy of Clearinghouse Rule **98-131**, relating to the **Wisconsin Environmental Policy Act**. The rule is submitted to you for referral to the appropriate standing committees.

Sincerely,



Julie A. Johnson  
Paralegal

JAJ/dim

Enclosure

cc: Gary Poulson (Deputy Revisor of Statutes)/Senator Robert Welch/  
Representative Glenn Grothman/Gene Kussart/Jim Gruendler/Carol Cutshall/  
Jon Novick/Mark Aquino

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**CR 98-131**

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The Wisconsin Department of Transportation proposes an order to amend TRANS 400.03(2), 400.04(7) and (12), 400.05, 400.07(1), (2)(intro.), (a), (b) and (c)(intro.), 400.08(2)(intro.) and (a), and 400.09(1) and (2)(intro.); and repeal and recreate TRANS 400.08(1), relating to the Wisconsin Environmental Policy Act.

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**REPORT OF THE DEPARTMENT OF TRANSPORTATION  
ON THE FINAL RULE DRAFT**

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This report is submitted to the presiding officers of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

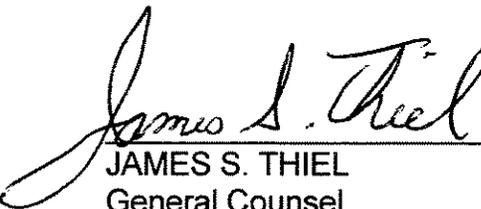
Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:



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JAMES S. THIEL

General Counsel

Office of General Counsel

Department of Transportation

Room 115-B, Hill Farms State

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P. O. Box 7910

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(608) 266-8928

**PART 1**  
**Analysis Prepared by the Wisconsin Department of Transportation**

**STATUTORY AUTHORITY:** ss. 1.11, 85.16(1) and 227.11, Stats.

**STATUTES INTERPRETED:** s. 1.11, Stats.

**General Summary of Proposed Rule.** The Wisconsin Department of Transportation has authority under ss. 1.11, 85.16(l) and 227.11(2), Stats., to promulgate this rule.

Wisconsin's Environmental Policy Act (WEPA), s. 1.11, Stats., closely follows the National Environmental Policy Act (NEPA), 42 USC 4332. As specified in s. 1.11(2)(c), Stats., the Department is to substantially follow the guidelines issued by the United States Council on Environmental Quality under the National Environmental Policy Act (NEPA) to implement WEPA.

The Department's existing rule for implementing WEPA is overly definitive and results in environmental documents being prepared based on the size of a project rather than the importance of a project's potential impacts. Compared to the federal regulations, 23 CFR 771 et seq., which use the concept of impact magnitude, TRANS 400 requires an Environmental Impact Statement (EIS) when a project is on new location for over 2.5 miles and, presumably, does not require an EIS if the project is on new location for only 2.4 miles. This contributes to the criticisms that WisDOT has spent more on environmental documents than is required by the federal regulations.

NEPA requires the federal government to prepare environmental documentation for major federal actions. WisDOT prepares the federal environmental documentation for review and approval by the federal government for actions for which federal funds are to be used by the Department. The requirements for federally funded actions are followed by the Department when federal funds are involved. These federally funded actions are also actions of the Department to which WEPA applies. Finally, when the Department pursues an action for which only State funds are involved, NEPA does not apply, but WEPA still applies. The intent of this chapter is to direct the Department to follow NEPA and its implementing regulations for both NEPA and WEPA purposes when federal funds are involved in the proposed action. The intent is to apply WEPA and its implementing rules in this chapter when only State funds are involved in the proposed actions, but to make the WEPA implementing rules track the federal law and federal regulations as closely as possible.

The existing rule also prescribes "matters" which must be included in a System-level Environmental Evaluation (SEE). This prescription requires the department to address these matters even when they are not important or relevant to the system plan.

In general, Trans 400 goes beyond federal requirements with regard to environmental evaluation of plans and legislation. This rule makes it discretionary whether the Department prepares environmental documents on plans, i.e. it makes preparation of System-level Environmental Evaluations (SEEs) optional. It also

eliminates the present requirement for Legislative Environmental Impact Statements (LEISs). The reason is that further environmental consideration actually occurs before plans or legislation are implemented.

By their nature, plans are continuing evolving over time and a review of a fixed plan may hinder efforts to refine policies through continuous revision of plans and application of plans. Environmental evaluation of plans is often highly speculative and diffuse because any potential harm from the plan is not imminent or certain and involves prediction of consequences that may affect many different parcels of land in a variety of ways, and which effects themselves will in all probability change over time. To the best of our knowledge no other state prepares SEEs on plans.

The same is true of legislative proposals, but with the additional difference that the Department can neither introduce nor enact legislation itself. Nor are agency LEISs required to be published as part of bills or as bills are introduced as are fiscal estimates. In 1979, the United States Supreme Court, in interpreting the identical phrase in NEPA as in WEPA regarding legislation, expressed its unanimous view that federal agencies are not required to prepare LEISs to accompany appropriation bills. **Andrus v. Sierra Club**, 442 US 347, 60 L. Ed. 2d 943, 99 S. Ct. 2335 (1979). In addition, 1997 Wisconsin Act 86, now requires the Department to submit a plan for expenditures to the Joint Committee on Finance within 30 days after the enactment of certain federal legislation, and no later than December 1. The time period required precludes preparation of any meaningful LEISs or SEE in any event. To the best of the Department's knowledge, no other state agency prepares LEISs on proposals to the Wisconsin Legislature.

The rule applies to the entire Department. The Department has long and extensive experience complying with the guidelines promulgated as rules by the United States Council on Environmental Quality and the various federal transportation agencies implementing NEPA. This rule continues the Department's long-standing and consistent policy of following these federal rules to comply with WEPA.

The Department will continue to base its decisions upon a balanced consideration of the environment, public comments, and the need for safe and efficient transportation. The Department's policy is to make the WEPA process more useful to decision makers and the public by reducing paperwork and delay. Its environmental documents shall be concise, clear and to the point, and emphasize real environmental issues and alternatives.

Under the existing rule, actions or procedures are categorized as Type I, II, III and IV. For clarity, this rule identifies these types by the more informative nomenclature as follows:

- Type I (EIS) – Environmental Impact Statement
- Type II (EA) – Environmental Assessment
- Type III (ER) – Environmental Report
- Type IV (CE) – Categorical Exclusion

The existing rule contains descriptions, consistent with federal regulations, of various Department actions normally categorized as Types I, II, III or IV. It is proposed to change TRANS 400.08 Categorization of department actions, to more closely reflect the lists of actions and procedures contained in the federal regulations published by the FHWA, FAA, FTA, and FRA. Appropriate changes to this list will focus WisDOT's environmental documents on a project's environmental issues rather than its size. The SEE requirements in TRANS 400.10 (2) would be changed to be less prescriptive by changing the phrase "shall address the following matters" to "may address environmental matters such as the following".

