Alaska
Department of
Transportation
and
Public Facilities

Alaska DOT&PF Environmental Procedures Manual

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List of Acronyms

4MP: Marine Mammal Monitoring and Mitigation Plan

ACHP: Advisory Council on Historic Preservation

ADA: Americans with Disabilities Act

AHPA: Alaska Historic Preservation Act

APE: Area of Potential Effect

ARPA: Archaeological Resources Protection Act

AS: Alaska Statute

ATP: Authority to Proceed

BA: Biological Assessment

BO: Biological Opinion

CE: Categorical Exclusion

CEQ: Council on Environmental Quality

CFR: Code of Federal Regulations

COA: Class of Action

DOI: U.S. Department of Interior

DOT&PF: Alaska Department of Transportation & Public Facilities

DPOR: Alaska Division of Parks and Outdoor Recreation

EA: Environmental Assessment

EIS: Environmental Impact Statement

EJ: Environmental Justice

EO: Executive Order

EPA: U.S. Environmental Protection Agency

EPM: Environmental Procedures Manual

ESA: Endangered Species Act

FAHP: Federal-Aid Highway Program

FHWA: Federal Highway Administration

FOIA: Freedom of Information Act

FONSI: Finding of No Significant Impact

FTA: Federal Transit Administration

FRA: Federal Railroad Administration

HPCM: Alaska Highway Preconstruction Manual

HUD: U.S. Department of Housing and Urban Development

IHA: Incidental Harassment Authorization

ITA: Incidental Take Authorization

ITS: Incidental Take Statement

LAW: Alaska Department of Law

LEP: Limited English Proficiency

LOA: Letter of Authorization

LOI: Letter of Initiation

LWCF: Land and Water Conservation Fund

MAP-21: Moving Ahead for Progress in the 21st Century Act

MMPA: Marine Mammal Protection Act

MOA: Memorandum of Agreement

MOU: Memorandum of Understanding

NEPA: National Environmental Policy Act

NHPA: National Historic Preservation Act

NMFS: National Marine Fisheries Service

NOI: Notice of Intent

NPS: National Park Service

NRHP: National Register of Historic Places

OHA: Office of History and Archaeology

OWJ: Official with Jurisdiction

PA: Programmatic Agreement

PCE: Programmatic Categorical Exclusion

PDA: Project Development Authorization

PE: Preliminary Engineering

PID: Project Information Document

PIP: Public Involvement Plan

PQI: Professionally Qualified Individual

QA: Quality Assurance

QC: Quality Control

REM: Regional Environmental Manager

ROD: Record of Decision

ROW: Right-of-Way

SAFETEA-LU: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

SEO: Statewide Environmental Office

SHPO: State Historic Preservation Officer

SOI: Secretary of the Interior

SOL: Statute of Limitations

STIP: Statewide Transportation Improvement Program

T&E: Threatened and Endangered

THPO: Tribal Historic Preservation Officer

USACE: U.S. Army Corps of Engineers

USC: U.S. Code

USDOJ: U.S. Department of Justice

USDOT: U.S. Department of Transportation

USFWS: U.S. Fish and Wildlife Service

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1. Environmental Procedures Overview

1.1. Introduction
1.2. Environmental Team – Structure, Roles, and Responsibilities
1.3. Project Development and the Environmental Process

1.1. Introduction

As part of the Federal Highway Administration (FHWA) Surface Transportation Project Delivery Program (23 U.S. Code [USC] 327), commonly known as the NEPA Assignment Program, the Alaska Department of Transportation and Public Facilities (DOT&PF) has assumed FHWA responsibilities for complying with the National Environmental Policy Act (NEPA) when developing federally-funded highway projects in Alaska that DOT&PF designs and constructs. Under the NEPA Assignment Program Memorandum of Understanding (MOU) between FHWA and DOT&PF dated November 3, 2017, DOT&PF has also assumed FHWA's legal responsibilities and liabilities for its actions and decisions pertaining to the environmental review and approval responsibilities assigned under the NEPA Assignment Program, including interagency consultation, and environmental regulatory compliance.

1.1.1. Purpose

The *Alaska DOT&PF Environmental Procedures Manual* (EPM) identifies environmental requirements to be followed on highway projects under the NEPA Assignment Program and supports compliance with the terms of the MOU. This overview chapter:

- Presents background on NEPA and the NEPA Assignment Program, including key responsibilities and MOU provisions
- Describes the roles and responsibilities of the DOT&PF environmental team
- Discusses the interrelationships between project development and the environmental process
- Outlines DOT&PF NEPA Assignment Program policies and procedures that support appropriate DOT&PF environmental decision-making and the preparation of project environmental documentation that meets NEPA and NEPA Assignment Program requirements

This manual describes the requirements for preparing and processing environmental documentation under the NEPA Assignment Program. Links to additional resources on statutes, regulations, best practices, and environmental resource analysis are provided throughout the EPM chapters. Use of the information in this manual will support development of environmental documents that are compliant, concise, and informative. This manual should be used in conjunction with other resources, including those noted in this manual, to complete the environmental process and produce compliant documents in a timely and efficient manner.

1.1.2. Background

On January 1, 1970, President Nixon signed into law the National Environmental Policy Act of 1969, which established a broad national framework for protecting the environment. The Council on Environmental Quality (CEQ) was also created under NEPA. Its purpose is to oversee NEPA implementation, develop NEPA Implementing Regulations (40 Code of Federal Regulations [CFR] 1500–1508), approve environmental procedures of federal agencies, and adjudicate environmental disputes between federal agencies. Each federal agency is responsible for implementing NEPA on its projects and for developing its own NEPA implementation regulations.

FHWA, the Federal Transit Administration (FTA), and the Federal Railroad Administration (FRA) issued regulations (23 CFR 771) to provide direction for applying NEPA to highway, transit, and railroad projects. FHWA has also issued guidance addressing those regulations, which includes FHWA Technical Advisory 6640.8A, *Guidance for Preparing and Processing Environmental and Section 4(f) Documents*. FHWA's Technical Advisory provides detailed information on the content and processing of environmental documents. FHWA, FTA, and FRA have also issued regulations to address additional environmental requirements related to the project development process (23 CFR 772 [noise], 774 [Section 4(f)], 777 [mitigation for wetlands and natural habitats]).

1.1.3. 23 USC 327 NEPA Assignment

In the 2005, a federal transportation bill, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), was signed

into law. Section 6005 of SAFETEA-LU, codified at 23 USC 327, established a Pilot Program to assign FHWA's full NEPA project level decision making responsibilities to up to five states.

The 2012 federal transportation bill, Moving Ahead for Progress in the 21st Century Act (MAP-21), expanded FHWA's authority to assign FHWA's full NEPA project-level decision-making responsibilities to all interested states. DOT&PF and FHWA signed a MOU on November 3, 2017, under the authority of 23 USC 327, through which the FHWA assigned FHWA's full NEPA project-level decision-making responsibilities to DOT&PF. This NEPA Assignment Program covers all environmental classes of action (COAs): Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs). All federal-aid highway projects, except those noted in Part 3.3.2 of the MOU, are included in the assignment.

Assignment of Federal Laws other than NEPA

For projects assigned under the NEPA Assignment Program, DOT&PF assumed FHWA's responsibilities for:

- Environmental review and documentation
- Interagency consultation and coordination
- Regulatory compliance
- Compliance with the federal environmental laws listed in Part 3.2.1. of the MOU

In addition to FHWA's responsibilities for the listed environmental laws, DOT&PF is responsible for complying with the requirements of any federal environmental laws that apply directly to DOT&PF (MOU Part 3.2.2).

There are exceptions to assignment of federal environmental responsibilities. Any FHWA environmental review responsibility not explicitly listed in Part 3.2.1 of the MOU remains the responsibility of FHWA unless added by written agreement (MOU Part 3.2.2). The following responsibilities are **not** assigned:

- FHWA's air quality conformity responsibilities required by Section 176 of the Federal Clean Air Act (42 USC 85.7506(c)) (MOU Part 3.2.4)
- Federal responsibilities for government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). FHWA remains responsible for all government-to-government consultation. However, notice from DOT&PF to a tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" (MOU Part 3.2.3)
- FHWA's responsibility to make a determination under 23 CFR 650.113 and 650.115 that a significant encroachment into a floodplain is the only practicable alternative (MOU Part 3.2.1)
- FHWA's responsibility to make an preliminary determination for an exception under 23 USC 144(c)(2) for bridge permitting under Section 502(b) of the General Bridge Act of 1946 and Section 9 of the Rivers and Harbors Act of 1899 (MOU Part 5.1.1 B)

DOT&PF coordination with the FHWA Alaska Division office staff is required for FHWA environmental review responsibilities not assigned.

Responsibilities and Requirements

By signing the MOU, DOT&PF became responsible for carrying out all of the FHWA responsibilities it assumed under the NEPA Assignment Program for assigned projects. FHWA has no responsibility or liability for any project actions or decisions made by DOT&PF under the program. Key MOU responsibilities and commitments include:

- DOT&PF has committed to maintaining adequate organizational and staff capability for the NEPA Assignment Program, including use of competent and qualified consultants where beneficial, to effectively carry out its NEPA Assignment Program responsibilities. This includes:
  - Using appropriate environmental, technical, legal, and managerial expertise
  - Devoting adequate staff resources
  - Demonstrating in a consistent manner the capacity to perform the responsibilities assumed under the MOU and applicable federal laws
- In assuming FHWA's responsibilities, DOT&PF is subject to the same procedural and substantive requirements that apply to FHWA in carrying out these responsibilities. These requirements include:
  - Federal laws and regulations

- Presidential Executive Orders
- U.S. Department of Transportation (USDOT) Orders
- FHWA Orders
- Official guidance and policy issued by USDOT, FHWA, or the CEQ
- Applicable federal court decisions
- Interagency agreements (e.g., programmatic agreements, memoranda of understanding, memoranda of agreement) that relate to the environmental review process

For the purposes of carrying out its NEPA Assignment Program responsibilities, DOT&PF is deemed to be a federal agency with respect to the environmental review, consultation, and other related actions required under those responsibilities (MOU Part 5.3.1).

Litigation

The State of Alaska agreed to waive its federal constitutional right to sovereign immunity, and will defend any challenges brought in federal court seeking judicial review of DOT&PF's exercise of the responsibilities assumed under the NEPA Assignment Program. This makes the State of Alaska, rather than FHWA, legally liable and responsible for its decisions and actions on projects under the NEPA Assignment Program, including any action for compliance, discharge, and/or enforcement of any of the responsibilities assumed by DOT&PF.

