



## **Chapter 2: National Environmental Policy Act and Implementing Regulations**

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## 2. National Environmental Policy Act and Implementing Regulations

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Transportation projects must comply with a wide range of Federal and state environmental laws, regulations, permits, reviews, notifications, consultations, and other approvals. This chapter introduces major regulations and guidelines that are applicable to transportation projects in Colorado.

The National Environmental Policy Act (NEPA) and implementing regulations discussed in this chapter mandate that transportation decisions involving Federal funds adhere to these regulations. In addition, Colorado Department of Transportation (CDOT) has committed to complying with the intent and requirements of NEPA for all transportation activities, regardless of whether or not they are federally funded. Although non-Federal projects will not require Federal agency approval, the NEPA process is an excellent framework for ensuring environmental factors are considered consistent with CDOT's environmental ethic. Thus, the guiding principles of NEPA have been incorporated into the CDOT transportation planning and project development process, as well as the maintenance and operation of the state transportation system.

### 2.1 National Environmental Policy Act

Developed in 1969 and signed into law on January 1, 1970 (NEPA, 42 United States Code [USC] § 4321 - 4347), NEPA requires that Federal agencies use a systematic, interdisciplinary approach to decision-making when actions may affect the quality of the human environment. The purpose of NEPA is to declare a national policy that will:

- ▶ Encourage productive and enjoyable harmony between man and his environment
- ▶ Promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man
- ▶ Enrich the understanding of the ecological systems and natural resources important to the Nation
- ▶ Establish a Council on Environmental Quality (CEQ)

NEPA is implemented through supporting Federal regulations developed by the CEQ (CEQ 40 Code of Federal Regulations [CFR] § 1500 - 1508) and regulations established by other Federal agencies. The CEQ regulations establish requirements to be followed for any project that is “financed, assisted, conducted, or approved by a Federal agency.” Before initiating a project, it is important to determine whether or not a Federal action is involved and if and how NEPA is applicable to the project.

**NEPA contains three important elements:**

- Declaration of national environmental policies and goals
- Establishment of action-forcing provisions for Federal agencies to implement those policies and goals
- Establishment of CEQ in the Executive Office of the President



The primary lead Federal agency for roadway projects in Colorado, the Federal Highway Administration (FHWA) works as a partner with CDOT and local agencies to implement NEPA on federally aided or approved projects. The Federal Transit Administration (FTA) is the primary lead Federal agency for transit projects. The Federal Railroad Administration (FRA) is the primary lead for railway projects. Chapter 10 of this Manual provides guidance for projects with FTA or FRA involvement.

## **2.2 Council on Environmental Quality – Regulations for Implementing the National Environmental Policy Act**

In 1978, CEQ published the implementing regulations for NEPA, which apply to all Federal agencies (CEQ 40 CFR § 1500 - 1508). The CEQ regulations indicate that each Federal agency should then develop its own more specific implementing regulations for NEPA. The first section of the CEQ regulations, 1500.1 and 1500.2, brings forth the essence of the law. The CEQ purposely left many parts of the mandated procedure flexible so that each Federal agency could develop specific procedures for applying the law and regulations to its own mission and needs.

CEQ's website : <https://www.whitehouse.gov/ceq/>

### **2.2.1 2020 CEQ Rulemaking**

In July 2020, CEQ made wholesale revisions to the NEPA regulations for the first time in more than 40 years. CEQ is now engaged in a comprehensive review of the 2020 rule pursuant to Executive Order 13990 (January 20, 2021). In its regulatory agenda, CEQ announced a phased approach to amending the NEPA regulations. On April 20, 2022, CEQ issued the Phase 1 Final Rule. Phase 2 of the Final Rule has not yet been released. These changes are not fully implemented by Federal agencies.

Notable changes from the updated rulemaking include page limits and timeframes for Environmental Assessments (EAs) and Environmental Impact Statements (EISs). More information can be accessed at <https://ceq.doe.gov/laws-regulations/regulations.html>. Key portions of the CEQ regulations are presented in the follow.