The descriptions of actions within various Types in TRANS 400.08 are currently too restrictive. Their specificity requires the preparation of unneeded EIS's on the one hand and may preclude the preparation of an EIS on the other simply because it is based on the magnitude of the project rather than the magnitude of the project's effects. The TRANS 400 list does not allow the flexibility to use another type of environmental document even when an action does not produce significant environmental impacts. The FHWA/FTA regulations, on the other hand, base the type of environmental document upon the significance of impacts.

**Fiscal Effect.** The proposed rule does not create any additional workload for the Department. The taxpayer will benefit from a reduction in costs. The changes will not lessen environmental protection nor will it compromise the Department's flexibility in addressing transportation needs at both the project and systems levels.

For the purposes of establishing a fiscal estimate for the rule, the following assumptions have been made: (a) The environmental evaluations (SEES and LEIS) represent a significant analytic undertaking that requires extensive data gathering, analysis and documentation, but is highly speculative; (b) The preparation of the SEE is an integral part of the detailed planning process; (c) The number of proposals or plans requiring a LEIS or SEE ranged from two to four a year. There may be some reduction in the resources presently spent on preparation of SEEs and LEISs. The existing resources expended on EISs and EAs will be reallocated to evaluation of those actions that have more significant impacts on the quality of the human environment from those that have less.

**Preparation and Copies of Proposed Rule.** This analysis was prepared by James S. Thiel, Office of General Counsel (608) 266-8928. Copies of the rule may be obtained upon request, without cost, by writing to Jon Novick, Department of Transportation, Division of Infrastructure Development, Bureau of Environment, Room 451, P. O. Box 7965, Madison, WI 53707-7965, or by calling (608) 266-8287. Alternate formats of the proposed rule will be provided to individuals at their request.

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**PART 2**  
**TEXT OF PROPOSED RULE**

Under the authority vested in the state of Wisconsin, department of transportation, by ss. 1.11, 85.16(1) and 227.11, Stats., the department of transportation hereby proposes an order to amend a rule interpreting s. 1.11, Stats., relating to the Wisconsin environmental policy act procedures for department actions.

**SECTION 1.** Trans 400.03(2) is amended to read:

Trans 400.03(2) Where another state or federal agency has concurrent responsibility with the department for a proposed ~~type-II~~ EA action, a joint environmental assessment, or EA, may be prepared with the other agency if the EA meets the requirements of this chapter. The department shall make an independent judgment on the need for an environmental impact statement, or EIS, in accordance with this chapter.

**SECTION 2.** Trans 400.04(7) and (12) are amended to read:

Trans 400.04(7) "EA" or "environmental assessment" means a concise, comprehensive document containing an analysis of a proposed ~~type-II~~ action to determine the significance of the action's environmental effects and whether or not the action constitutes a major action.

(12) "FONSI" or "finding of no significant impact" means an approved, completed EA containing a finding that the proposed ~~type-II~~ action is not a major action.

**SECTION 3.** Trans 400.05 is amended to read:

**TRANS 400.05 Federal regulations adopted.** Federal regulations, 23 CFR 771.115, 771.117, 771.119(a) and 771.123(a), April 1, ~~1991,~~ 1998, adopted jointly by the federal highway administration and urban mass transit administration of the United States department of transportation, and its federal aviation administration order 5050.4A,

chapter 3, ~~paragraph~~ paragraphs 20, 21, 22, and 23, October 8, 1985, pursuant to 40 CFR 1508.4, July 1, ~~1990~~, 1998, as approved by the United States council on environmental quality, and 40 CFR 1506.8 and 1508.17 are adopted by the department and are attached hereto in appendix 1.

**NOTE:** The "urban mass transit administration" has been renamed the "federal transit administration," but the federal rule text has not yet been changed.

**SECTION 4.** Trans 400.07(1), (2)(intro.), (a), (b) and (c)(intro.) are amended to read:

Trans 400.07(1) The designations, ~~type I, type II, type III and type IV~~ EIS and CE shall be used to categorize department actions. Actions designated ~~type I~~ EIS actions shall be considered major actions, and actions designated ~~type IV~~ CE shall be considered categorical exclusions. An EA and an ER describe procedures to be followed to categorize department actions. The EA process yields a determination whether an action requires an EIS or a finding of no significant impact. The ER process confirms whether an action falls within a categorical exclusion or requires further evaluation and documentation.

(2) Except for actions designated ~~type IV~~ CE actions which ~~shall~~ do not require any environmental documentation, actions and procedures designated ~~type I, type II or type III~~ EIS, EA or ER shall require the following environmental documentation:

(a)(title) ~~Type I~~ EIS or LEIS. ~~A type I~~ An EIS action is ~~normally~~ a major action ~~or~~. An LEIS may be prepared for a major and significant new proposal.

1. An environmental impact statement, or EIS or LEIS, shall be prepared for ~~type I~~ actions as follows:

~~1. EIS. An EIS shall be prepared for major actions.~~

2. ~~LEIS. When~~ A legislative environmental impact, or LEIS, may be prepared ~~when~~ a major and significant new proposal consists of a report or recommendation of the department on a proposal for legislation initiated by the department that is not within the scope of any categorical exclusion, ~~the department shall prepare an LEIS substantially following the guidelines of the United States council on environmental quality in 40 CFR 1506.8, July 1, 1990.~~

(b)(title) ~~Type II EA, SEE or screening sheet. A type II action~~ An EA is normally ~~one~~ a procedure followed for an action for which the significance of the environmental impact is not clearly established. ~~Either an~~ An EA, SEE or screening sheet ~~shall initially be prepared for type II actions~~ may be used as follows:

1. ~~EA.~~ An EA shall be prepared for those project actions for which the significance of the environmental impact is not clearly established. If it is concluded from the analysis in the EA that the ~~type II~~ action is a major action, an EIS shall be prepared. If it is concluded from the analysis in the EA that the ~~type II~~ action is not a major action, the EA shall be revised to constitute a FONSI, and the FONSI shall serve as the environmental document. The FONSI shall be prepared only after availability of the EA for public and cooperating agency review and comment and the incorporation of any appropriate revisions resulting from the public involvement process. Where a permit will be required or other agency coordination is specifically required by law, the FONSI may serve as the vehicle for such permit or coordinating agency approval.

2. ~~SEE. In~~ A SEE may be prepared in the case of proposals contained in system plans, if it is concluded they are major and significant new proposals, ~~a SEE shall be prepared.~~ If it is concluded from an analysis of the system plan that it does not contain

any major and significant new proposals, a clear statement of that determination ~~shall~~ may be incorporated within the system plan or as a separately identifiable and retained record of the department's determination.

3. ~~Screening sheet.~~ In the case of reports or recommendations of the department on proposals for legislation initiated by the department, if it is concluded from the screening sheet they contain major and significant new proposals, an LEIS ~~shall~~ may be prepared. If it is concluded from the screening sheet that they do not contain any major and significant new proposals or are within the scope of any categorical exclusion, a clear statement of that determination ~~shall~~ may be included on the screening sheet.