Meeting Federal Requirements

The processes outlined in this manual are designed to meet the requirements of FHWA's NEPA regulations (23 CFR 771) and CEQ NEPA regulations (40 CFR 1500–1508), as well as other applicable federal regulations (e.g., 23 CFR 774, 36 CFR 800), executive orders, formal FHWA guidance, and negotiated agreements between DOT&PF and other regulatory agencies.

DOT&PF is responsible for conducting all necessary environmental studies and preparing all environmental review documents for projects assumed under the NEPA Assignment Program. This involves an assessment of whether the project may affect sensitive or regulated resources, such as floodplains, wetlands, endangered/ threatened species, historic and archeological sites, private properties, businesses, communities, minority or low-income populations, air quality, and wildlife habitat. As documented in this manual and in the associated *Quality Assurance and Quality Control Plan* (QA/QC Plan) developed for the NEPA Assignment Program, DOT&PF has instituted an internal review and approval process to support appropriate compliance with all environmental requirements on NEPA Assignment Program projects.

1.2. Environmental Team – Structure, Roles, and Responsibilities

The DOT&PF environmental team has personnel at the three regions (Central, Northern, and Southcoast; see Figure 1-1) and at the statewide level (Headquarters, including the Statewide Environmental Office). Regional and Statewide Environmental Office (SEO) personnel work as a team to ensure that the environmental requirements for all projects are met. The goals of the environmental team are aligned to support DOT&PF compliance with all applicable environmental laws, rules, and regulations.

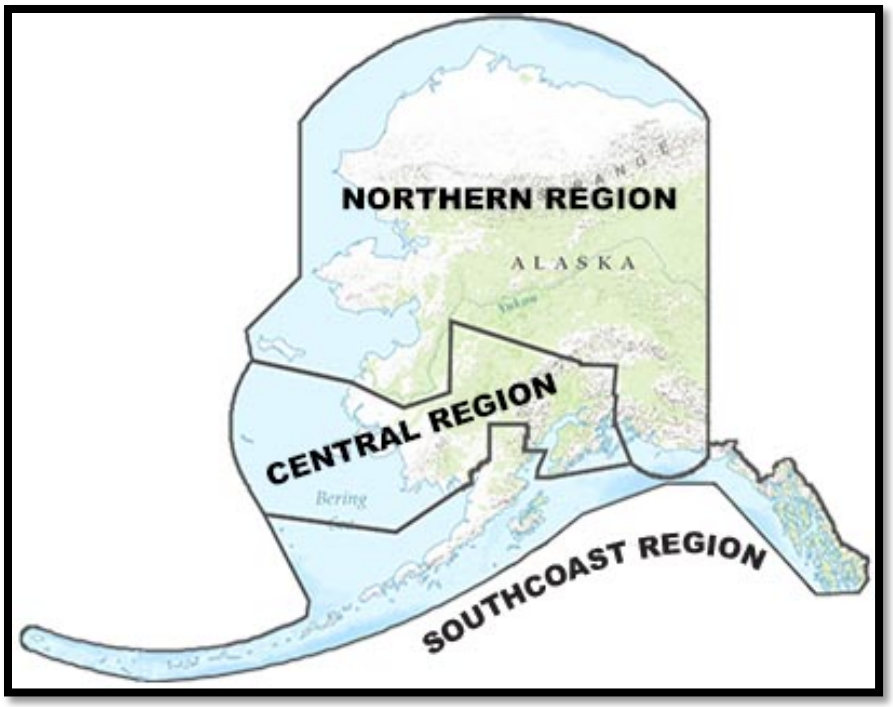

Figure 1-1
DOT&PF Regions

1.2.1. Environmental Impact Analysts

In each region and at the statewide level, Environmental Impact Analysts perform numerous functions in the environmental documentation and permitting process. Job functions of an Environmental Impact Analyst may range from conducting a field analysis (e.g., wetland delineation) to preparing an environmental document (e.g., an EA). The majority of project-specific environmental documentation and permitting work is conducted by Environmental Impact Analysts in the regional offices. Senior regional Environmental Impact Analysts may also be delegated Regional Environmental Manager (REM) approval authorities. There are SEO and regional personnel who specialize in cultural and archaeological resources as part of the Cultural Resources Team, as well as SEO staff focused on stormwater permitting and compliance.

1.2.2. Regional Environmental Managers

Each REM has direct oversight and responsibility for meeting the environmental requirements of projects developed within each region.

Examples of the REM's responsibilities include:

- Represent DOT&PF in meetings and consultations with federal and state agencies, and in public forums
- Supervise and support regional environmental staff
- Supervise preparation of environmental documents (providing edit/review functions)
- Approve Programmatic Categorical Exclusions (PCEs) and PCE Re-evaluations
- Undertake quality assurance (QA) and quality control (QC) review of environmental documents
- Monitor compliance with environmental commitments and permit stipulations
- Coordinate projects with the public and resource agencies
- Serve as the regional point-of-contact for emergency permits
- Serve as the regional point-of-contact for state and federal resource agencies

- Serve as the regional point-of-contact with the SEO on all environmental matters
- Recommend compensatory mitigation

1.2.3. Statewide NEPA Assignment Program Manager and NEPA Program Managers

The SEO Statewide NEPA Assignment Program Manager is responsible for managing the implementation of the NEPA Assignment Program and supervises and distributes the workload of the SEO NEPA Program Managers. The Statewide NEPA Assignment Program Manager and the NEPA Program Managers are responsible for providing QC and oversight for NEPA Assignment projects as well as QA and QC for the NEPA Assignment Program.

Examples of the NEPA Program Manager's responsibilities include:

- Serve as SEO point-of-contact with regard to each region's environmental document processing
- Concur with COA determination recommendations
- Approve non-Programmatic CEs and non-Programmatic CE Re-evaluations
- May be delegated signature authority by the Statewide Environmental Program Manager for EAs and Findings of No Significant Impact (FONSIs) (see EPM Chapter 4)
- Approve Section 4(f) De Minimis Impact Findings and Programmatic Evaluations

Examples of the Statewide NEPA Assignment Program Manager responsibilities include:

- Act as a deputy to the Statewide Environmental Program Manager
- Serve as a point-of-contact to FHWA regarding the NEPA Assignment Program
- Lead internal self-assessments and reporting under the MOU
- Update the NEPA Assignment Program EPM and associated forms

As the supervisor, the Statewide NEPA Assignment Program Manager has all the same approval authorities and may fulfill the same project-level responsibilities, as workloads require, as a NEPA Program Manager. Therefore, any references to a NEPA Program Manager is assumed to include the Statewide NEPA Assignment Program Manager.

1.2.4. Statewide Environmental Program Manager

The Statewide Environmental Program Manager is responsible for managing environmental and regulatory issues at the statewide level and ensuring that DOT&PF implements environmental policies and procedures accurately and consistently.

Examples of the Statewide Environmental Program Manager's responsibilities include:

- Advise DOT&PF Executive Management Team and Commissioner on environmental matters
- Provide oversight for the NEPA Assignment Program
- Provide support and guidance to REMs on environmental and permitting issues
- Concur with COA determination recommendations
- Approve CE, EA, FONSI, EIS, ROD, and Re-evaluation documents
- Approve Section 4(f) Individual Evaluations
- Conduct and coordinate environmental and permit training
- Facilitate conflict resolution between DOT&PF and regulatory agencies
- Identify and implement measures to streamline environmental and permitting processes
- Serve as the point-of-contact for U.S. Army Corps of Engineers (USACE) concerning Section 404 and Section 10 requirements
- Represent DOT&PF on statewide interagency task forces and working groups
- Directly manage an interdisciplinary team of environmental professionals

1.3. Project Development and the Environmental Process

Project development and the environmental process begin with the authorization of project activity funds. Environmental steps occur throughout development of the project, from the planning phase through completion of construction. This section provides a brief overview of the steps involved in project development and the environmental process.

FHWA's NEPA project development regulations require the project to (23 CFR 771.111(f)):

1. Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
2. Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
3. Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

FHWA's Environmental Review Toolkit provides discussion on segmentation and the development of logical termini.

FHWA's NEPA regulations require NEPA approval prior to final design and project construction (23 CFR 771.113(a)).

1.3.1. Project Development

For a federal-aid project to be developed, it must have an approved Project Development Authorization (PDA) and Authority to Proceed (ATP). The engineering manager develops the initial PDA request with input from the planning, design, and environmental sections (*Alaska Highway Preconstruction Manual*, Project Development). The ATP provides authorization from FHWA to proceed with the different stages of project development, and is granted after the initial project funding steps are complete.

The project funding request includes the following information:

- The requested ATP level and funding requirements by phase and year
- A *Project Information Document* (PID) signed by the engineering manager and the REM
  - The REM completes the portion of the PID that describes the environmental status of the project, including COA and re-evaluation status.
- A project map showing the limits and approximate length of the project
- A detailed budget for the authorization request

The different project ATP authorizations are for:

- Utility Relocation
- Planning and Research
- Preliminary Engineering (PE) through Reconnaissance Engineering
- PE through Environmental Document Approval
- PE through Final Plans, Specifications, and Estimate
- Right-of-Way Appraisal and Acquisition
- Construction

Most new projects initially receive ATP for PE through Environmental Document Approval. Consult the *Alaska Highway Preconstruction Manual* (HPCM) for a more in-depth discussion on project development.

1.3.2. Preparing Environmental Documents

Environmental document development and approval is a mandatory step in the delivery of every federally-funded project. To comply with NEPA and other federal laws and regulations, environmental documents must accurately describe multiple aspects of the project, including:

- Project purpose and need
- Project description
- Affected environment
- Environmental consequences
- Environmental commitments and mitigation measures
- Permits and authorizations
- Public and agency involvement, comments, and coordination

Additional information regarding development of compliant environmental documents is presented in subsequent chapters of this manual.

1.3.3. Environmental Project File

Each region may choose to develop its own file organization structure or may use an SEO suggested file structure to meet the requirements of the MOU Part 8.2.3.

The MOU mandates that the environmental project file should include the environmental document and all supporting documentation associated with the environmental analysis, such as:

- Separate files for privileged communications or confidential material
- Checklists and forms, including NEPA approval forms
- Approved environmental decision documents
- Public and governmental agency letters and correspondence
- Public and agency notices, scoping, comments and other correspondence, and meeting notes
- Environmental resource information
- Environmental permits and authorizations
- Relevant project-related correspondence and emails
- Final technical information and reports
- Field surveys and notes
- Other types of supporting information, such as maps, typical sections, permits, and plans
- Documentation of QA and QC

An organized environmental project file facilitates efficient project management and reduces the risk of overlooking important environmental requirements. Documentation from the environmental project file forms part of the administrative record, providing evidence of compliance with federal requirements. Information included in the environmental project file is subject to public records laws, such as the Alaska Public Records Act. The environmental project file is subject to periodic audits by the FHWA and the SEO.