#### **CEQ - Regulations for Implementing NEPA:**

Part 1500 - Purpose and Policy

Part 1501 - NEPA and Agency Planning

Part 1502 - Environmental Impact Statement

Part 1503 - Commenting on Environmental Impact Statements

Part 1504 - Pre-decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory

Part 1505 - NEPA and Agency Decision Making

Part 1506 - Other Requirements of NEPA

Part 1507 - Agency Compliance

Part 1508 - Definitions



## 2.2.2 1500.1 Purpose and Policy

NEPA is the basic national charter for protection of the environment. It establishes policy, sets goals (Section 101), and provides means (Section 102) for carrying out the policy. Section 102(2) contains “action-forcing” provisions to make sure that Federal agencies act according to the letter and spirit of the Act. The regulations implement Section 102(2). Their purpose is to tell Federal agencies what they must do to comply with the procedures and achieve the goals of NEPA. The President, Federal agencies, and courts share responsibility for enforcing NEPA to achieve the substantive requirements of Section 101.

- (a) NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.
- (b) Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions based on an understanding of environmental consequences and to take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

CDOT’s Policy Directive 1904.0 establishes the CDOT NEPA Manual as the method that CDOT and consultants working for CDOT shall use for maintaining compliance with NEPA standards.

## 2.2.3 When Does the National Environmental Policy Act Apply to Your Project?

Under Federal law, NEPA applies to any proposed action or transportation project that has a Federal nexus, including, but not limited to, instances where:

- ▶ Federal funds or assistance will be used at some phase of project development
- ▶ Federal funding or assistance eligibility must be maintained
- ▶ Federal permits or approvals are required, such as Clean Water Act - Section 404 Individual Permit, U.S. Department of Transportation [USDOT] Act - Section 4(f), Endangered Species Act - Biological Opinion for Section 7, etc.
- ▶ There will be new or revised access to the interstate system, which requires FHWA approval

**CEQ. 1981.** Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process. Subject: Questions and Answers about the NEPA Regulations. March 16.

**FHWA Technical Advisory T6640.8A.** 1987. Guidance for Preparing and Processing Environmental and Section 4(f) Documents. October 30.



## 2.3 Joint Federal Highway Administration/ Federal Transit Administration – Environmental Impact and Related Procedures

To address the NEPA responsibilities established by CEQ, the FHWA and FTA jointly issued regulations, Environmental Impact and Related Procedures (FHWA and FTA, 23 CFR 771 § 771.101 - 771.131). FHWA guidance, complementing the regulations, was issued in the form of a Technical Advisory (T6640.8a), Guidance for Preparing and Processing Environmental and Section 4(f) Documents (FHWA, 1987). FHWA developed the Technical Advisory to provide guidance to its field offices and applicants regarding the types of information needed to comply with NEPA, Section 4(f) of the USDOT Act of 1966 (USDOT Act, 49 USC § 303), and other environmental requirements. The Technical Advisory provides detailed information on the contents and processing of environmental documents. The FTA issues guidance, often in the form of circulars, to provide grantees with direction on program-specific issues and statutory requirements. Chapter 10 provides guidance for projects with FTA or FRA involvement.

FTA's website <http://www.fta.dot.gov>

USDOT's website <https://www.transportation.gov/>

FHWA and FTA adopted the policy of managing the NEPA project development and decision-making process as a coordinated process or “umbrella,” under which all applicable environmental laws, executive orders, and regulations are considered and addressed prior to the final project decision and document approval. **Figure 2-1** depicts the NEPA “umbrella” and related environmental laws, executive orders, regulations, etc. Specific discussion of the relevant laws, executive orders, and regulations can be found in Chapter 9.

Conclusion of the NEPA process results in a decision that addresses multiple concerns and requirements. The FHWA and FTA NEPA process allows transportation officials to make project decisions that balance engineering and transportation needs with social, economic, and natural environment factors. During the process, a wide range of stakeholders, including the public, businesses, interest groups, and agencies at all levels of government, provide input into project and environmental decisions.

Before implementing NEPA compliance for a specific project, check online to be certain there are no recent regulatory changes. At a minimum, check the CEQ website, the CDOT environmental website, and the FHWA environmental website.



Figure 2-1. NEPA Umbrella





## 2.4 Classes of Action

Transportation projects vary in type, size, complexity, and potential to affect the environment. Transportation project effects can vary from very minor to significant impacts on the human and natural environment. To account for the variability of project impacts, three basic “classes of action” prescribe the level of documentation required in the NEPA process:

- ▶ Class I - EIS
- ▶ Class II - Categorical Exclusion (CatEx)
- ▶ Class III - EA

The class of action determines how compliance with NEPA is carried out and documented.

**Table 2-1** identifies the three classes of action. Additional information on each class of action is presented in Chapters 4, 5, and 6. The NEPA process is outlined on **Figure 2-2**.