(c)(title) ~~Type III ER.~~ A type III ER is a procedure followed for an action that is normally one that is likely to fit the criteria for a conditional categorical exclusion in 23 CFR 771.117(d), April 1, ~~1994~~ 1998 or federal aviation administration order 5050.4A, chapter 3, paragraph 23.a., October 8, 1985, or otherwise requires coordination with or concurrence of another agency. An environmental report, or ER, shall be prepared ~~for type III actions~~ to demonstrate whether the proposed action does fit the criteria or conditions for approval as a categorical exclusion ~~in the federal rule~~ and has been properly coordinated with other agencies having jurisdiction by law over specific activities. The ER shall serve as the department's record of coordination with other agencies having jurisdiction over specific activities, including the following activities:

**SECTION 5.** Trans 400.08(1) is repealed and recreated to read:

**TRANS 400.08 Categorization of department actions.** (1) Based on federal regulations and past experience with analysis of similar actions the following are categorized as EIS, EA, ER or CE:

(a) *EIS - Environmental Impact Statement.* The federal highway administration regulations at 23 CFR 771.115(a) April 1, 1998, federal aviation administration order 5050.4A, chapter 3, paragraph 21, October 8, 1985, identify types of federally funded actions which require the preparation of an environmental impact statement.

**NOTE:** The National Environmental Policy Act (NEPA) requires the federal government to prepare environmental documentation for major federal actions. The Wisconsin Department of Transportation prepares the federal environmental documentation for review and approval by the federal government of actions for which federal funds are to be used by the Department. The requirements for federally funded actions are followed by the Department when federal funds are involved. These federally funded actions are also actions of the Department to which the Wisconsin Environmental Policy Act (WEPA) applies. Finally, when the Department pursues an action for which only State funds are involved, NEPA does not apply, but WEPA still applies. The intent of this chapter is to direct the Department to follow NEPA and its implementing regulations for both NEPA and WEPA purposes when federal funds are involved in the proposed action. The intent is to apply WEPA and its implementing rules in this chapter when only State funds are involved in the proposed actions, but to make the WEPA implementing rules track the federal law and federal regulations as closely as possible.

The following are examples of department major actions that require the preparation of an environmental impact statement:

1. 'Highways and transit.'
  - a. Construction of a new controlled access freeway.
  - b. Construction of a new highway project of 4 or more lanes on a new location.
  - c. New construction or extension of fixed rail transit facilities, including rapid rail, light rail, commuter rail, and automated guideway transit.
  - d. New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.
2. 'Airports.'
  - a. First time airport layout plan approval or airport location approval for a commercial service airport located in a standard metropolitan statistical area.

b. Federal financial participation in, or airport layout plan approval of, a new runway capable of handling air carrier aircraft at a commercial service airport in a standard metropolitan statistical area.

3. 'Railroads.' a. Construction of a new major railroad.

b. Construction of new major facilities to handle freight, maintenance or passengers.

**NOTE: The federal railroad administration regulation at 49 CFR 266.19, October 1, 1997, generally identifies actions that do not require an environmental impact statement.**

(b) *EA - Environmental Assessment.* EA procedures apply to actions for which the significance of the environmental impacts is not clearly established and require the preparation of an environmental assessment to make that determination. The federal highway administration regulations at 23 CFR 771.115(c) April 1, 1998, and the federal aviation order 5050.4A, chapter 3, paragraph 22, October 8, 1985 identify the types of federal actions that require the preparation of an environmental assessment. Examples of the department's actions that are required to follow the EA procedure are as follows:

1. 'Highways and transit.' Highways and transit actions that are not EIS or CE actions are required to follow EA procedures. This category requires the preparation of an environmental assessment to determine the appropriate environmental document required, unless it appears an ER would be more appropriate.

2. 'Airports.' An airport layout plan approval of the following types of actions shall be subject to the analysis of an environmental assessment and subsequent decision as to whether to prepare an environmental impact statement or a finding of no significant impact:

- a. Airport location.
  - b. New runway.
  - c. Major runway extension.
  - d. Runway strengthening which would result in a 1.5 Ldn or greater increase in noise over any noise sensitive area located within the 65 Ldn contour.
  - e. Construction or relocation of entrance or service road connections to public roads which adversely affect the capacity of such public roads.
  - f. Land acquisition associated with any of the items in subds. 2.a. to e. and land acquisition which results in relocation of residential units when there is evidence of insufficient comparable replacement dwellings or major disruption of business activities.
  - g. Establishment or relocation of an instrument landing system, or an approach lighting system.
  - h. An airport development action that affects property of state or local historical, architectural, archeological, or cultural significance; requires land acquisition of over 5 acres from a farm operation; affects wetlands, coastal zones, or floodplains; or affects endangered or threatened species.
3. 'Administrative facilities.' Construction of a new or replacement administrative building, including an office building, state patrol academy, driver licensing and testing station, state patrol communications building, or other similar facility, at a new location.
4. 'Financial assistance.' This provision applies to issuance as well as acceptance of the following grants by the department:
- a. Financial grant for railroad construction action that may require an EIS.
  - b. Financial grant for construction of new port facilities.

c. Financial grant for construction of a new disposal facility for harbor dredge material.

d. Financial grant for dredging of material for the purpose of expanding an existing harbor.

e. Financial grant for disposal of contaminated harbor dredge material into a new disposal facility.

5. 'Policy, contract, standard and specification changes.' a. Change in policy for nonhighway use of highway right-of-way or non-railroad use of railroad right-of-way by utility companies, or for access to public roads or private residential or commercial driveways or farm crossings.

b. Change in policy for transport of hazardous cargo, such as explosives, hazardous wastes, toxins, radioactive material, or any other similar cargo.

c. Change in policy for the maintenance program relating to the use of deicing materials, or to the use of pesticides, herbicides or insecticides within the right-of-way, or to the use of cutback asphalt or creosoted ties, or other similar materials.

d. Change in policy for acquisition of scenic easements.

6. 'System planning.' Publication or adoption of a system plan. Preparation of a SEE or EA for a system plan is discretionary.

(c) *ER - Environmental Report.* ER procedures apply to actions identified in 23 CFR 771.117(d), April 1, 1998, and federal aviation administration order 5050.4A, chapter 3, paragraph 23a., October 8, 1985. ER actions require documentation with an environmental report. The environmental report shall demonstrate that the action meets the criteria for a categorical exclusion by demonstrating that specific conditions or criteria

for the action have been addressed and that significant environmental effects will not result. Examples of ER actions to which ER procedures apply are as follows:

1. 'Highways and transit.' a. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes, including lanes for parking, weaving, turning or climbing.

b. Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.

c. Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.

d. Transportation corridor fringe parking facilities.

e. Construction of new truck weigh stations or rest areas.

f. Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

g. Approvals for changes in access control.

h. Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and which is located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

i. Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

j. Construction of bus transfer facilities, including an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements, when

located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

k. Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

L. Hardship acquisition of land where the acquisition may not limit or impede the evaluation of future alternatives for planned construction projects, due to the investment in land through hardship acquisition, including evaluation of future shifts in alignment of highways.