Documentation of Quality Assurance and Quality Control

Evidence of QA shall be maintained in the region project file and includes: Emails; telephone conversation notes; meeting notes summarizing collaborative discussions about any aspect of environmental document development held by the project environmental team, as well as meetings with the following groups as appropriate: broader project team, resource agencies, participating agencies, and local government sponsors. For additional details, see EPM Chapter 11.

The MOU, Part 8.2.3, requires DOT&PF make NEPA Assignment Program project and general administrative files reasonably available for inspection by FHWA at the files' locations upon reasonable notice (not less than five business days). These files shall include, but are not limited to, letters and comments received from governmental agencies, the public, and others with respect to DOT&PF's MOU responsibilities. The MOU also requires DOT&PF to maintain privileged communications in separate files and, at the request of FHWA, provide those communications to FHWA's counsel for the purposes of FHWA's review and monitoring of the NEPA Assignment Program and to preserve DOT&PF's privileges in those communications.

1.3.4. Record Retention Requirements

The record retention and disposition schedules for the SEO and region environmental offices are established by the DOT&PF Statewide Design & Engineering Services Division schedules (SOA Schedule No. 25-539.2). These schedules conform with the requirements of FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1B, issued July 29, 2013.

Draft documents will be kept until a final version is approved. Once a document is made final, all earlier versions or drafts are considered to have no administrative value and may be discarded.

According to Records Retention and Disposition Schedule 25-539.2, NEPA decision documents shall be retained permanently and transferred to the state archives as stated in the schedule. Environmental project files will be retained for ten years after project closeout, unless otherwise required by the schedule.

DOT&PF will permanently store records for Significant Transportation Projects as they are defined in FHWA Order No. 1324.1B.

The MOU, Part 8.3.2, describes required retention schedules for FHWA-DOT&PF Environment Correspondence Files; NEPA and Related Documents; EISs - Other Agencies; and Noise Barriers.

Technical Appendix

Quality Assurance and Quality Control Plan on the DOT&PF Statewide Environmental Office webpage for detailed quality assurance and quality control procedures.

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2. Class of Action Determination

2.1. Introduction
2.2. Class of Action
2.3. Class of Action Determination

2.1. Introduction

This chapter provides:

- A description of the classes of action as defined by the Federal Highway Administration's (FHWA's) National Environmental Policy Act (NEPA) regulations
- A summary of the process for determining a project's class of action (COA)
- The documentation requirements for these determinations

2.2. Class of Action

For every project using FHWA funding or requiring FHWA approval, the environmental documentation process begins with a COA determination. The COA is a major factor in determining the level of environmental document required, which influences the project budget and schedule.

FHWA's NEPA regulations identify three environmental classes of action (23 Code of Federal Regulations [CFR] 771.115), each having different documentation and compliance requirements. The classes of action are:

- *Environmental Impact Statements* (Class I) (23 CFR 771.115(a)) (40 CFR 1508.11) (23 CFR 771.123)– Actions that significantly affect the environment require an Environmental Impact Statement (EIS) (40 CFR 1508.27). The EIS process includes a Notice of Intent, Draft EIS, Final EIS, and Record of Decision (ROD). See 23 CFR 771.115(a) for examples of actions that normally require an EIS and Environmental Procedures Manual (EPM) Chapter 5 for EIS preparation and processing information.
- *Categorical Exclusions* (Class II) (23 CFR 771.115(b)) (40 CFR 1508.4) (23 CFR 771.117)– Categories of actions that do not individually or cumulatively have a significant environmental effect may be excluded from the requirement to prepare an EIS or Environmental Assessment (EA) through the Categorical Exclusion (CE) determination.
  - The majority of Alaska Department of Transportation and Public Facilities (DOT&PF) projects are processed as CEs. Actions that typically meet the definition of a CE are identified on two specific lists, commonly referred to as the "c" list (23 CFR 771.117(c)) and the "d" list (23 CFR 771.117(d)). However, certain projects may not fall under a specific "c" or "d" list activity and may still be processed as a non-listed CE that satisfies the criteria in "a" (23 CFR 771.117(a)). Documentation requirements vary depending on the specific project activities. See EPM Chapter 3 for more information on preparing and processing CEs.
- *Environmental Assessments* (Class III) (23 CFR 771.115(c)) (40 CFR 1508.9) (23 CFR 771.119) – Actions in which the significance of the environmental impact is not clearly established require an EA. An EA is used to determine whether or not the environmental impacts are significant and if there will be a need for further analysis and documentation. An EA is a concise document that should briefly provide sufficient evidence and analysis for determining a Finding of No Significant Impact or whether an EIS is warranted (40 CFR 1508.9). See EPM Chapter 4 for more information on preparing and processing EAs.

2.2.1. Logical Termini

FHWA's NEPA project development regulations require the project to (23 CFR 771.111(f)):

1. Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
2. Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
3. Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

FHWA's Environmental Review Toolkit provides discussion on segmentation and the development of logical termini. Logical termini may need to be considered during the COA determination(s) for abutting projects. When aware of abutting projects, consult with the NEPA Program Manager for assistance in assessing whether to evaluate the projects together under NEPA and determining the appropriate COA.

2.2.2. Significant Impacts

A project that results in significant impacts to the human environment is a Class I project and requires an EIS (23 CFR 771.115(a)). The Council on Environmental Quality (CEQ) NEPA regulations provide guidance on the concept of significance in the evaluation of impacts. In determining significance, CEQ regulations require consideration of both the context and the intensity of the potential impacts on the project area resources (40 CFR 1508.27).

40 CFR 1508.27:

> *Significantly* as used in NEPA requires considerations of both context and intensity:
>
> (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) 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.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

These factors should be kept in mind when assessing whether an action may have significant impacts during a COA determination.

2.2.3. Unusual Circumstances

An action that involves unusual circumstances may not meet the requirements of a CE (23 CFR 771.117(b)). Any action that would normally be classified as a CE but could involve unusual circumstances will require appropriate environmental studies to determine if the CE classification is proper.

Unusual circumstances include (23 CFR 771.117(b)):

- Significant environmental impacts;
- Substantial controversy on environmental grounds;

- Significant impacts on properties protected by Section 4(f) of the *DOT Act of 1966* (23 CFR 774.3) or Section 106 of the *National Historic Preservation Act* (36 CFR 800); or
- Inconsistencies with any federal, state or local law, requirement, or administrative determination relating to the environmental aspects of the action.

The presence of unusual circumstances is considered during the COA determination for all projects. If a project involves unusual circumstances, consult with the NEPA Program Manager for assistance in determining the appropriate COA.

2.3. Class of Action Determination

The COA determination is based upon the types of activities proposed with a project and an assessment of the probable impacts of those activities. The project scope, as provided in the Statewide Transportation Improvement Program (STIP) and the federal-aid funding agreement, should be reviewed when making an initial COA determination, since the environmental document must address the impacts that would result from implementation of the scope identified in the federal-aid funding agreement in order to maintain federal-aid funding eligibility for the project. The activities involved in developing the proposed project must be understood in order to assess the potential for significant impacts and whether unusual circumstances may be a factor for the project.

Some level of research is usually conducted in support of the COA determination. The level of research required depends on the complexity of the proposal and/or the setting. This information also assists in establishing accurate schedules for completing the environmental process as well as reasonable expectations for project funding and permitting. In some cases, it will be obvious that no significant impacts to environmental resources would occur within the project area. In other cases, there may be multiple sensitive resources in the project area, and it may be necessary to consult with the NEPA Program Manager and appropriate resource agencies to determine the COA. A public meeting may also be necessary to assess the potential level of public controversy in support of the COA determination. If there is not sufficient information available to determine the probable impact of the action, the Regional Environmental Manager (REM) should contact the NEPA Program Manager to discuss the work necessary to develop sufficient information.

A project action will remain in a status of undetermined COA until sufficient information is available. As soon as sufficient information is available to identify and determine the probable impact of the action, the REM will identify and recommend the probable COA to the NEPA Program Manager by submitting a Class of Action Consultation Form (*COA Consultation Form*).

A *COA Consultation Form* is completed for every federal-aid highway project. The *COA Consultation Form* provides sufficient information for, as well as documents, the REM's recommendation and the NEPA Program Manager's approval.

The following information is included on the *COA Consultation Form*:

- Project Name
- Federal Project Number
- State Project Numbers
- Primary/Ancillary Project Connections
- List of Attachments (if applicable) - may include maps or figures relevant to the COA determination process
- Project Scope
- Project Description
- Brief discussion of probable impacts of the action
- Funding source(s)

For CE actions, the *COA Consultation Form* also documents:

- CE action category ("c" or "d" list actions, or satisfying "a" criteria)
- Project funding documentation for projects classified under "c" list 23 (c(23))
- For actions classified under c(26), c(27), and c(28), information verifying that the following conditions listed in 23 CFR 771.117(e) are not present:
  (1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;
  (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not

meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of "adverse effect" to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (Section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

- Any unusual circumstances or public controversy

The NEPA Program Manager will review the *COA Consultation Form* and determine whether they concur with the recommended project classification. Upon concurrence with the COA, the NEPA Program Manager will sign the *COA Consultation Form* and return a copy to the REM via email for placement in the region project file.

If the NEPA Program Manager does not concur with the REM's COA recommendation, they will return the *COA Consultation Form* to the REM unsigned with a written explanation for the non-concurrence. The NEPA Program Manager will work with the REM to resolve concerns regarding the COA before the REM submits a new *COA Consultation Form*.

If any new project information or changes in project design during project development will affect the project's COA, the region should prepare a new *COA Consultation Form* documenting the updated information. The REM will submit the new form to the NEPA Program Manager for review and approval.

Technical Appendix

FHWA's NEPA regulations at 23 CFR 771 include class of action definitions.

Class of Action Consultation Form

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3. Categorical Exclusion

3.1. Introduction
3.2. CE Definition
3.3. Processing a CE

3.1. Introduction

This chapter provides an overview of actions classified as categorical exclusions (CEs) and describes the CE documentation and approval process required by the Alaska Department of Transportation and Public Facilities (DOT&PF).

3.2. CE Definition

The Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations define a CE as 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" (40 Code of Federal Regulations [CFR] 1508.4).

The Federal Highway Administration (FHWA) NEPA regulations (23 CFR 771.117(a)) define CEs as actions that meet the CEQ definition of a CE 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
- Require the relocation of significant numbers of people
- Have a significant impact on any natural, cultural, recreational, historic or other resource
- Involve significant air, noise or water quality impacts
- Have significant impacts on travel patterns
- Otherwise, either individually or cumulatively, have any significant environmental impacts

An action that qualifies for a CE is excluded from the requirement to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS). A CE is not a waiver of NEPA review, but is instead one type of NEPA review.