If any changes to the project may affect the classification determination, the CDOT project team and FHWA jointly reconsider the appropriate classification and FHWA approves the revised classification determination. FHWA is the ultimate decision-maker for Federal project classification. If no Federal action is anticipated, CDOT can make the determination for classification without FHWA consultation.

According to CEQ regulations (40 CFR § 1500-1508), the determination that a project will have a “significant impact” is a function of both setting (previously known as context and also known as the potentially affected environment) and the degree of anticipated impacts. Setting means that the significance of the potential impact must be analyzed in several perspectives such as society as a whole (e.g., human, national), the affected region, the affected interests, and the locality. Degree (previously referred to as intensity) refers to the severity of impact. Significance of the impact will vary with the setting of the proposed action and the surrounding area (including residential, industrial, commercial, and natural sites).

As documented in CDOT’s *Environmental Stewardship Guide* (2017), CDOT recognizes that the interdisciplinary approach that NEPA advocates is key to the development and evaluation of successful transportation concepts. This approach has been adopted for all CDOT projects, including projects that require CDOT approvals, reflecting CDOT’s environmental ethic and commitment to meeting both the intent and requirements of NEPA.



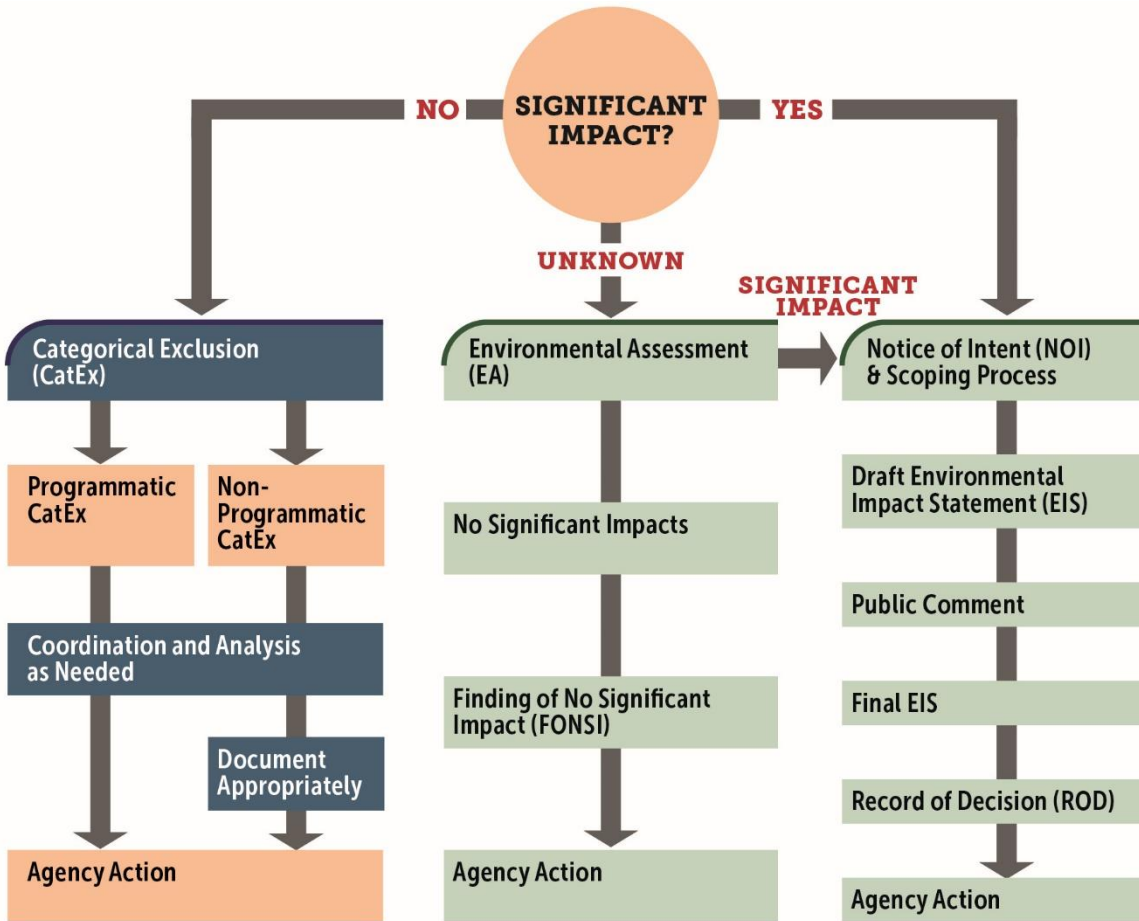


Table 2-1. NEPA Classes of Action

Class I Environmental Impact Statement (EIS) - Chapter 4	Class II Categorical Exclusion (CatEx) - Chapter 5	Class III Environmental Assessment (EA) - Chapter 6
<p>Required for actions likely to have significant environmental effects that cannot be mitigated</p>	<p>Required for actions that do not individually or cumulatively have a significant environmental effect. Necessary environmental studies and compliance with all applicable requirements are still required for the project.</p>	<p>Required for actions that do not qualify as CatEx but where there is insufficient information to determine whether the project’s impacts warrant an EIS. An EA may also be a useful tool in that it incorporates environmental considerations with project design and can aid in NEPA compliance when an EIS is not required.</p>
<p>Examples include:</p> <ul style="list-style-type: none"> <li>▪ A new, controlled-access freeway</li> <li>▪ A highway project of four or more lanes in a new location</li> <li>▪ New construction or extension of fixed rail transit facilities</li> </ul>	<p>Examples include:</p> <ul style="list-style-type: none"> <li>▪ Pedestrian facilities</li> <li>▪ Landscaping</li> <li>▪ Routine maintenance, including resurfacing, bridge replacement and rehabilitation, and minor widening</li> </ul>	<p>Examples include:</p> <ul style="list-style-type: none"> <li>▪ Actions that are clearly not Class II (CatEx)</li> <li>▪ Actions that are clearly not Class I (EIS)</li> <li>▪ New construction of highway interchange</li> </ul>