2. 'Airports.' a. Runway, taxiway, apron, or loading ramp construction or repair work including extension, strengthening, reconstruction, resurfacing, marking, grooving, fillets and jet blast facilities, and construction of new heliports on existing airports, except where such action will create environmental impacts off airport property.

b. Installation or upgrading of airfield lighting systems, including runway end identification lights, visual approach aids, beacons and electrical distribution systems.

c. Installation of miscellaneous items including segmented circles, wind or landing direction indicators or measuring devices, or fencing.

d. Construction or expansion of passenger handling facilities.

e. Construction, relocation or repair of entrance and service roadways.

f. Grading or removal of obstructions on airport property and erosion control actions with no off-airport impacts.

g. Landscaping generally and landscaping or construction of physical barriers to diminish impact of airport blast and noises.

h. Projects to carry out noise compatibility programs.

i. Land acquisition and relocation associated with subds. 2.a to i.. above.

j. Removal of a displaced threshold.

3. 'Administrative facilities.' Extensive remodeling, expansion or modification of an administrative building, including an office building, state patrol academy, driver licensing and testing station, state patrol communications building, or other similar facility, which either substantially increases the capacity of the facility or substantially changes its use.

4. 'Financial assistance.' This provision applies to issuance as well as acceptance of the following grants by the department.

a. Financial grant for repair or modification of existing port facilities in locations below the ordinary high-water mark that are not within an area designated by a bulkhead line, a lake bed grant, or a submerged lands lease.

b. Financial grant for repair of an approved disposal facility for contaminated dredge material.

c. Financial grant under the transportation economic assistance program for the construction of a local transportation facility.

5. 'Policy, contract, standard and specification changes.' a. Change in policy on artificial lighting for highways and airports.

b. Change in policy for planting and landscaping on transportation corridors.

c. Processing a contract change for significant changes in design.

d. Major change in design standards or construction specifications.

(d) *CE - Categorical Exclusions.* CE actions are categorically excluded from the requirement to prepare environmental documentation pursuant to the rule published by the United States department of transportation in 23 CFR 771.117, April 1, 1998, or its federal aviation administration order 5050.4A, chapter 3, paragraph 23, October 8, 1985. CE actions do not require environmental documentation because, based on past experience with similar actions, they do not involve significant environmental impacts. They are actions which do not induce significant impacts to planned growth or land use for the area, do not require the relocation of significant numbers of people, do not have a significant impact on any natural, cultural, recreational, historic or other resource, do not involve significant air, noise, or water quality impacts, do not have significant impacts on travel patterns, and do not otherwise, either individually or cumulatively, have any significant environmental impacts. Examples of CE actions include the following:

1. 'Highways and transit.'
  - a. Activities which do not involve or lead directly to construction, including planning and technical studies, grants for training and research programs, research activities, approval of a unified work program and any findings required in the planning process, approval of statewide programs, approval of project concepts, engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed.
  - b. Approval of utility installations along or across a transportation facility.
  - c. Construction of bicycle and pedestrian lanes, paths, and facilities.
  - d. Activities included in the state's "highway safety plan" under 23 U.S.C 402.
  - e. Transfer of lands when the subsequent action to be taken on the lands transferred is not a department action.

f. The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

g. Landscaping.

h. Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no land acquisition or traffic disruption will occur.

i. Emergency repairs.

j. Acquisition of scenic easements.

k. Improvements to existing rest areas and truck weigh stations.

2. 'Airports.' a. Acquisition of an existing privately owned airport, as long as acquisition only involves change of ownership.

b. Acquisition of security equipment required by rule or regulation for the safety or security of personnel and property on the airport, or safety equipment required by rule or regulation for certification of an airport or snow removal equipment.

c. Issuance of airport planning grants.

d. Airport improvement program actions which are tentative and conditional and clearly taken as a preliminary action to establish a sponsor's eligibility under the program.

e. Retirement of the principal of bond or other indebtedness for terminal development.

f. Issuance of airport policy and planning documents including the national plan of integrated airport systems, or NPIM, airport improvement program, or AIP, priority system, advisory circulars on planning, design, and development programs which are not

intended for direct implementation or which are issued by FAA as administrative and technical guidance to the public.

g. Issuance of certificates and related actions under the airport certification program.

h. Issuance of grants for preparation of noise exposure maps and noise compatibility programs pursuant to 49 USC 47501 et seq. and 14 CFR part 150.

i. Airspace determinations.

3. 'Administrative facilities.' Minor construction or expansion of an airport facility, such as a runway, taxiway, apron, service or entrance road, or passenger handling or parking facility.

4. 'Financial assistance.' This provision applies to issuance as well as acceptance of grants by the department.

a. Financial grant for repair modification of existing facilities in locations below ordinary high water mark that are within an area designated by a bulkhead line, a lake bed grant, or a submerged lands lease.

b. Financial grant for maintenance dredging of navigable waterway.

c. Financial grant for disposal of contaminated dredge material at existing approved disposal facilities.

**SECTION 6.** Trans 400.08(2)(intro.) and (a) are amended to read:

Trans 400.08(2) In addition, the following actions and activities of the department are categorized as ~~type IV~~ CE actions:

(a) Activities exempt by statute or approved as categorical exclusions by the United States council on environmental quality pursuant to 40 CFR 1508.4, July 1, 1998

~~1990, and the rule published by the United States department of transportation in 23 CFR 771.117, April 1, 1991, or its federal aviation administration order 5050.4A, chapter 3, paragraph 23, October 8, 1985.~~

**SECTION 7.** Trans 400.09(1) and (2)(intro.) are amended to read:

Trans 400.09(1) As part of system plan development process, the department ~~shall~~ may perform SEE scoping. This scoping is to identify the issues to be addressed, alternatives to be analyzed, and the affected public or agencies involved in the system plan development. No scoping is required for reports or recommendations on proposals for legislation, LEIS's, or ~~type III and type IV~~ ER or CE actions.

(2) For ~~type I and type II project level~~ actions requiring an EIS or EA procedures, the department shall determine by means of scoping, insofar as possible at the time that a proposed action is approved for planning, development or implementation, the probable action designation, environmental review and agency coordination that will be required. If a decision to prepare an EIS is made, the department shall inform the public and affected agencies by publishing a notice of intent in the Wisconsin administrative register and a local newspaper of general circulation. The notice of intent shall include:

**SECTION 8.** Trans 400.10(2)(intro.) is amended to read:

Trans 400.10(2)(intro.) SEE CONTENT. While the general issues to be addressed by a SEE are similar to those in the individual project evaluations, it is recognized that , in most cases the analysis of transportation alternatives, including multi-modal analyses where appropriate, will be qualitative, reflecting the broad level of generality of system plans. Therefore, by necessity, a SEE shall be more conceptual, qualitative, and general

than is common with the individual project environmental reviews. A SEE, prepared as an integral part of a system plan, ~~shall~~ may address the following matters:

(END OF RULE TEXT)

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**Effective Date.** This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

Signed at Madison, Wisconsin, this 28 day of October, 1998.