3.2.1. Unusual Circumstances (23 CFR 771.117[b]

Any action which would normally be classified as a CE, but could involve *unusual circumstances*, will require appropriate environmental studies to determine if the CE classification is proper.

"Unusual circumstances" include:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impacts on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act

Inconsistencies with any federal, state or local law, requirement, or administrative determination relating to the environmental aspects of the action. Should any unusual circumstances be identified for a project, consult the NEPA Program Manager for assistance in determining whether the CE classification remains appropriate.

3.2.2. The "c" and "d" Lists 23 CFR 771.117(c) and (d)

FHWA's CE regulations (23 CFR 771.117) contain two lists of actions that, based on past experience, do not normally involve significant environmental impacts. These actions are expected to normally meet the criteria for a CE. See 23 CFR 771.117(c) for "c" list actions, and 23 CFR 771.117 (d) for "d" list actions.

3.2.3. The "d" non-listed actions (23 CFR 771.117(d))

If an action does not fit within a "c" or "d" list category, the action my still satisfy the criteria of "a" (23 CFR 771.117(a)) and may be processed as a non-listed CE. These actions are known to have no significant environmental impacts based upon past experiences with similar actions.

3.3. Processing a CE

A number of different factors need to be considered before determining that a project qualifies as a CE. The following factors will affect how a CE is processed:

- The type of action involved
- The potential level of impacts
- Whether the action qualifies under a Programmatic Approval (see Environmental Procedures Manual [EPM] Section 3.3.1., Programmatic Approvals)

The *Expedited CE Approval Form* and the *CE Documentation Form* can be downloaded from Statewide Environmental Office's webpage of manuals and forms.

"c" List Actions
These actions require the completion of either an *Expedited CE Approval Form* or a *CE Documentation Form*. Actions classified under (c)(26), (c)(27), and (c)(28) must meet the conditions listed in 23 CFR 771.117(e) to be processed as a "c" list CE. The *optional 23 CFR 771.117(e) Form* or text within the environmental document may be used to demonstrate each of the conditions are met.

"d" List Actions
With the exception of actions approved under 23 CFR 771.117(d)(6), these actions require the completion of a *CE Documentation Form* to verify compliance with local, state, and federal requirements and to ensure the project does not involve unusual circumstances that require an EA or EIS. Actions approved under 23 CFR 771.117(d)(6) require the completion of an Expedited CE Approval Form.

The CE approval process is described in Section 3.3.2., DOT&PF Review and Approval Process, below.

The "d" Non-listed Actions
These actions require the completion of a *CE Documentation Form*. These actions must be of a category of similar actions, with specific examples of projects in the category that caused no significant impacts. If a project relied upon for comparison obtained a mitigated Finding of No Significant Impact (mitigated FONSI), additional explanation may be required to demonstrate that the proposed non-listed CE action will not require similar mitigation of impacts. These non-listed CE actions also cannot be expected to cause significant impacts directly, indirectly or cumulatively.

3.3.1. Programmatic Approvals (Programmatic CEs)

Approval authority for certain CEs has been delegated to the Regional Environmental Managers (REMs) under a Chief Engineer's Directive for Programmatic CEs (PCEs). A project must meet all of the General Programmatic Approval Conditions to qualify for any Programmatic Approval. Under this directive, the REM certifies that applicable actions meet the terms of a Programmatic Approval and determines the documentation requirements. The REM may delegate approval authority to a senior environmental analyst. If the senior environmental analyst is unable to perform the delegated duties, approval authority would transfer to a NEPA Manager. There are three types of Programmatic Approvals, which apply to different types of projects. Each has different processing requirements.

Approval 1 – Certain projects processed under 23 CFR 771.117(c)
This Programmatic Approval applies to "c" list actions that meet the Programmatic Approval 1 conditions listed in the Chief Engineer's Directive for Programmatic CEs. While projects approved under Programmatic Approval 1 require an *Expedited CE Approval Form*, a *CE Documentation Form* may be completed at the discretion of the REM.

Approval 2 – Certain projects processed under 23 CFR 771.117(c) and (d)
This Programmatic Approval applies to "c" and "d" list actions that meet the Programmatic Approval 2 conditions listed in the Chief Engineer's Directive for Programmatic CEs. Projects approved under Programmatic Approval 2 require a *CE Documentation Form*.

Approval 3 – Certain Right-of-Way Actions Approved Under 23 CFR 771.117(d)(6)
This Programmatic Approval applies to certain right-of-way (ROW) actions under (d)(6) to dispose of excess ROW or for joint or limited use of ROW, where the proposed use does not have significant adverse impacts that meet the Programmatic Approval 3 conditions listed in the Chief Engineer's Directive for Programmatic CEs. Projects approved under Programmatic Approval 3 require an *Expedited CE Approval Form*.

Projects that qualify as PCEs are approved by the REM (see EPM Section 3.3.2.), whereas CEs that do

not meet the requirements of a Programmatic Approval require approval by the NEPA Program Manager.

3.3.2. DOT&PF Review and Approval Process

Quality Assurance (QA)
The project development team, as established by the region, performs QA during development of the CE through collaboration, project meetings, reports and environmental document development. Documentation of the QA process (e.g., emails, meeting notes, phone logs) is included in the region project file.

Expedited CE Approval Form
The *Expedited CE Approval Form* documents the purpose and need, description, and scope for the proposed project, and provides a brief discussion of probable impacts. An *Expedited CE Approval Form* is only used when Programmatic Approval 1 or 3 applies. The REM has approval authority for these CEs.

The REM must verify that the conditions of the Programmatic Approval are met and documented in the *Expedited CE Approval Form* prior to approval.

The REM reviews the form for content accuracy, signs, and provides a copy to the NEPA Program Manager and includes a copy of the approved form in the project file. No *CE Documentation Form* is required.

CE Documentation Form
The *CE Documentation Form* documents the purpose and need and description for the proposed project, identifies the project's environmental consequences, and summarizes public and agency coordination activities.

The *CE Documentation Form* is prepared and signed by the Environmental Impact Analyst. It is reviewed and signed by the Engineering Manager and the REM.

By signing the *CE Documentation Form*, the Engineering Manager and the REM certify that each has reviewed the form contents. The REM's signature verifies that the CE complies with:

- CEQ and FHWA NEPA regulations (40 CFR 1508.4; 23 CFR 771.117)
- All applicable environmental laws, regulations, agency agreements, and this manual
- Consistency within and between the PCE, supporting appendices, and technical reports
- Conformance to all NEPA requirements and applicable guidance, policies, and procedures

PCE Approval Process
When a Programmatic Approval applies, the REM has approval authority for the project CE documentation and also verifies the *CE Documentation Form* complies with the conditions of Programmatic Approval.

The REM includes a copy of the approved form in the project file and provides a copy to the NEPA Program Manager.

Non-Programmatic CE Approval Process
When no Programmatic Approval applies, the NEPA Program Manager has approval authority for the project CE documentation.

Quality Control (QC)
The REM reviews the form for content accuracy, signs it and forwards it to the NEPA Program Manager for approval.

It is the NEPA Program Manager's responsibility to verify the *CE Documentation Form* complies with the following:

- CEQ and FHWA NEPA regulations (40 CFR 1508.4; 23 CFR 771.117)
- All applicable environmental laws, regulations, agency agreements, and this manual
- Consistency within and between the PCE, supporting appendices, and technical reports
- Conformance to all NEPA requirements and applicable guidance, policies, and procedures

The NEPA Program Manager will work with the REM to resolve any concerns identified in the QC review. NEPA Program Manager QC review comments and REM responses will be placed in the region project file.

The NEPA Program Manager signs the *CE Documentation Form* and provides a copy of the approved form to the REM to include in the region project file.

Technical Appendix

DOT&PF Statewide Environmental Office
Contains links to DOT&PF environmental policies, procedures, forms, templates, and information on the environmental process.

Statewide Environmental Office Document Preparation Website
The DOT&PF environmental document preparation webpage contains links to the current *CE Documentation Form* and the *Expedited CE Approval Form*.

CEQ Guidance on Categorical Exclusions
The guidance recommends best practices for appropriate use of categorical exclusions.

FHWA Guidance on Categorical Exclusions can be found here.

Chief Engineer's Directive on Programmatic CEs (November 13, 2017) and attachment PROGRAMMATIC CATEGORICAL EXCLUSIONS For Use on Federal Aid Highway Program Projects Authorized Under 23 U.S.C. 327, November 2017

4. Environmental Assessment and Finding of No Significant Impact

4.1. Introduction
4.2. Preparation of the EA
4.3. DOT&PF Review and Approval
4.4. Public Involvement and Agency Coordination
4.5. Final EA
4.6. Finding of No Significant Impact (23 CFR 771.121(a))
4.7. Notice of Availability
4.8. Limitation of Claims Notice
4.9. Supplemental EA
4.10. Quality Control Review

4.1. Introduction

An Environmental Assessment (EA) is prepared for projects when the significance of the potential environmental impacts is uncertain. The EA provides the analysis for the Alaska Department of Transportation and Public Facilities (DOT&PF) to determine if a proposed action has the potential to cause significant environmental impacts. If the EA indicates that no significant impacts would occur, a Finding of No Significant Impact (FONSI) may be prepared. An EA and FONSI are prepared in accordance with the procedures in this chapter. If the EA indicates the proposed action would cause significant environmental impacts, an Environmental Impact Statement (EIS) would be prepared in accordance with Chapter 5 and the information contained in the EA would facilitate preparation of the EIS.

The EA should be succinct, and:

- Include the purpose and need for the action
- Describe impacts to the social, economic, and natural environment
- Account for direct, indirect, and cumulative effects
- Include a comparison of potential impacts from each build alternative being considered
- Discuss the no build alternative
- Evaluate one or more build alternatives
- Include public and agency involvement
- Provide the necessary evidence and analyses for determining whether a FONSI is appropriate or if an EIS is required

4.2. Preparation of the EA

The EA is intended to be a concise document and will likely require more complex analysis than a Categorical Exclusion (CE). Preparation of an EA should follow guidance developed by FHWA for the preparation of an EIS under Executive Order 13807, as it pertains to agency coordination (see One Federal Decision, FHWA resources on Executive Order 13807). Technical analyses should be briefly summarized and incorporated by reference in the EA. Final technical reports, studies, or analyses prepared in support of the project are generally not appended to the EA, but maintained in the region office as part of the project file and are available for public review upon request. The EA should focus on the social, economic, and natural environment resources that are potentially impacted by the proposed action. If an analysis demonstrates that a resource category would not be potentially impacted by the proposed action, this determination should be stated early in the EA and the resource category should not be discussed further.