<p>Upon completing the EIS, FHWA signs a Record of Decision (ROD) that presents the basis for the determination, summarizes any mitigation measures to be incorporated in the project, and documents any Section 4(f) approval.</p>	<p>CDOT uses two classifications of CatExs: programmatic and non-programmatic. Based on Colorado’s Risk-Based Approach, all projects can be approved as a programmatic CatEx if 23 CFR 771.117e has been met. Projects that qualify for a CatEx but do not meet 23 CFR 771.117e can be approved as a non programmatic CatEx. CDOT approves programmatic CatExs, and FHWA and CDOT approve non programmatic CatExs.</p>	<p>In coordination with FHWA, CDOT determines whether a Finding of No Significant Impact (FONSI) is appropriate or if further study is required in an EIS.</p>



Figure 2-2. NEPA Process Options (Classes of Actions)





CEQ regulations call for consideration of the following in determining significance:

- ▶ Degree of effect on public health or safety
- ▶ Presence of unique characteristics of the project area such as proximity to resources or protected areas
- ▶ Degree to which effects on the quality of the human environment are likely to be highly controversial
- ▶ Degree to which possible effects are uncertain or involve unique or unknown risks
- ▶ Degree to which the action would set a precedent for future actions with significant effects
- ▶ Contribution to cumulatively significant effects
- ▶ Degree to which there may be adverse effects to properties or districts on, or eligible for, listing on the National Register of Historic Places
- ▶ Degree to which there may be adverse effects on an endangered or threatened species or its critical habitat
- ▶ Conflict with Federal, state, or local laws for the protection of the environment
- ▶ Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial

To determine significance, the severity of the impact must be examined in terms of:

- ▶ Type, quality, and sensitivity of the resource involved
- ▶ Location of the proposed project
- ▶ Duration of the effect (short- or long-term)
- ▶ Other considerations of context

## **2.5 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users**

In August 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users was signed into law (known as SAFETEA-LU) (23 USC § 1001 - 11167), and a new environmental review process (Section 6002) was established for highways, transit, and multimodal projects. The Section 6002 process encourages early and frequent public and agency involvement in the project development process and development of a coordination plan. The coordination plan is intended to align public and agency participation and comment in the environmental review process. SAFETEA-LU further defined the role of agencies involved with a transportation project receiving Federal funds, which, in turn, helps to expedite project delivery and address concerns relating to project implementation delays, unnecessary duplication of effort and added costs.

## **2.6 Moving Ahead for Progress in the 21st Century Act**

In July 2012, the Moving Ahead for Progress in the 21st Century Act (MAP-21) was signed into law. MAP-21 authorized the funding of surface transportation programs for Federal fiscal years 2013, 2014, and 2015 and was the first long term highway authorization enacted since SAFETEA-LU in 2005.