CHARLES H. THOMPSON

Secretary

Wisconsin Department of Transportation

WISCONSIN LEGISLATIVE COUNCIL STAFF



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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 98-131**

AN ORDER to amend Trans 400.03 (2), 400.04 (7) and (12), 400.05, 400.07 (1) and (2) (intro.), (a), (b) and (c) (intro.), 400.08 (2) (intro.) and (a) and 400.09 (1) and (2) (intro.); and to repeal and recreate Trans 400.08 (1), relating to the Wisconsin environmental policy act.

Submitted by **DEPARTMENT OF TRANSPORTATION**

09-01-98 RECEIVED BY LEGISLATIVE COUNCIL.  
09-30-98 REPORT SENT TO AGENCY.

RS:MM:jal;rv



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## CLEARINGHOUSE RULE 98-131

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

### 2. Form, Style and Placement in Administrative Code

a. In order to provide consistency, s. Trans 400.07 (1) should be expanded to include a description of environmental assessment (EA) and environmental report (ER) actions, similar to the descriptions provided for environmental impact statement (EIS) and categorical exclusion (CE) actions.

b. Section Trans 400.07 (2) (intro.) states that a CE action "*may* not require any environmental documentation . . ." [Emphasis added.] The rule should provide clear standards to determine under which circumstances environmental documentation is and is not required. It may be clearer to say: "CE actions which ~~shall~~ do not require."

c. The use of the term "major and significant actions," in s. Trans 400.07 (2) (a) 1., is problematic because this is not a defined term, although the terms "major action" and "major and significant new proposal" are defined. In addition, is it the intent of the rule that an EIS must be prepared for actions which are, at the same time, both major and significant? Must an EIS be prepared for an action which is major but not significant?

d. It appears that the title to s. Trans 400.07 (2) (a) should include "LEIS," since that paragraph identifies circumstances in which a legislative environmental impact statement (LEIS) must be prepared.

e. Should s. Trans 400.07 (2) (intro.) include references to system-level environmental evaluations (SEEs) and LEISs since that section identifies circumstances in which those types of environmental documents must be prepared?

f. Section Trans 400.07 (2) (a) (intro.) states that an EIS action is "normally" a major action or a major and significant new proposal. The use of the term "normally" implies that sometimes an action for which an EIS must be prepared is not a major action or a major and significant new proposal. The rule should provide clear standards to determine the situations in which an EIS must be prepared for an action which is not major or a proposal which is not major and significant. This comment also applies to the use of "normally" in pars. (b) and (c).

g. Section Trans 400.08 (1) (a) (intro.) contains citations to federal regulations which identify types of federally funded actions requiring the preparation of an EIS. Should the rule state clearly that these types of actions require the preparation of an EIS by the department? Are the examples provided in subs. (1) to (3) types of actions which are included in the federal regulations cited or are these additional types of actions which require the preparation of an EIS? These points should be clarified. This comment also applies to pars. (b), (c) and (d).

h. Section Trans 400.08 (1) (a) 3. (intro.) should be rewritten to follow grammatically from the introductory material in par. (a) (intro.). In addition, in sub. (1) (a) 3. (intro.), what is the relevance of the fact that the types of actions listed which require the preparation of an EIS result in significant increases of rail traffic? The other subdivisions do not contain similar explanatory material.

i. Section Trans 400.08 (1) (b) (intro.) states that the types of department actions which require preparation of an EA are not limited to those set forth in the rule. The rule should set forth clear standards for determining what other types of department actions require preparation of an EA. This comment also applies to pars. (c) and (d).

j. Section Trans 400.08 (1) (b) 1. should be rewritten to specify that the "actions" referred to are highways and transit actions.

k. In s. Trans 400.08 (1) (b) 2. (intro.), "categories" should be changed to "types" to eliminate any confusion that may be caused by the fact that, in the rest of the rule, "category" refers to the type of environmental documentation which is required for departmental action.

l. In s. Trans 400.08 (1) (b) 2. f., the word "above" should be replaced by a specific numeric cross-reference. [See also sub. (1) (c) 2. i.]

m. In s. Trans 400.08 (1) (b) 2. h., what is meant by "extraordinary circumstances"?

n. In s. Trans 400.08 (1) (b) 4. a., the phrase "type 1 action in the table above" should be replaced with language which corresponds to the changes made by the rule. In addition, that subparagraph should be rewritten to specify the action taken by the department with respect to the financial grant which is subject to the preparation of an EA. It is unclear whether that subparagraph refers to the department's issuance or acceptance of a grant or to some other action.

o. In s. Trans 400.08 (1) (c) (intro.), the material in the third sentence is merely descriptive and should be rewritten in the form of a directive. Specifically, in the third sentence, "demonstrates" could be changed to "shall demonstrate."

p. It appears that the information contained in the first sentence of s. Trans 400.08 (1) (c) 1. L. does not pertain to the categorization of department actions but rather specifies circumstances under which the department may acquire land. This material should be relocated to an appropriate portion of the department's administrative rules. In addition, the rule should state what type of environmental documentation is required if the land acquisition referred to does not qualify for an ER. In addition, in the second sentence, what is meant by "shifts in alignment" and how is it determined whether land acquisition "limit[s] the evaluation of alternatives"?

q. In s. Trans 400.08 (1) (c) 2. a., "construction of" should be inserted before "new heliports."

r. In s. Trans 400.08 (1) (c) 4. c., the phrase "the transportation economic assistance" appears to be incomplete. Should "program" be added to the end of that phrase?

s. In s. Trans 400.08 (1) (d) (intro.), the phrase "categorical exclusions" should be replaced with "categorically excluded from the requirement to prepare environmental documentation."

t. In s. Trans 400.08 (1) (d) 1. f., it appears that a right-hand parentheses was inadvertently inserted after "public." In addition, should "public" be changed to "publicly"?

u. In s. Trans 400.08 (1) (d) 2. g., it appears that the phrase "the airport certification" is incomplete. Should "airport" be changed to "airport's"?

v. Section Trans 400.08 (1) (d) 2. h. is confusing and should be rewritten. In addition, in that subparagraph, "per" should be changed to "pursuant to." Finally, a U.S. Code citation should be used for the federal reference, if possible.

w. The phrase "project-level actions," in s. Trans 400.09 (2) (intro.) should be defined.

x. In s. Trans 400.10 (2) (intro.), the use of the phrase "prepared as an integral part of a system plan" implies that there are situations in which a SEE which is prepared does not constitute an integral part of a system plan. If this is the case, the rule should explain whether the information following that introductory material pertains to that type of SEE. If, in the alternative, a SEE must always be prepared as an integral part of a system plan, that requirement should be clearly stated in the rule. Finally, the last sentence states that a SEE "may" address the matters set forth in the paragraphs following the introductory material. The rule should set forth a more meaningful guideline for determining the appropriate contents of a SEE.

y. Section Trans 400.07 (1) states that the designations EIS, EA, ER and CE "shall be used to categorize department actions." The use of the passive verb form fails to specify who has the duty of categorizing department actions. Does the rule purport to categorize all possible types of department actions, without the need for any further determination of appropriate categorization? If so, the phrase "shall be used" should be deleted, because it implies that some person or persons have the duty of categorizing department actions.