An EA is developed in two-stages, with a Draft EA circulated for public and agency comments and a Final EA providing a basis for a final decision. During the preparation of the EA, agency and public comments and DOT&PF responses, as well as documentation of coordination efforts, will be maintained in the region project file. The comments and responses are to be summarized in the EA Comments and Coordination chapter and attached in an appendix to the EA.

The following are required in an EA:

- Cover Page
- Purpose and Need
- Alternatives (including no build and proposed action/preferred alternative)
- Affected Environment & Environmental Consequences (including avoidance, minimization, and mitigation measures)
- Comments and Coordination

- Section 4(f) Evaluation (if applicable)
- Appendices (supporting information: e.g., scoping report, Section 6(f) analysis)

The National Environmental Policy Act (NEPA) Assignment Program Memorandum of Understanding (MOU) (Part 3.1.2.) requires the following language be included on the cover page of each EA in a way that is conspicuous to the reader:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.*

If only one build alternative is evaluated, the EA must briefly describe alternatives that were considered and eliminated from further study. If an alternative is eliminated from further consideration because it does not meet the purpose and need, the EA must explain how or why the particular alternative did not meet the purpose and need.

If more than one build alternative is evaluated in the EA, a preferred alternative should be identified. DOT&PF may decide to not include a preferred alternative in the EA, but this decision must be approved by the Statewide Environmental Program Manager. If a preferred alternative is not identified in the EA, it must be identified in the Final EA and made available for additional public involvement.

The EA should disclose any primary/ancillary project connections (e.g., tiered projects or phased construction over time), analyze the cumulative impacts of the connected projects, and reference any previously approved environmental documents for the connected projects.

The following references should be consulted for additional guidance on preparation of the EA:

- Federal Highway Administration (FHWA) Technical Advisory on NEPA document preparation (T 6640.8A)
- American Association of State Highway and Transportation Officials' Improving the Quality of Environmental Documents – information on EA content and format
- FHWA Environmental Review Toolkit – tools for NEPA and Section 4(f) analysis and documentation and resources for water, wetlands, wildlife, and historic preservation
- 23 U.S. Code (USC) 139, may be used to help the preparer verify that all necessary components are included in the environmental document
- One Federal Decision, FHWA resources on Executive Order 13807

4.3. DOT&PF Review and Approval Process

The project development team, as established by the region, performs Quality Assurance (QA) during development of the EA through collaboration, project meetings, and intradepartmental review of sections, chapters, or the entire document. Statewide Environmental Office (SEO) review of specific EA chapters may occur prior to submitting the final document for SEO review and approval. Early coordination and communication with SEO can help resolve issues and facilitate an efficient final review process. The region and SEO will perform separate Quality Control (QC) reviews for the Draft EA, Final EA, FONSI and any supplemental EA, as described in Chapter 11. After each QC review, a legal review of the environmental document must be requested. It is important to recognize that more than one review cycle may be necessary prior to receiving document approval.

4.4. Public Involvement and Agency Coordination

For EAs, DOT&PF generally conducts the public involvement steps listed below. Additional public involvement requirements and information are located in Chapter 7.

- Notice to Begin Engineering and Environmental Studies
- Public Involvement Plan
- Scoping
- Notice of Availability
- Public Meeting(s)/Hearing

The MOU (Part 3.1.3.) requires that the following language be disclosed to the public and agencies as part of public involvement and agency outreach procedures, including any Notice of Intent, scoping, or public meeting notice, Notice of Availability, or public hearing:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.*

4.4.1. Notice of Availability

An EA approved for public availability must be made available to the public through a notice of availability that briefly describes the action, its impacts and specifies locations where the EA can be reviewed. The region will first distribute copies of the EA to the appropriate agencies and public for their review and comment, and then publish a notice of availability by the following methods as appropriate:

- In local newspapers, if any
- In the Alaska Online Public Notices
- By mail or email
- By other methods, as appropriate

The region will make the approved EA available for public review as follows:

- By request
- Online (e.g., project websites, Facebook)
- At local libraries, if any
- At DOT&PF region and SEO offices
- At other locations, as appropriate (e.g., community centers)

It is recommended that public and agency review occur concurrently. Refer to Chapter 7 for additional information. The EA is made available for review for a minimum of 30 days from the date the notice of availability was published (23 CFR 771.119(e)). The notice of availability is to be mailed to those who request it (40 CFR 1506.6(b)(1)) and should be published in a local newspaper, if any, and sent by DOT&PF to affected federal, state, and local government entities and state intergovernmental review contacts (23 CFR 711.119(d),(e),(f)). A 30-day review period is standard, but may be reduced or increased in rare circumstances with SEO approval.

Final technical studies may be made available for public or agency review with the EA, with the exception of technical studies and other documentation regarding cultural resources (e.g., Section 106 consultation materials) containing sensitive information, which may be restricted. The Environmental Impact Analyst or Regional Environmental Manager (REM) will consult with the region Cultural Resource Specialist for consistency with DOT&PF's *Cultural Resources Confidentiality Guidelines* before allowing public or agency review of materials containing potentially sensitive information.

See Section 7.5.5 for additional information.

4.4.2. Public Hearing / Public Meeting

Public hearings are formal meetings required by FHWA regulations as described below. Public hearings also have specific requirements that must be met. See Section 7.5.6 for additional information on public hearings. SEO is responsible for the decision to hold a public hearing. While the degree of public participation and agency involvement and the means of soliciting input for EAs are commensurate with project type and complexity, an EA project will provide, at a minimum, the opportunity for a public hearing during the project development process.

If a public hearing is not required or requested, public meetings, workshops, and other means of involvement may be used throughout the project development process. Refer to Chapter 7 for additional information regarding required actions for project public meetings and public hearings.

Projects requiring reviews or approvals as part of other regulatory processes (Section 106 and Section 4(f)) may require additional public and agency involvement and/or notification procedures, which should be integrated into the NEPA process as early as possible. Section 106 and Section 4(f) approvals are standalone documents that must be completed in support of a complete environmental document. For instance, if the project requires an Individual Section 4(f) Evaluation, it must be circulated to the appropriate agencies. Requirements for agency review

of Section 4(f) evaluations are found in 23 CFR 774 and in Chapter 8 of this manual.

4.5. Final EA

At the conclusion of the public review period, a summary of the comments received and a response to each substantive comment or category of comments is prepared and the EA is revised accordingly. The REM, in consultation with the SEO staff member, determines whether to incorporate revisions into the Final EA through errata sheets or with strike-outs and revised text in a newly printed document. The Final EA is documentation of a separate approval action. Additional legal review of the Final EA must occur after incorporating modifications resulting from the public review process.

The Final EA will:

- Include a new cover page with the required MOU disclosure (Part 3.1.2.)
- Identify the preferred alternative if not previously identified, or if changed since the EA public review period additional public involvement may be appropriate prior to the approval of the decision document
- Identify changes in the proposed action, impacts, mitigation measures, findings, agreements and commitments, determinations, and laws or regulations
- Discuss comments received during the EA public review period, and responses provided, including changes to the project or the EA made in response to comments
- Include a new signature sheet

The format for the Final EA may be either:

- An updated version of the EA with strike-outs of revised text, and comments and responses included as an appendix to the Final EA; or
- Errata sheets attached to the EA with the comments and responses included along with the errata sheets (not in the appendix):
    - Changes in the proposed action, impacts, mitigation measures, findings, agreements, determinations, and laws or regulations are reflected in the errata sheets
    - For use in situations where only very minor changes, including corrections, are necessary, and must include page numbers for public involvement comment responses and for locations of any text changes

The Final EA is reviewed for QC as described in Chapter 11.

A FONSI may be submitted to SEO for approval along with the Final EA.

4.6. Finding of No Significant Impact (23 CFR 771.121(a))

A FONSI is both the determination by the SEO that the project will have no significant impacts on the environment, and the documentation of the decision. The Final EA, and any other appropriate environmental documents, is referenced as the basis for the determination. A FONSI is prepared after the 30-day Draft EA public review period is complete and SEO determines that no significant environmental impacts will result from the proposed action. The FONSI is a standalone document with separate signature approval from Final EA, though they may be bound together. A FONSI may be submitted to SEO for approval along with the Final EA. The FONSI determination is made by the Statewide Environmental Program Manager, and may be delegated to the NEPA Program Manager. If significant impacts are identified through the EA process and the project continues to move forward, the SEO is consulted regarding document classification and preparation of an EIS.

A FONSI will include the following:

- A description of the selected alternative
- A summary of environmental impacts, commitments, and mitigation measures
- A description of changes to the proposed action in response to the public and agency comments

Per the NEPA Assignment Program MOU (Part 3.1.2.), the following language will be included on the FONSI cover page:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of*

Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.

The FONSI is reviewed for QC as described in Chapter 11.

4.6.1. Legal Sufficiency Review

All Final EAs or FONSIs relying on a Statute of Limitations (SOL) Notice prepared per 23 USC 139(l) are required to receive a legal sufficiency review and determination. Communications with the Alaska Department of Law (LAW) and legal advice are confidential and are maintained in a separate file for privileged communications, which is not available for consultant, public, or agency distribution or review. When all legal comments have been appropriately addressed, LAW provides a memorandum documenting that the legal sufficiency review has been completed. The LAW memorandum documenting completion of the legal sufficiency review is included in a non-confidential folder of the project file. The Statewide Environmental Program Manager cannot approve a SOL Notice for a Final EA and FONSI until it has been determined to be legally sufficient.

4.7. Notice of Availability

After the FONSI is approved, or concurrent with the SEO review, the region will prepare a notice of availability of the FONSI for SEO approval. After SEO approval, the region will issue DOT&PF's notice of availability of the FONSI to the public and appropriate federal, state, and local agencies (23 CFR 771.121(b)) as described in Section 7.5.8 and Section 7.5.4.

4.8. Limitation of Claims Notice

In accordance with 23 CFR 771.139, SEO may prepare a 23 USC 139(*l*) notice of final agency action for publication in the *Federal Register* by FHWA. Section 139(*l*) refers to a federal statute, 23 USC 139(*l*), establishes a 150-day SOL on legal claims against USDOT and other federal agencies for certain environmental and other approval actions, if specific circumstances apply. A Limitation of Claims Notice must be placed in the *Federal Register* for the 150-day SOL to apply. Publication in the *Federal Register* starts the clock for the SOL. As with other *Federal Register* notices, DOT&PF prepares the notice and transmits it to FHWA for placement in the *Federal Register*.