MAP-21 transformed the policy and programmatic framework for investments to guide the growth and development of the country's vital transportation infrastructure. MAP-21 created a streamlined, performance-based, and multimodal program to address the many challenges facing the U.S. transportation system. Challenges included improving safety, maintaining infrastructure condition, reducing traffic congestion, improving efficiency of the system and freight movement, protecting the environment, and reducing delays in project delivery.

MAP-21 guidance is available on the FHWA website: <http://www.fhwa.dot.gov/map21/>

## **2.7 Fixing America's Surface Transportation Act**

The Fixing America's Surface Transportation (FAST) Act in 2015 built on the authorities and requirements in SAFETEA-LU, MAP-21, and efforts under FHWA's Every Day Counts in an effort to accelerate the environmental review process for surface transportation projects by institutionalizing best practices and expediting complex infrastructure projects without undermining critical environmental laws or opportunities for public engagement.

The FAST Act also provided clarifications from MAP-21 by:

- ▶ Adding purpose and need and preliminary evaluation of alternatives (including elimination of unreasonable alternatives) to the list of planning decisions that can be used in the environmental review process;
- ▶ Eliminating the requirement for concurrence of other participating agencies;
- ▶ Replacing participating agency concurrence with the concurrence of cooperating agencies with responsibility for permitting, review, or project approval;
- ▶ Eliminating the requirement for approval by the state, relevant metropolitan planning organizations (MPO), and/or local or tribal governments where the project is located;
- ▶ Establishing conditions by which a PEL study can be adopted or incorporated by reference; and
- ▶ Emphasizing the preference for programmatic mitigation plans in future NEPA documents.

FAST Act guidance is available on the FHWA website: <http://www.fhwa.dot.gov/fastact/>

## **2.8 Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure**

On August 15, 2017, Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects was issued. The Executive Order requires Federal agencies to process environmental reviews and authorization decisions for major infrastructure projects as One Federal Decision (OFD). A major infrastructure project is an infrastructure project for which multiple Federal authorizations will be required to proceed with



construction, the lead Federal agency has determined that it will prepare an EIS under NEPA, and the project sponsor has identified the reasonable availability of funds sufficient to complete the project. The Executive Order sets a government-wide goal of reducing the average time to complete required environmental reviews and authorization decisions for a major infrastructure project to not more than two years from publication of a Notice of Intent (NOI) to prepare an EIS to issuance of a ROD.

The OFD Memorandum of Understanding for Major Infrastructure Projects (OFD MOU) establishes a process for environmental reviews of major infrastructure projects. It describes the roles and responsibilities for the lead, cooperating, and participating agencies, as well as the permitting milestones. The OFD MOU identifies three concurrence points where the lead Federal agency must request the concurrence of cooperating agencies with authorization decision responsibilities:

- ▶ Purpose and Need (prior to issuance of the NOI)
- ▶ Alternatives to be carried forward for evaluation (prior to detailed analysis in the Draft EIS)
- ▶ Identified Preferred Alternative (Prior to the Final EIS)

Concurrence points prevent delay to permitting by ensuring agencies address key concerns and issues early in the process. Once a concurrence point is reached, the lead agencies will request written concurrence. Cooperating agencies have 10 days to concur or non concur. Concurrence means confirmation by each agency that the information is sufficient for that stage in the process.

To ensure timely decision-making, agencies shall complete:

1. EAs within 1 year unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. One year is measured from the date of agency decision to prepare an EA to publication of an EA or a FONSI.
2. EISs within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the NOI to the date a ROD is signed.

## **2.9 Executive Order 13985, Advancing Racial Equity and Support for the Underserved**

Executive Order 13985 signed on January 20, 2021, by President Biden, changed the definition of what is covered under Environmental Justice. Environmental Justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment.

The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

As guidance is pending, check the CDOT website for updates.



## 2.10 Infrastructure Investment and Jobs Act

The Infrastructure Investment and Jobs Act (IIJA), also known as the “Bipartisan Infrastructure Law” (BIL), was signed on November 15, 2021. The IIJA focuses on more direct funding opportunities for local governments and expands the types of infrastructure improvements eligible for funding, including multimodal, electric vehicle, and carbon emission reduction type projects. At the time that this Manual was updated, FHWA had not released a guidance document on the IIJA.

The IIJA requires special attention to climate change and equity as they relate to infrastructure, housing, and transportation, especially during the MPO planning process.