#### 4. Adequacy of References to Related Statutes, Rules and Forms

A cross-reference should be added to specify what is meant by the "highway safety plan" referred to in s. Trans 400.08 (1) (d) 1. d.

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. The first word of s. Trans 400.07 (2) (a) 2. should be "An."
- b. In s. Trans 400.07 (2) (a) 2., it appears that the material following the first comma should be rewritten to constitute a separate sentence. In par. (b) 2., the word "in" should be inserted after the word "prepared."
- c. In s. Trans 400.08 (1) (a), to the greatest extent possible, the subparagraphs should be rewritten to follow grammatically the introductory language in par. (a). For example, s. Trans 400.08 (1) (a) 1. a., should be rewritten as follows: "Construction of a new controlled access freeway."
- d. In the first sentence of s. Trans 400.08 (1) (b) (intro.), "in" should be changed to "for."
- e. It appears that the introductory material set forth in s. Trans 400.08 (1) (b) 1. and 2. is unnecessary because, by definition, the purpose of an EA is to determine the significance of the action's environmental effects and whether the action constitutes a major action, thus necessitating the preparation of an EIS.
- f. In s. Trans 400.08 (1) (b) 2. f., "plus" should be changed to "and." In addition, it appears that either "or" or "and" should be inserted after "dwellings."
- g. In s. Trans 400.08 (1) (b) 2. h., it appears that "or which involves the effect" should be changed to "or which has an effect." In addition, in that subparagraph, the material following the last semicolon appears to be incomplete.
- h. In s. Trans 400.08 (1) (c) 1. a., it appears that "lanes for" should be inserted after "including" and "or" should be inserted before "climbing."
- i. In s. Trans 400.08 (1) (c) 1. h., it appears that "which is" should be inserted before "located." In addition, should a term more precise than "near" be used to describe the required proximity of a street to a new bus storage or maintenance facility? A similar comment applies to the use of the term "minor" in subd. 1. i.
- j. In s. Trans 400.08 (1) (c) 3., the material following the last comma should be rewritten as follows: "which either substantially increases the capacity of the facility or substantially changes its use."
- k. In s. Trans 400.08 (1) (d) 1. e., it is unclear what is meant by the phrase "the subsequent action."
- l. In s. Trans 400.08 (1) (d) 2. b., it appears that "or" should be inserted after the first occurrence of the word "airport."
- m. What is a "noise compatibility program" referred to in s. Trans 400.08 (1) (d) 2. h.?
- n. In s. Trans 400.08 (1) (d) 4. a., it appears that the word "or" should be inserted after the last comma. Also, subd. 4. c. needs to be rewritten.

ANALYSIS OF FINAL DRAFT OF TRANS 400

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(a) **Need for Amended Rule.** The Department's existing rule for implementing WEPA is overly definitive and results in environmental documents being prepared based on the size of a project rather than the importance of a project's potential impacts. Compared to the federal regulations, 23 CFR 771 et seq., which use the concept of impact magnitude, TRANS 400 requires an Environmental Impact Statement (EIS) when a project is on new location for over 2.5 miles and, presumably, does not require an EIS if the project is on new location for only 2.4 miles. This contributes to the criticisms that WisDOT has spent more on environmental documents than is required by the federal regulations.

NEPA requires the federal government to prepare environmental documentation for major federal actions. WisDOT prepares the federal environmental documentation for review and approval by the federal government for actions for which federal funds are to be used by the Department. The requirements for federally funded actions are followed by the Department when federal funds are involved. These federally funded actions are also actions of the Department to which WEPA applies. Finally, when the Department pursues an action for which only State funds are involved, NEPA does not apply, but WEPA still applies. The intent of this chapter is to direct the Department to follow NEPA and its implementing regulations for both NEPA and WEPA purposes when federal funds are involved in the proposed action. The intent is to apply WEPA and its implementing rules in this chapter when only State funds are involved in the proposed actions, but to make the WEPA implementing rules track the federal law and federal regulations as closely as possible.

(b) **Modifications as a Result of Testimony at Public Hearing.** The public hearing was held in Madison on October 1, 1998. No modifications were made as a result of testimony at the hearing.

(c) **List of Persons who Appeared or Registered at Public Hearing.** No one appeared nor registered at the public hearing. No written comments were received.

(d) **Response to Legislative Council Recommendations.** The Department generally made changes that address all the recommendations of the Legislative Council. In the case of SEEs, however, because the Department determined that their preparation should be discretionary, it was not considered necessary to provide more meaningful guidelines for determining their appropriate content.

(e) **Final Regulatory Flexibility Analysis.** This rule will have no adverse effect on small businesses.

## APPENDIX 1

### Federal Regulations and Procedures Adopted by the Wisconsin Department of Transportation

#### United States Council on Environmental Quality 7-1-98

- 40 CFR § 1500.4 Reducing paperwork
- 40 CFR § 1500.5 Reducing delay
- 40 CFR § 1506.8 Proposals for legislation
- 40 CFR § 1508.4 Categorical exclusion
- 40 CFR § 1508.17 Legislation

#### United States Department of Transportation

##### Federal Highway Administration and Urban Mass Transit Administration 4-1-98

- 23 CFR § 771.115 Classes of actions
- 23 CFR § 771.117 Categorical exclusions
- 23 CFR § 771.119 Environmental assessments
- 23 CFR § 771.123 Draft environmental impact statements

##### Federal Aviation Administration 10-8-85

- Order 5050.4A, Chapter 3
- Paragraph 20 General
- Paragraph 21 Actions normally requiring an EIS
- Paragraph 22 Actions normally requiring an EA
- Paragraph 23 Categorical exclusions

#### Assistance to States for Local Rail Service Under Section 5 of the Department of Transportation Act

[49 CFR 266.19] [Revised as of October 1, 1997]

- 266.19 Environmental impact

UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY  
40 CFR § 1500.4 7-1-98

**§ 1500.4 Reducing paperwork.**

Agencies shall reduce excessive Paperwork by:

- (a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).
- (b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).
- (c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).
- (d) Writing environmental impact statements in plain language (§ 1502.8).
- (e) Following a clear format for environmental impact statements (§ 1502.10).
- (f) Emphasizing the portions of the environmental impact statement that are useful to decision makers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).
- (g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to de-emphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).
- (h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).
- (i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).
- (j) Incorporating by reference (§ 1502.21).
- (k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
- (l) Requiring comments to be as specific as possible (§ 1503.3).
- (m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).
- (n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).
- (o) Combining environmental documents with other documents (§ 1506.4).
- (p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).
- (q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR. 55990, Nov. 29.1978; 44 FR. 873, Jan. 3. 1979]

UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY  
40 CFR § 1500.5 7-1-98

**§1500.5 Reducing delay.**

Agencies shall reduce delay by:

- (a) Integrating the NEPA process into early planning (§ 1501.2).
- (b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).
- (c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).
- (d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).
- (e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).
- (f) Preparing environmental impact statements early in the process (§ 1502.5).
- (g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
- (h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).
- (i) Combining environmental documents with other documents (§ 1506.4).
- (j) Using accelerated procedures for proposals for legislation (§ 1506.8).
- (k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.
- (l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

**§1506.8 Proposals for legislation.**

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY  
40 CFR § 1508.4 7-1-98

**§ 1508.4 Categorical exclusion.**

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY  
40 CFR § 1508.17 7-1-98

**1508.17 Legislation.**

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

FEDERAL HIGHWAY ADMINISTRATION AND URBAN MASS TRANSIT ADMINISTRATION

23 CFR § 771.115 4-1-98

**§ 771.115. Classes of actions.**

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs)*. Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally require an EIS:

- (1) A new controlled access freeway.
- (2) A highway project of four or more lanes on a new location.
- (3) New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).
- (4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) *Class II (CEs)*. Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c). When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d).