SOL notices should list or describe all permits, licenses, and approvals by federal agencies that relate to and are within the scope of the project and are final as of the date of the notice. The SOL notice should include the key laws under which the federal agencies took final action (*PROPOSED REVISED GUIDANCE FOR PUBLIC COMMENT, ENVIRONMENTAL REVIEW PROCESS GUIDANCE,* Appendix D: FHWA Guidance on the Statute of Limitations (SOL) provision under 23 U.S.C. Section 139(l) (Question D-5)). SOL Notices require legal sufficiency review (23 USC 139(*l*)).

The region Environmental Impact Analyst will prepare the SOL for the REM's review and submittal to the Statewide Environmental Program Manager for review and submittal to LAW for the legal sufficiency review.

4.9. Supplemental EA

Federal courts have consistently recognized that the CEQ standards for supplementing environmental documents (40 CFR 1502.9) are the same for EAs and EISs. Accordingly, a supplement to either a Draft EA or a Final EA is to be prepared if:

- The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

When developing a supplemental Draft or Final EA follow the procedures, exclusive of scoping, for developing the Draft and Final EAs presented earlier in this chapter. The procedures for public and agency review and comment, DOT&PF review and approval, and quality control review also apply to the supplemental Draft and Final EAs.

4.10. Quality Control Review

QC is an integral part of the DOT&PF environmental review process. The goals of QC are to identify and correct errors and omissions, support a quality finished product, and document QC. QC is a review process that occurs after the document is complete, prior to document approval. QC review is completed on the Draft EA, the Final EA, and the FONSI. Procedures for each of these review steps are described in Chapter 11.

QC review comments, comment responses, and resolutions at each stage of the process are documented in writing and placed in the region project file to document QC review.

Technical Appendix

FHWA NEPA regulations on preparing EAs can be found at 23 CFR 771, Environmental Impact and Related Procedures.

The complete CEQ regulations for implementing NEPA can be found at 40 CFR 1500-1508.

FHWA's "Efficient Environmental Review Process" is designed to improve and streamline project-specific environmental decision-making. For more information, see 23 USC 139.

The FHWA Environmental Review Toolkit provides information on methods and analyses regarding specific environmental resource categories.

Assistance with environmental and Section 4(f) document preparation and processing can be found in FHWA Technical Advisory 6640.8A.

DOT&PF's 2002 EA Preparation guidance has useful suggestions for EA content and format.

FHWA has also developed guidance on the EA and FONSI.

The California Department of Transportation has developed annotated outlines for various environmental document types, including an EA Annotated Outline.

The American Association of State Highway and Transportation Officials' publication "Improving the Quality of Environmental Documents" provides information on EA content and format.

Consult the Alaska Highway Preconstruction Manual (HPCM) for a more in-depth discussion on project development.

Consult the *NEPA Assignment Program Quality Assurance and Quality Control Plan* for additional discussion on QA/QC documentation.

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5. Environmental Impact Statement

5.1. Introduction
5.2. Preparation and Publication of the Notice of Intent
5.3. Preparation of the Draft EIS
5.4. DOT&PF Review and Approval Process
5.5. Public Involvement and Agency Coordination
5.6. Preparation of the Final EIS
5.7. Record of Decision
5.8. Combined Final EIS/Record of Decision
5.9. Limitation of Claims Notice
5.10. Supplemental EIS

5.1. Introduction

An Environmental Impact Statement (EIS) is prepared for an action that is likely to cause significant impacts on the environment. The EIS presents the evaluation of project alternatives and their potential impacts to the human and natural environment to support a decision from the Alaska Department of Transportation and Public Facilities (DOT&PF) on which alternative to approve. As noted in the Federal Highway Administration (FHWA) Environmental Review Toolkit, the EIS process is completed in the following ordered steps: Notice of Intent (NOI), Draft EIS, Final EIS, and record of decision (ROD) or combined Final EIS/ROD. A ROD is prepared at the conclusion of the EIS process to document the decision and its basis. An EIS and ROD are prepared according to the procedures in this chapter.

The purpose of an EIS is to "serve as an action-forcing device to ensure that the policies and goals defined in the [National Environmental Policy] Act (NEPA) are infused into the ongoing programs and actions of the Federal Government… [An EIS] is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions" (Council on Environmental Quality ([CEQ] 40 Code of Federal Regulations [CFR] 1502.1). An EIS documents the development of a project by describing the purpose and need for the proposed action, a full range of reasonable alternatives that would address the purpose and need, the affected environment, and providing a detailed analysis of the potential impacts resulting from each reasonable alternative. The EIS also documents the project's compliance with other applicable environmental laws, regulations, and executive orders.

Actions requiring an EIS under FHWA regulations are considered Class I actions. The following examples of Class I actions that normally require an EIS are found at 23 CFR 771.115:

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

5.2. Preparation and Publication of the Notice of Intent

A Notice of Intent (NOI) is the official notification that a federal agency is beginning the process to prepare an EIS. However, under Executive Order 13807, the goal of completing an EIS (from NOI to ROD) within two years will likely require public and agency outreach related to the EIS to occur prior to the NOI. FHWA has a pre-NOI activities list and guidance for facilitating the completion of an EIS within two years (see One Federal Decision, FHWA resources on Executive Order 13807). DOT&PF develops a NOI for publication in the *Federal Register* after it has consulted with any other project sponsor, initiated the 23 U.S. Code (USC) 139 environmental review process, and reached its decision to prepare an EIS (23 CFR 771.123). Since only federal agencies may publish notices in the *Federal Register*, under the NEPA Assignment Program DOT&PF will continue to submit the NOI to FHWA for publication in the *Federal Register*. See 7.6.3 for additional information.

5.3. Preparation of the Draft EIS

FHWA regulations, at 23 CFR 771.123 , describe the requirements and processes to develop a Draft EIS. FHWA Technical Advisory 6640.8A provides detailed guidance on the preparation and processing of environmental documents, and requires that the following be included in a Draft EIS:

- Cover Page
- Summary
- Table of Contents
- Purpose of and Need for Action
- Alternatives
- Affected Environment & Environmental Consequences
- List of Preparers
- List of Agencies, Organizations, and Persons to Whom Copies of the Statement are Sent
- Comments and Coordination
- Section 4(f) Evaluation (if applicable)
- Index
- Appendices (if any)

The NEPA Assignment Program Memorandum of Understanding (MOU) (Part 3.1.2) requires the following language be included on the cover page of a Draft EIS in a way that is conspicuous to the reader:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.*

FHWA Technical Advisory 6640.8A contains detailed guidance on the format and content of an EIS. The following sections focus on three major elements of the Draft EIS: the purpose of and need for action, the development of alternatives, and the analysis of the alternatives.

5.3.1. Purpose of and Need for Action

The Purpose and Need chapter of the EIS identifies and describes the proposed action and the transportation problem(s) or other needs that the project is intended to address (40 CFR 1502.13), and may include discussion of the logical termini. Logical termini is further discussed in 5.3.2. The purpose and need of a project is essential in establishing a basis for the development of the range of reasonable alternatives required in an EIS and assists with the identification and eventual selection of a preferred alternative (FHWA Environmental Review Toolkit). The chapter should clearly demonstrate that a need exists and should define the need in terms understandable to the general public; i.e., the discussion should clearly describe the problems that the proposed action would correct. The chapter describes the consistency of the proposed action with local transportation planning, local comprehensive planning, land use planning, and growth management efforts. The purpose and need statement should be sufficiently narrow to serve as an effective means to evaluate alternatives but not so narrow as to preclude reasonable alternatives. It will assist with the identification of reasonable alternatives and the selection of the preferred alternative.

The following bullets are examples of possible project purposes:

- Improve traffic flow
- Accommodate high traffic volumes
- Improve connectivity between transportation modes
- Increase safety for motorists, pedestrians, and bicyclists
- Correct roadway deficiencies
- Reduce congestion and delays

The need for the project establishes the rationale for pursuing the action. The following bullets are examples of possible project needs:

- System linkage – Is the proposed project a "connecting link?" How does it fit in the transportation system?
- Capacity – Is the capacity of the present facility inadequate for the present traffic? Projected traffic? What capacity is needed? What is the level(s) of service for existing and proposed facilities?
- Transportation Demand – Is there a relationship to any statewide plan or adopted urban transportation plan?
- Legislation – Is there a federal, state, or local governmental mandate for the action?
- Social demands or economic development – What

projected economic development/land use changes indicate the need to improve or add to the highway capacity?

- Safety hazards – Is the proposed project necessary to correct an existing or potential safety hazard? Is the existing accident rate excessively high? Why? How will the proposed project improve it?
- Roadway deficiencies – Is the proposed project necessary to correct existing roadway deficiencies (e.g., substandard or outdated geometrics, load limits on structures, inadequate cross section, or high maintenance costs)?

Further guidance regarding the development of a purpose and need statement can be found in FHWA Technical Advisory 6640.8A and FHWA Memorandum *The Importance of Purpose and Need*. A well-developed purpose and need chapter will assist in limiting the number of alternatives that will achieve the project goals, and provide the basis for a legally defensible alternatives discussion.

5.3.2. Development of Alternatives

Logical Termini

FHWA's NEPA project development regulations require the project to (23 CFR 771.111(f)):

1. Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
2. Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
3. Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

An FHWA memo dated November 5, 1993 provides additional guidance on the development of logical termini.

The Alternatives chapter of the EIS describes the reasonable alternatives that are being evaluated to meet the purpose of and need for the proposed action. The CEQ defines the term "reasonable" as those alternatives that are "practical and feasible from a technical and economic standpoint using common sense" (CEQ NEPA's 40 Most Frequently Asked Questions, Guidance Question 2A). The Alternatives chapter typically includes descriptions of all alternatives considered for the proposed action and how they were screened to eliminate unreasonable alternatives, leaving a full range of reasonable alternatives and a No Action alternative to be presented and evaluated in detail in the EIS. The No Action alternative is always included in the EIS; it is the benchmark against which the impacts of the other alternatives are compared and describes the situation that would occur without the proposed action. CEQ NEPA's 40 Most Frequently Asked Questions, Guidance Question 1b and FHWA Technical Advisory 6640.8A provides a detailed guidance discussion of the factors that might be considered in determining what constitutes a reasonable range of transportation alternatives.

In preparing an EIS, it is important to be clear about DOT&PF's rationale for generating, evaluating, and eliminating alternatives. CEQ regulations require that alternatives that were considered in the planning process and subsequently rejected be briefly described and the reasons for their elimination discussed (40 CFR 1502.14[a]). Alternatives suggested by cooperating and participating agencies or the public during scoping that are eliminated without detailed study should be adequately documented and their reasons for elimination discussed. Include sufficient detail in the EIS to ensure that legal requirements have been met and well documented.