**Table 2-2** outlines specific changes.

More information is available at:

[https://www.environment.fhwa.dot.gov/legislation/authorizations/bil/bil\\_qa.aspx](https://www.environment.fhwa.dot.gov/legislation/authorizations/bil/bil_qa.aspx)

When available from FHWA, IIJA information can be accessed through this website:

<https://www.fhwa.dot.gov/bipartisan-infrastructure-law/>



Table 2-2. IJJA-Initiated Changes to NEPA Processes

Category	Question	Answer
Definitions / Applicability Requirements	Does the IJJA add or modify any definitions that apply to the Sec. 139 environmental review process?	<p>The <i>environmental review process</i> definition now includes the process and schedule, including a timetable for and completion of any environmental permit, approval, review, or study under any Federal law other than NEPA. See 23 USC § 139(a)(5).</p> <p>The term <i>authorization</i> means “any environmental license, permit, approval, finding, or other administrative decision related to the environmental review process required under Federal law to site, construct, or reconstruct a project” 23 USC § 139(a)(2). Examples include Clean Water Act permits and Endangered Species Act consultation.</p> <p>The term <i>environmental document</i> “includes an environmental assessment [EA], finding of no significant impact [FONSI], notice of intent [NOI], environmental impact statement [EIS], or record of decision [ROD] under the National Environmental Policy Act of 1969.” 23 USC § 139(a)(3).</p> <p>The term <i>major project</i> means a project for which –</p> <ol style="list-style-type: none"> <li>I. Multiple permits, approvals, reviews, or studies are required under a Federal law other than the National Environmental Policy Act of 1969 (42 USC 4321 et seq.);</li> <li>II. The project sponsor has identified the reasonable availability of funds sufficient to complete the project;</li> <li>III. The project is not a covered project (as defined in section 41001 of the FAST Act [42 USC 4370m]); and</li> <li>IV. Either the head of the lead agency has determined that an EIS is required or the head of the lead agency has determined that an environmental assessment (EA) is required, and the project sponsor requests that the project be treated as a major project.</li> </ol> <p>In Sec. 139 and this guidance, the term <i>major project</i> does not have the same meaning as the FHWA <i>major project</i> term described in 23 USC § 106(h). For purposes of this guidance, the term <i>major project</i> will refer to the term as defined for the Sec. 139 environmental review process.</p>





Category	Question	Answer
Process Improvements	Did IJJA Sec. 11301 add new schedule requirements for major projects?	<p>Yes. IJJA Sec. 11301 modified 23 USC § 139(d)(10) to require all authorization decisions necessary for the construction of a major project to be completed no later than 90 days after the date of the issuance of a ROD for the major project. Similarly, major project EA (see major project definition above) schedules would need to show all authorization decisions to be completed by no later than 90 days after the date of the issuance of a FONSI.</p> <p>The head of the lead agency may extend the deadline if: (1) Federal law prohibits the lead agency or another agency from issuing the approval or permit within the 90 days; (2) the project sponsor requests that the permit or approval follow a different timeline; or (3) the lead agency determines that the extension would facilitate the completion of the major project’s environmental review and authorization process.</p>
Process Improvements	Did IJJA Sec. 11301 change the factors that should be considered when developing the project schedule?	<p>Yes. The IJJA changed the schedule requirements for any project subject to the Sec. 139 environmental review process. The coordination plan and schedule should continue to specify all anticipated opportunities for review and comment by the public and participating agencies. The Sec. 139 environmental review process allows the lead agencies to determine how detailed the schedule should be and whether to use specific dates or durations. Establishing a schedule involves consideration of the following factors, including those listed in 23 USC § 139(g)(1)(B)(ii):</p> <ol style="list-style-type: none"> <li>I. Responsibilities of participating agencies under applicable laws;</li> <li>II. Resources available to the cooperating agencies;</li> <li>III. Overall size and complexity of the project;</li> <li>IV. Overall time required by an agency to conduct an environmental review and make decisions under applicable Federal law relating to a project (including the issuance or denial of a permit or license) and the cost of the project;</li> <li>V. Ability to have reviews occur concurrently;</li> <li>VI. Sensitivity of the natural and historic resources that could be affected by the project; and</li> <li>VII. Development of a combined FEIS/ROD (or EA, as applicable) to the maximum extent practicable, including identifying a Preferred Alternative in the DEIS when possible.</li> </ol>