(c) *Class III (EAs)*. Actions in which the significance of the environmental impacts is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required

FEDERAL HIGHWAY ADMINISTRATION AND URBAN MASS TRANSIT ADMINISTRATION

23 CFR § 771.117 4-1-98

**§ 771.117 Categorical exclusions.**

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

- (1) Significant environmental impacts;
- (2) Substantial controversy on environmental grounds;
- (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and § 771.117(a) of this regulation and normally do not require any further NEPA approvals by the Administration:

(1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 CFR part 630; approval of project concepts under 23 CFR part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

- (2) Approval of utility installations along or across a transportation facility.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities.
- (4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.
- (5) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action.
- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- (7) Landscaping.
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- (9) Emergency repairs under 23 U.S.C. 125.

- (10) Acquisition of scenic easements.
  - (11) Determination of payback under 23 CFR part 480 for property previously acquired with Federal-aid participation.
  - (12) Improvements to existing rest areas and truck weigh stations.
  - (13) Ridesharing activities.
  - (14) Bus and rail car rehabilitation.
  - (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
  - (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.
  - (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.
  - (18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.
  - (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
  - (20) Promulgation of rules, regulations, and directives.
- (d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:
- (1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).
  - (2) Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.
  - (3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.
  - (4) Transportation corridor fringe parking facilities.
  - (5) Construction of new truck weigh stations or rest areas.
  - (6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
  - (7) Approvals for changes in access control.
  - (8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
  - (9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
  - (10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements when located in a

commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes; advance land acquisition loans under section 3(b) of the UMT Act<sup>3</sup> Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify (sic) for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(e) Where a pattern emerges of granting CE status for a particular type of action the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988]

<sup>3</sup> Hardship acquisition is a early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health safety or financial reasons that remaining in the property poses an undue hardship compared to others.

Protective acquisition is done to prevent imminent development of a parcel which is needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

FEDERAL HIGHWAY ADMINISTRATION AND URBAN MASS TRANSIT ADMINISTRATION  
23 CFR Sec. 771.119

**§ 771.119 Environmental assessments.**

(a) An EA shall be prepared by the applicant in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration believes an EA would assist in determining the need for an EIS.

FEDERAL HIGHWAY ADMINISTRATION AND URBAN MASS TRANSIT ADMINISTRATION  
23 CFR Sec. 771.123

**§771.123 Draft environmental impact statements.**

a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the Federal Register. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

20 . GENERAL.

a. In the Airports Program, Federal actions which require environmental processing generally involve the approval of specific projects at specific airports. A series of projects may be grouped into an overall plan for development, with successive phases being contingent upon other events such as a projected increase in traffic or a change in the aircraft using the airport. Such programs for development will usually be the subject of tiered environmental actions (see paragraph 101 and CEQ 1508.28).

b. All Federal actions fall in one of three categories:

- (1) Those normally requiring an environmental impact statement (CEQ 1508.11).
- (2) Those requiring an environmental assessment (CEQ 1508.9).
- (3) Those which are normally categorically excluded (CEQ 1508.4).

FEDERAL AVIATION ADMINISTRATION

ORDER 5050.4A

Airport Environmental handbook

21. ACTIONS NORMALLY REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT.

a. The following Federal actions will normally require an environmental impact statement:

(1) First time airport layout plan approval or airport location approval (see paragraphs 30 and 32) for a commercial service airport located in a standard metropolitan statistical area.

(2) Federal financial participation in, or airport layout plan approval of, a new runway capable of handling air carrier aircraft at a commercial service airport in a standard metropolitan statistical area.

b. Even though these actions normally require an environmental impact statement, the preparation of the environmental impact statement will usually be preceded by an environmental assessment. If the environmental assessment demonstrates that there are no significant impacts, the action shall be processed as a finding of no significant impact instead of an environmental impact statement.

FEDERAL AVIATION ADMINISTRATION

ORDER 5050.4A

Airport Environmental handbook

22. ACTIONS NORMALLY REQUIRING AN ENVIRONMENTAL ASSESSMENT.

a. Federal financial participation in, or airport layout plan approval of, the following categories of actions shall be subject to the analysis of an environmental assessment and subsequent decision as to whether to prepare an environmental impact statement or a finding of no significant impact.

(1) Airport location.

(2) New runway.

(3) Major runway extension.

(4) Runway strengthening which would result in a 1.5 Ldn or greater increase in noise over any noise sensitive area located within the 65 Ldn contour.

(5) Construction or relocation of entrance or service road connections to public roads which adversely affect the capacity of such public roads.

(6) Land acquisition associated with any of the above items plus land acquisition which results in relocation of residential units when there is evidence of insufficient comparable replacement dwellings, major disruption of business activities, or acquisition which involves land covered under section 4(f) of the DOT Act (recodified 49 USC Subtitle I, section 303, January 12, 1981).

(7) Establishment or relocation of an instrument landing system, or an approach lighting system.

(8) An airport development action that falls within the scope of paragraph 24 or which involves any of the following:

(a) Use of section 4(f) land.

(b) Effect on property included in or eligible for inclusion in the National Register of Historic Places or other Property of state or local historical, architectural, archeological, or cultural significance.

(c) Land acquisition for conversion of farmland, scoring over 160 on Form AD-1006, protected under the Farmland Protection Policy Act (FPPA) to nonagricultural use through Federal financial assistance or through conveyance of government land.

(d) Wetlands, coastal zones, or floodplains.

(e) Endangered or threatened species.

b. FAA requests for conveyance of government land for airport purposes under section 516 of the 1982 Airport Act unless the proposed use of the land falls within the scope of paragraph 23 (see paragraph 34 for more detailed instructions).

c. The actions identified in this paragraph shall be supported through one of the following action choices based upon an environmental assessment:

(1) Environmental impact statements.

(2) Findings of no significant impact (see paragraph 27).

d. Actions identified in this paragraph may be the subject of written reevaluations of previously approved environmental impact statements or findings of no significant impact. (See paragraph 103).