Each of the reasonable alternatives should be considered and discussed with a comparable level of detail, allowing the reader to evaluate the comparative merits of each. At a minimum, the discussion of each alternative should include a clear, non-technical description of the project concept, location, termini, costs, status of right-of-way needs, and any features of the project that help to clarify differences among alternatives. The Alternatives chapter of the EIS should include a concise summary and comparison of the impacts potentially resulting from each reasonable alternative.

The Draft EIS should identify the DOT&PF's preferred alternative or alternatives, if one exists. The preferred alternative is generally the one that the DOT&PF believes would best fulfill its mission and responsibilities while meeting project purpose and need and minimizing impacts to the environment (natural, cultural, and socioeconomic). Typically, the alternatives are adjusted throughout the NEPA process to accommodate avoidance measures and to minimize

harm to the environment and communities. The preferred alternative is typically the alternative that achieves the best balance between needs, impacts, costs, and regulatory requirements. Under certain circumstances, 23 U.S. Code (USC) 139 *Efficient Environmental Reviews for Project Decisionmaking* allows the preferred alternative to be developed to a higher level of detail as long as it does not prejudice the consideration of other alternatives.

As a practical matter, the preferred alternative should be identified in the Draft EIS in order to take advantage of the combined Final EIS/ROD efficiency provided for in the Moving Ahead for Progress in the 21st Century Act (see MAP-21; and the U.S. Department of Transportation's (USDOT's) Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews).

If there is no clear preferred alternative, one need not be identified in the Draft EIS; in this situation, the Draft EIS should explain that a preferred alternative will be identified in the Final EIS. The Draft EIS should also explain that selection of an alternative will not be made until the ROD is issued, after any additional input received on the Final EIS has been fully evaluated.

5.3.3. Analysis of Alternatives

All reasonable alternatives under consideration need to be rigorously explored and evaluated objectively in the EIS. The Affected Environment & Environmental Consequences section(s) of the EIS provides context for the evaluation of impacts of the alternatives. It identifies the existing environmental resources in the area and the condition of the environment. The material should discuss, commensurate with the context and intensity of potential impacts, the existing social, economic, and environmental setting. Also, it should identify environmentally sensitive features. The use of graphics and/or photographs for this purpose is especially effective. There is a tendency to include too much information in the Affected Environment discussion in the EIS: descriptions should be no longer than needed to understand the area and the potential impacts of the alternatives.

The Environmental Consequences discussion in the EIS describes the potential impacts of project alternatives and documents the methodologies used in evaluating these impacts. Alternatives are assessed to determine how each addresses the transportation issues identified in the purpose and need, as well as potential impacts to the identified resources. The direct and indirect environmental impacts of each of the alternatives and the potential measures that could be taken to avoid, minimize, or mitigate these impacts must be described. Cumulative impacts that would result from the action must also be discussed. Mitigation must be considered for all adverse impacts, regardless of their significance. Environmental impacts should be discussed in terms of their context and intensity. Information in this section is used to compare the alternatives and their impacts.

The Draft EIS should be concise, clear, and to the point, and supported by evidence. The Draft EIS must also summarize the scoping process and the results of meetings, consultations, coordination, and comments received during early coordination. During the preparation of the EIS, agency and public comments and DOT&PF responses, as well as documentation of coordination efforts, are maintained in the region project file. The comments and responses are to be summarized in the EIS Comments and Coordination chapter; the complete list of comments and responses will be included in an appendix to the EIS.

The following references should be consulted for additional guidance:

- Federal Highway Administration (FHWA) Technical Advisory on National Environmental Policy Act (NEPA) document preparation (T 6640.8A)
- AASHTO's Practitioner's Handbook 15: Preparing High Quality Environmental Documents for Transportation Projects
- The FHWA Environmental Review Toolkit, particularly sections on purpose and need, alternatives, and the EIS
- 23 USC 139 Efficient Environmental Reviews for Project Decisionmaking can assist the reviewer in verifying that all necessary components are included in the EIS.

5.4. DOT&PF Review and Approval Process

The project development team, as established by the region, performs Quality Assurance (QA) and Quality Control (QC) review during preparation of the EIS through collaboration, project meetings, and intradepartmental review of sections, chapters, or the

entire document. The Regional Environmental Manager (REM) provides the first-tier QA review and may request that subject matter experts review environmental document sections that contain information pertaining to their areas of expertise. Once comments have been addressed to the satisfaction of the REM, the REM will obtain region preconstruction engineer recommendation for public availability and then transmit the Draft EIS to the State Environmental Office (SEO) for review. It is important to recognize that more than one review cycle with the REM or SEO may be necessary prior to document approval.

The QC review of the Draft EIS focuses on content accuracy and information consistency. The QC review also verifies that the Draft EIS is complete and conforms to all NEPA requirements and applicable guidance, policy, and procedure, and that the document is ready to advance to public review. Chapter 11 provides detail on the QC process.

5.4.1. Legal Review

Following REM and SEO review, the SEO submits the Draft EIS to the Alaska Department of Law (LAW) for legal review. The primary goal of legal review is to assess the document for compliance with legal requirements. At the completion of the legal review, LAW provides a written statement that the legal review has been completed and all legal comments have been appropriately addressed. The Draft EIS will not be approved for public circulation until legal review is satisfactorily completed. The LAW statement documenting completion of legal review is included in the region project file. Legal review results and communications are confidential. Legal review comments remain within DOT&PF and are not available for public or agency distribution or review.

5.4.2. Cooperating Agency Review

Cooperating agencies are typically given an opportunity to review the Draft EIS before it is approved for public circulation. This review period may be up to 30 days long, depending on the complexity of the project and related issues. DOT&PF should respond to cooperating agency comments in the Draft EIS. Cooperating agency review can be prior to legal review.

5.4.3. Approval for Circulation

To document that the Draft EIS has completed QC review and legal review, the REM and Statewide Environmental Program Manager each certify the following in separate QC review completion certification emails for the region project file.

5.5. Public Involvement and Agency Coordination

Public and agency involvement is an integral part of the EIS process. Because an EIS involves issues and impacts of greater magnitude than an Environmental Assessment, public and agency involvement is usually more robust than for other project types, and additional steps are required. The enhanced public involvement requirements are intended to increase engagement with agencies and the public and to support early identification, and efficient resolution, of issues that could delay project approval.

FHWA Technical Advisory 6640.8A provides detailed guidance on the preparation of the NOI, the scoping process, and the documentation of comments and coordination that should be included in the EIS.

5.5.1. 23 USC 139 – Efficient Environmental Review Process

Congress included a number of environmental streamlining provisions as part of the 2005 transportation funding act referred to as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Notable among these is Section 6002, "Efficient Environmental Review Process," codified at 23 USC 139. The 2012 transportation funding act, MAP-21, and the 2015 Fixing America's Surface Transportation Act (FAST Act) modified the environmental review process enacted with SAFETEA-LU. The process is mandatory for EISs with an NOI dated after August 10, 2005; it is optional (but not frequently used) for Environmental Assessments. Title 23 USC 139 environmental review process requirements include the following:

- For NEPA assignment projects, DOT&PF is the lead agency for projects, pursuant to 23 USC 139(a)(4).
- The lead agency must invite all federal, state, local, and tribal government agencies that may have an interest in the project to be participating agencies (23 USC 139(d)).
- Agencies defined as participating and cooperating agencies are required to carry out their obligations under other applicable laws concurrently and in

conjunction with their NEPA review in a timely and environmentally responsible manner (23 USC 139(d)(7)).

- E.O. 13807 requires Federal agencies to process environmental reviews and authorization decisions for "major infrastructure projects" as One Federal Decision (OFD) and sets a government-wide goal of reducing, to two years, the average time for each agency to complete the required environmental reviews and authorization decisions for major infrastructure projects, as measured from the date of publication of a notice of intent. All permits and reviews for a transportation project are to rely on a single NEPA document developed by the lead agency; that NEPA document is to be sufficient to satisfy the requirements for any federal approval or other federal action for the project, including federal agency permits (23 USC 139(d)(8)).
- The lead agency must develop a coordination plan for public and agency participation and comment during the environmental review process; the plan must include a schedule (23 USC 139(g)).
- Participating agencies and the public must be given an opportunity for input in the development of the project purpose and need and the range of alternatives to be considered (23 USC 139(f)).
- The lead agency is to collaborate with participating agencies on the appropriate methodologies to be used and the level of detail for the analysis of project alternatives (23 USC 139(f)(4)(C)).
- The lead agency and participating agencies are to work cooperatively to identify and resolve issues that could delay the completion of the environmental review process or result in denial of any approvals required for the project under applicable laws. Title 23 USC 139(h) provides an issue identification and resolution process, including referral to the CEQ and imposing financial penalties.
- There is a 150-day statute of limitations for project judicial review, provided that a notice of final agency action is published in the *Federal Register* (23 USC 139(l)).
- A single document that includes both the Final EIS and the ROD should be used, unless:
    - The Final EIS makes substantial changes to the proposed project relevant to environmental or safety concerns; or
    - There are significant new circumstances or information relevant to environmental concerns that bears on the proposed project or the impacts of the proposed project (23 USC 139(n)).

Additional guidance on complying with the 23 USC 139 environmental review process can be found at FHWA/FTA's SAFETEA-LU Environmental Review Process and USDOT's Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews.

Lead Agency: Under 23 USC 139, DOT&PF serves as the lead federal agency for projects. Other federal, state, or local governmental entities may act as joint lead agencies at the discretion of DOT&PF. For more information on this topic, see the FHWA/Federal Transit Administration SAFETEA-LU Environmental Review Process.

In compliance with 23 USC 139, DOT&PF must initiate the efficient environmental review process by inviting federal, state, tribal, regional, or local agencies that have jurisdiction or expertise or will comment on the project to be participating or cooperating agencies.

Participating Agencies: In order to enhance interagency coordination and identification of issues of concern, 23 USC 139 created a new category of involvement in the environmental review process, termed the "participating agency." The intent of this category is to encourage agencies at all levels of government with an interest in the project to be active participants in the NEPA evaluation. Under 23 USC 139, any federal or non-federal agency that "may have an interest in the project" is required to be invited to become a participating agency in the project environmental review process (23 USC 139(d)). Participating agency invitation letters are required to be sent within 45 days of NOI publication and are to include a deadline for response. Thirty days is a common response deadline. Any federal agency invited to be a participating agency will be designated as a participating agency unless it declines, in writing, stating that the invited agency: (A) Has no jurisdiction or authority with respect to the project; (B) Has no expertise or information relevant to the project; and

(C) Does not intend to submit comments on the project.

State and local agencies invited to be participating agencies will be designated as participating agencies only if they respond affirmatively in writing.