Category	Question	Answer
Process Improvements	Did IIJA Sec. 11301 change the factors that should be considered when developing the project schedule? (Continued)	<p>Sec. 11301 of the BIL also added schedule considerations specific to <i>major projects</i>. For “major projects,” to the maximum extent practicable and consistent with Federal law, the lead agency will develop, in concurrence with the project sponsor, a schedule that is consistent with an agency average of not more than 2 years for the completion of the environmental review process (23 USC § 139(g)(1)(B)(iii)).</p> <p>All FHWA, FRA, or FTA projects initiated after October 1, 2021, that require development of an EIS (or EA, if requested by the project sponsor) and meet the definition of a <i>major project</i> are subject to the 2 year average schedule requirements. The completion of the environmental review process for a major project with an EIS is measured from the date of the Notice of Intent (NOI) publication to the issuance of the ROD for an EIS and, for an EA, from the date on which the lead agency determines that an EA is required to issuance of a FONSI (or decision to pursue an EIS). The established schedule must include milestones to complete the environmental review process and any other Federal, state, or local permit, approval, or review required for the project, and must be consistent with the timeframes in 40 CFR 1501.7(i).</p>
Process Improvements	Did IIJA Sec. 11301 change the page limit for EIS projects?	<p>Yes. The IIJA modified the EIS page limit requirement to 200 pages or fewer (23 USC 139(n)(3)). However, the Council on Environmental Quality (CEQ) requirements at 40 CFR 1502.7 include a 150-page limit for the text of an EIS but allow up to a 300-page limit for projects of unusual scope or complexity. Even though the CEQ language allows up to 300 pages for certain EISs, 23 USC § 139 dictates the requirements for FHWA, FRA, and FTA projects and the lead Federal agency needs to approve any new page limits for EISs that are projected to be more than 200 pages long.</p>
Process Improvements	Did IIJA Sec. 11301 change the time limit for NEPA decisions?	<p>Yes. The statutory language in the IIJA supersedes the language in the CEQ regulations for EISs and EAs designated as major projects. For major projects, the schedule, to the maximum extent practicable, will be consistent with an agency average of not more than 2 years (23 USC 139(g)(1)(B)(iii)). Further, the project-by-project approval of exceptions in the CEQ regulations for the time limits will not be necessary for major projects.</p> <p>If a project is evaluated as an EA but it is not defined as a major project, then the EA must be completed within one year unless the senior agency official approves a new time limit, consistent with the CEQ regulations (40 CFR 1501.10(b)(1)).</p>



Category	Question	Answer
Process Improvements	Does the IIJA change the conditions under which the Federal Agencies issue separate NEPA documents for a project?	<p>Yes. IIJA Sec. 11301 modified 23 USC § 139(d)(8) so that the single environmental document language now captures EISs and EAs that are following the Sec. 139 environmental review process. To the maximum extent practicable, and for all Federal authorizations and reviews for a project, the Agencies and all Federal participating and cooperating agencies must rely on a single environmental document.</p> <p>However, the IIJA modifies 23 USC § 139(d)(8)(D) to allow the lead agency to waive the requirement to prepare a single environmental document if:</p> <ol style="list-style-type: none"> <li>I. The project sponsor requests separate documents;</li> <li>II. The NEPA obligations of a cooperating agency or participating agency have already been satisfied; or</li> </ol> <p>The lead agency determines that a single environmental document would not facilitate timely completion of the environmental review process for the project.</p>
Process Improvements	Does BIL create a new reporting requirement for all environmental documents?	<p>Yes. BIL Section 11301 created a new requirement at 23 USC § 139 (c)(6)(D). Similar to other reporting requirements, FHWA will look at the EAs and EISs completed in the previous fiscal year, calculate the time it took to complete each document from initiation to decision, and then determine the average and median time it took by class of action. FRA and FTA may provide guidance on how they calculate annually the average time taken to complete all environmental documents.</p>
Other	BIL Sec. 11312 created a new NEPA reporting requirement. Who is responsible for collecting the data and issuing the report?	<p>BIL Sec. 11312 created a new requirement at 23 USC § 157 for NEPA data reporting. USDOT must submit an annual report to Congress regarding various categorical exclusion (CE), EA and EIS data. The Agencies' Headquarters will be responsible for collecting the data from the Field Offices and coordinating report development.</p> <p>The Secretary will submit the report to the Committee on Environment and Public Works (Senate) and the Committee on Transportation and Infrastructure (House of Representatives).</p>
Other	What substantive changes did Sec. 11316 of the IIJA make to the Section 4(f) review of proposed uses of public parks, recreation lands, wildlife and waterfowl refuges, and historic sites?	<p>IIJA Sec. 11316 amended 23 USC § 138 to establish a timeline for the Agencies to approve certain proposed uses of Section 4(f) property. As of October 1, 2021, individual Section 4(f) Evaluations require consultation with the Secretaries of the Interior (DOI), Housing and Urban Development (HUD), and Agriculture (USDA) in the form of a 30-day review period on the draft Evaluation. The review period may be extended for a maximum of 15 days. If timely comments are not received from an agency, the Agencies must assume that agency has no objection to the proposed action. IIJA did not make corresponding changes to 49 USC § 303.</p>