### 23. CATEGORICAL EXCLUSIONS.

a. Unless specifically covered by paragraphs 21, 22, 24, or 26, the items below are categorically excluded from the requirement for formal environmental assessment. Paragraphs 21 and 22 identify specific airport actions such as major runway extensions which require, as a minimum, an environmental assessment. Paragraph 24 identifies extraordinary circumstances which create a requirement for environmental assessment of actions otherwise excluded. Paragraph 26 deals with cumulative impact. For any of the following specific items, paragraphs 21, 22, 24, and 26 shall be reviewed.

(1) Runway, taxiway, apron, or loading ramp construction or repair work including extension, strengthening, reconstruction, resurfacing, marking, grooving, fillets and jet blast facilities, and new heliports on existing airports, except where such action will create environmental impacts off airport property.

(2) Installation or upgrading of airfield lighting systems, including runway end identification lights, visual approach aids, beacons and electrical distribution systems.

(3) Installation of miscellaneous items including segmented circles, wind or landing direction indicators or measuring devices, or fencing.

(4) Construction or expansion of passenger handling facilities.

(5) Construction, relocation or repair of entrance and service roadway.

(6) Grading or removal of obstructions on airport property and erosion control actions with no off-airport impacts.

(7) Landscaping generally, and landscaping or construction of physical barriers to diminish impact of airport blast and noise.

(8) Projects to carry out noise compatibility programs.

(9) Land acquisition and relocation associated with any of the above items.

(10) Federal release of airport land (see paragraph 35).

(11.) Removal of a displaced threshold.

b. The following items are not subject to the paragraphs listed in a. above and are categorically excluded:

(1) Acquisition of an existing privately owned airport, as long as acquisition

only involves change of ownership.

(2) Acquisition of: security equipment required by rule or regulation for the safety or security of personnel and property on the airport (14 CFR Part 107), safety equipment required by rule or regulation for certification of an airport (14 CFR Part 139) or snow removal equipment.

(3) Issuance of airport planning grants.

(4) Airport Improvement Program actions which are tentative and conditional and clearly taken as a preliminary action to establish a sponsor's eligibility under the Program.

(5) Retirement of the principal of bond or other indebtedness for terminal development.

(6) Issuance of airport policy and planning documents including the National Plan of Integrated Airport Systems (NPIAS); Airport Improvement Program (AIP) priority system, advisory circulars on planning, design, and development programs which are not intended for direct implementation or which are issued by FAA as administrative and technical guidance to the public.

(7) Issuance of certificates and related actions under the Airport Certification Program (14 CFR Part 139).

(8) Issuance of grants for preparation of noise exposure maps and noise compatibility programs per sections 103(a) and 104(a) of the Aviation Safety and Noise Abatement Act of 1979 and 14 CFR Part 150 determinations on noise exposure maps and approval of noise compatibility programs.

(9) Airspace determinations (see paragraph 25, Advisory Actions).  
Code of Federal Regulations]

ASSISTANCE TO STATES FOR LOCAL RAIL SERVICE UNDER SECTION 5 OF THE  
DEPARTMENT OF TRANSPORTATION ACT[  
[49 CFR 266.19] Revised as of October 1, 1997]

**Sec. 266.19 Environmental impact.**

(a) General. The Administrator has determined that providing assistance to cover the following costs is not a major action significantly affecting the quality of the human environment: Rehabilitation or improvement consisting of work normally performed on a periodic basis which does not change the existing character of the facility (including work to overcome normal periodic maintenance that had been deferred) rail service continuation, acquisition, and planning.

(b) Substitute service assistance, rail facility construction assistance, and non-exempt rehabilitation or improvement assistance-

(1) Environmental assessment.

(i) When an applicant requests substitute service assistance, rail facility construction assistance, or rehabilitation or improvement assistance (except for rehabilitation or improvement assistance which is exempt under paragraph (a) of this section), the applicant shall:

(A) Prepare an environmental assessment to determine whether the future use of the property will significantly affect the quality of the human environment; or

(B) Provide sufficient documentation to enable the Administrator to determine that the project satisfies the following criteria:

(1) The action is not likely to be environmentally controversial from the point of view of people living within the environment affected by the action or controversial with respect to the availability of adequate relocation housing;

(2) The action is not inconsistent with any Federal, State, or local law, regulation, ordinance, or judicial or administrative determination relating to environmental protection;

(3) The action will not have any significant adverse impact in any natural, cultural, recreational, or scenic environment(s) in which the action takes place, or on the air or water quality or ambient noise levels of such environment(s);

(4) The action will not: use 4(f)-protected properties; adversely affect properties under section 106 of the National Historic Preservation Act; involve new construction location in a wetlands area; or affect a base floodplain;

(5) The action will not cause a significant short- or long-term increase in traffic congestion, or other significant adverse environmental impact on any mode of transportation;

(6) The action is not an integral part of a program of actions which, when considered separately, would not be classified as major FRA actions, but when considered together would be so classified; and

(7) Environmental assessment or documentation is not required by any Federal law, regulation, guideline, order, or judicial or administrative determination other than this part.

(ii) Prior to submitting an application, FRA recommends that the applicant seek the Administrator's advice as to form and substance of the assessment for the

project under consideration. The environmental assessment shall utilize an interdisciplinary approach in identifying the type, degree of effect, and probability of occurrence of primary, secondary and cumulative potential environmental impacts (positive and negative) of the proposed action and of alternative courses of action. The depth of coverage shall be consistent with the magnitude of the project and its expected environmental effects. The environmental assessment and all documents used as a basis for the assessment shall be submitted together with the application for assistance.

(2) Environmental impact statement. A draft environmental impact statement (EIS) shall be submitted with each application when the environmental assessment concludes that the future use significantly affects the quality of human environment. FRA recommends that prior to submitting the application, the applicant seek the Administrator's advice as to form and substance of the EIS for the project under consideration.

(3) Finding of no significant impact. A draft finding of no significant impact declaration shall be submitted with each application when the applicant's environmental assessment concludes that the future use does not significantly affect the quality of the human environment. The finding of no significant impact shall include a description of the project, and sufficient data and environmental findings to support the conclusions as to the impact upon the quality of the human environment. FRA recommends that prior to submitting the application, the applicant seek the Administrator's advice as to the form and substance of this finding for the project under consideration.

(4) Section 4(f) determination. For projects involving the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereon, information to support a determination pursuant to section 4(f) of the Act shall be submitted together with the application. The section 4(f) determination shall document that:

- (i) There is no feasible and prudent alternative to the use of such land; and
- (ii) The project includes all planning to minimize harm resulting from such

use.

(5) Historic preservation. For projects involving the use of historic, cultural or archeological resources listed or eligible for listing in the National Register of Historic Places, information which documents that the Advisory Council on Historic Preservation has been afforded an opportunity for review and comment on the proposed project in accordance with 16 U.S.C. 470 and 36 CFR part 800 shall be submitted with the application.

(c) Highway or highway-related facilities. Substitute service projects involving highway or highway-related facilities are subject to the applicable substantive Federal Highway Administration regulations on environmental considerations (23 CFR part 771).