Category	Question	Answer
Other	Will the IIJA Sec. 11316 changes to the Section 4(f) review process require a change in the Section 4(f) regulation?	Yes. The Section 4(f) regulation at 23 CFR 774.5(a) will need to be modified to reflect the new timeframe found in 23 USC § 138(a)(2)(B). Specifically, the regulation will need to reflect that the regulatory minimum of 45 days for receipt of comments is now reduced to 30 days for FHWA projects. Both the Section 4(f) regulation and the IIJA allow that if comments are not received within 15 days after the comment deadline, the administration (as defined in 23 CFR 774.17) may assume lack of objection and proceed. However, because IIJA did not amend 49 USC § 303, FRA and FTA will continue to apply the existing requirements in Part 774 (i.e., 60-day coordination period with DOI, HUD, and USDA).

Source: [https://www.environment.fhwa.dot.gov/legislation/authorizations/bil/bil\\_ga.aspx](https://www.environment.fhwa.dot.gov/legislation/authorizations/bil/bil_ga.aspx).

## 2.11 Executive Order 13990

In January 2021, President Biden issued Executive Order 13990 to direct Federal agencies to review Federal regulations taken between January 2017 and January 2021 that conflicted with objectives of improving public health and the environment including the following:

- ▶ Ensuring access to clean air and water;
- ▶ Limiting exposure to dangerous chemicals and pesticides;
- ▶ Holding polluters accountable, including those who disproportionately harm communities of color and low-income communities;
- ▶ Reducing greenhouse gas emissions;
- ▶ Bolstering resilience to the impacts of climate change;
- ▶ Restoring and expanding our national treasures and monuments; and
- ▶ Prioritizing both environmental justice and employment.

In addition to Colorado Senate Bill 21-260, air quality is regulated under the 1990 Clean Air Act Amendments. Transportation Conformity, which applies to areas of the state where the National Ambient Air Quality Standards (NAAQS) have been violated in the past, requires that all federally funded transportation projects and projects of regional air quality significance be described and modeled for regional conformity. A fiscally constrained regional transportation plan must be prepared by the area MPO and must have funding included in the Transportation Improvement Program (TIP).

Executive Order 13990 also revoked Executive Order 13807 and directed the CEQ to review the 2020 NEPA regulations. On October 7, 2021, the CEQ published the first phase of a notice of proposed rulemaking to modify the 2020 NEPA regulations. The rules have not yet been finalized as of the date of this publication.

More information is available at: <https://www.energy.gov/sites/default/files/2021/02/f83/eo-13990-protecting-public-health-environment-restoring.pdf>



## 2.12 Colorado Senate Bill 21-260

Colorado Senate Bill 21-260 and the associated rulemaking Rules Governing Statewide Transportation Planning Process and Transportation Planning Regions (2 Code of Colorado Regulations [CCR] 601-22) established greenhouse gas (GHG) pollution reduction planning levels for transportation that will improve air quality, reduce smog, and provide more sustainable options for travelers across Colorado. GHG pollution includes pollutants that are anthropogenic (man-made) emissions of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, and sulfur hexafluoride.

Major elements of the rulemaking include:

- ▶ Establishment of the GHG reduction levels for transportation planning for CDOT (statewide) and the five MPOs in the state in terms of carbon dioxide equivalents (CO<sub>2</sub>e).
- ▶ Establishment of the process for CDOT/MPOs to determine compliance with the GHG reduction requirements. This requires MOVES emission quantification modeling of the transportation plans using the most current version of MOVES.
- ▶ If the stipulated GHG reduction levels cannot be met, the plan may still be in compliance if an adequate GHG mitigation plan is included or if certain project funding restrictions will be implemented.
- ▶ The Transportation Commission must review and approve the transportation plans and any associated actions.
- ▶ The Transportation Commission may grant waivers to individual projects.

More information is available at: <https://leg.colorado.gov/sb21-260-bill-summary>



## 2.13 References

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