Cooperating Agencies: A federal participating agency may also be designated as a cooperating agency under NEPA (40 CFR 1501.6 and 23 CFR 771.111(d)). A cooperating agency is defined as any federal agency with jurisdiction by law or special expertise with respect to any environmental issue that should be addressed in the EIS (40 CFR 1508.5). Any such federal agency is to be invited to be a cooperating agency. Note that any cooperating agency would also meet the definition of a participating agency and is to be invited, in writing, to serve both roles.

5.5.2. Initiation of 23 USC 139 Environmental Review Process

As the first step in the 23 USC 139 environmental review process, the REM is required to formally notify the Statewide Environmental Program Manager that the review process is being initiated. The notification includes the type of work, its termini, length, and general location, as well as the federal permits and approvals anticipated to be necessary for the proposed project (23 USC 139(e)). The draft NOI may be used for this purpose as long as it contains the required notification information.

5.5.3. Notice of Intent

An NOI is the official notification that a federal agency is beginning the process to prepare an EIS. DOT&PF develops an NOI for publication in the *Federal Register* after it has consulted with any other project sponsor, initiated the 23 USC 139 environmental review process, and reached its decision to prepare an EIS (23 CFR 771.123).

The MOU at Part 10.2.1(B)(i)(a) requires that each NOI receive a legal sufficiency determination prior to publication. Following REM and SEO review, the SEO submits the draft NOI to LAW for a legal sufficiency determination. The LAW statement documenting completion of the legal sufficiency review is included in the region project file. Legal sufficiency communications are confidential and remain within DOT&PF and are not available for public or agency distribution or review.

Because only federal agencies may publish notices in the *Federal Register*, under the NEPA Assignment Program DOT&PF will continue to submit the NOI to FHWA for publication. CEQ regulations require that the NOI include the following (40 CFR 1508.22):

- A description of the proposed action and possible alternatives, including the no-build alternative
- Information regarding the scoping process, including whether, when and where any scoping meeting will be held
- The name and address of a contact person at DOT&PF who can answer questions about the proposed project and the EIS, which will usually be a region contact

For the NOI to serve also as the 23 USC 139 initiation of environmental review, the NOI must also include:

- The type of work
- The proposed project's termini, length, and general location
- Other anticipated federal approvals required for the project, such as permits

The NOI should also be made available locally, through sources such as a local or regional newspaper, as part of a project mailer to appropriate project area zip codes, and/or published online on the State of Alaska Online Public Notices website.

For additional guidance on the content and format of an NOI, see the FHWA Technical Advisory T 6640.8A, Appendix B.

5.5.4. Coordination Plan

DOT&PF must develop a coordination plan for public and agency participation during the environmental review process (23 USC 139(g)). The coordination plan describes how agencies and the public will participate and comment during project environmental review. The coordination plan is to be in place within 90 days of NOI publication. An environmental review schedule is required to be part of the coordination plan, and is to be established after consultation with and concurrence of each cooperating and participating agency. The schedule and any adjustments to it are to be provided to all participating agencies and made available to the public. The coordination plan will include appropriate elements of the Public Involvement Plan. Refer to Chapter 7, Section 7.3.1

for Public Involvement Plan considerations, and to the following sections for the required agency and public coordination under 23 USC 139.

5.5.5. Scoping

Scoping is the process through which a federal lead agency solicits input from agencies, other stakeholders, and the public regarding the scope of the issues to be addressed in the project EIS and the significant issues related to the proposed project (40 CFR 1501.7). Scoping begins after the NOI is published in the *Federal Register*. The scoping process is used to identify the project purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS (23 CFR 771.123(b) and 40 CFR 1501.7). The public and participating agencies must be given the opportunity to provide input in the development of the purpose and need and the range of alternatives (23 USC 139(f)).

Participating agency invitations, as required by 23 USC 139(d), are sent out early in the scoping process. CEQ regulations (40 CFR 1501.7) also require the lead agency to invite the participation of affected federal, state, and local agencies, affected Indian tribes, the project proponent, and other interested parties in the EIS process.

Through collaboration with participating and/or cooperating agencies, DOT&PF develops methodologies to be used to analyze alternatives (23 USC 139(f)(4)(c)). DOT&PF makes the ultimate decision on the methodologies to be used, taking into account participating agency expertise.

Public meetings are not required as part of the scoping process, but are commonly held and serve as an excellent tool for sharing information with agencies and the public and for receiving input. If held, public scoping meetings should be noticed in a local or regional newspaper, sent within a project mailer to residents in appropriate project area zip codes, and/or published online on the State of Alaska Online Public Notices website.

5.5.6. Draft EIS Notice of Availability and Circulation

Notice of Availability

DOT&PF must make available and solicit comments on the Draft EIS after it is prepared. A Notice of Availability is filed with the U.S. Environmental Protection Agency (EPA) for publication in the *Federal Register* (40 CFR 1506.9). The Notice of Availability specifies the locations where the EIS can be reviewed (*required*: DOT&PF regional office; *optional*: local public library, DOT&PF website, community center, and other similar locations). The Notice of Availability also identifies the public comment period for the EIS, which will be not less than 45 days and not more than 60 days, unless DOT&PF establishes a different deadline, with the agreement of all participating agencies. DOT&PF may also extend the comment deadline for good cause (23 USC 139(g)(2)). The notice will state where comments are to be sent (23 CFR 771.123(i)).

If the project has impacts to floodplains, wetlands, Section 4(f) properties, and/or Section 106 properties, incorporate language in the Notice of Availability to cover the public notification requirements for these topics. The Notice of Availability should include standard language from the Civil Rights Office to address Title VI compliance and ADA accessibility.

The Notice of Availability of the Draft EIS should also be published locally, in locations such as a local or regional newspaper, within a project mailer to residents in appropriate project area zip codes, and/or on the State of Alaska Online Public Notices website.

If DOT&PF is considering the issuance of a combined Final EIS/ROD for the project, DOT&PF must provide notice on the cover of the Draft EIS of its intent to follow this approach: "DOT&PF will issue a single Final Environmental Impact Statement and Record of Decision document pursuant to Pub. L. 112-141, 126 Stat. 405, Section 1319(b) unless DOT&PF determines statutory criteria or practicability considerations preclude issuance of the combined document pursuant to Section 1319." For additional information on the combined Final EIS/ROD, see USDOT's Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews. Additionally, if DOT&PF is considering the use of this approach it must identify a preferred alternative in the Draft EIS.

Notices should be combined when applicable. It is DOT&PF standard practice to publish a combined notification for a Notice of Availability and Notice of Public Hearing, if one is held.

Circulation

The Draft EIS must be made available to the public and circulated to agencies for comment no later than the time the Draft EIS is filed with the EPA for *Federal Register* publication (23 CFR 771.123(g)). The Draft EIS is transmitted to public officials, interest groups, and members of the public known to have an interest in the proposed project; federal, state, and local agencies with jurisdiction or expertise, and/or those that have been designated as participating or cooperating agencies; and affected state and federal land management agencies (see 23 CFR 771.123(g)). DOT&PF must request comments from appropriate state and local agencies, affected Indian tribes, and any agency that has requested that it receive EISs on actions of the kind proposed (40 CFR 1503.1). The Notice of Availability and the Draft EIS must identify where comments are to be sent (23 CFR 771.123(i)).

5.5.7. Public Hearing

FHWA's public involvement requirements (23 CFR 771.111(h)) dictate that one or more public hearings or opportunities for public hearing(s) be held for projects on which an EIS is prepared. The public hearing is held during the Draft EIS comment period. Whenever a public hearing is held, the Draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing (23 CFR 771.123 (h)). For additional information on public hearings, see Chapter 7.

5.6. Preparation of the Final EIS

At the end of the public circulation period, a summary of the comments received and a response to each substantive comment or category of comments is developed and the Final EIS is prepared. The Final EIS identifies the preferred alternative, discusses the basis for its identification as preferred, and evaluates all reasonable alternatives considered (23 CFR 771.125(1). If the preferred alternative in the Final EIS is different from the preferred alternative presented in the Draft EIS, the Final EIS must clearly identify the changes, describe the reasons for the changes, and discuss the reasons why any new impacts are not of major concern. The Final EIS also includes all substantive comments received on the Draft EIS and responses to those comments. Comment responses are to be written in an appropriate and respectful manner and are to adequately address the issue or concern raised by the commenter or, when comments do not warrant further response, the Final EIS is to explain why they do not warrant further response and provide sufficient information to support that position. The Final EIS must also discuss any responsible opposing view that was not adequately addressed in the Draft EIS and provide DOT&PF's response to the issue(s) raised (40 CFR 1502.9(b)).

The Final EIS summarizes public and agency involvement and documents compliance, to the extent possible, with all applicable environmental laws and executive orders or provides reasonable assurance that their requirements can be met (23 CFR 771.125(a)(1)). Mitigation measures that are to be incorporated into the proposed action are described. Those mitigation measures presented as commitments in the Final EIS will be incorporated into the project as specified in 23 CFR 771.109(b) and (d).

5.6.1. Final EIS Errata Sheet Approach

In preparing a Final EIS, if modifications to the Draft EIS are minor and are limited to factual corrections or explanations of why the comments do not warrant further response, errata sheets may be attached to the Draft EIS in lieu of rewriting the Draft EIS for the final document (see, 23 USC 139(n); 40 CFR 1503.4(c); and USDOT's Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews). The errata sheets must be made publicly available to the same extent as the Draft EIS, and the Draft EIS must remain available. The errata sheets must include:

- the factual corrections made to the Draft EIS with references to the relevant page numbers in the Draft EIS;
- sources, authorities and reasons that support the position of DOT&PF that the comments do not warrant modification of the Draft EIS or additional response;
- an indication of the specific circumstances that would require further response, particularly the circumstances that could lead to a re-evaluation or a supplemental environmental impact statement; and,
- a web address or other indication of where a copy of the Draft EIS may be obtained.

The REM and the Statewide Environmental Program Manager must agree upon the use of the errata sheet approach. The public and agency comments, the responses to comments, and the errata sheet(s) must

be reviewed for approval as the Final EIS (see Section 5.6.2).

5.6.2. Final EIS Review and Approval

Similar to review at the Draft EIS stage, the REM and Statewide Environmental Program Manager each conduct a review of the Final EIS to confirm that it meets NEPA requirements and DOT&PF standards, and is ready for final approval. Chapter 11 provides details on the QC and approval process for the Final EIS.

5.6.3. Final EIS Distribution

DOT&PF must file the Final EIS with the EPA in accordance with 40 CFR 1506.9. No later than the time the document is filed with the EPA, DOT&PF must distribute it to all individuals, organizations, and agencies that have jurisdiction, provided substantive comments on the Draft EIS, or requested a copy (23 CFR 771.125(g)). For lengthy documents, DOT&PF may distribute the Final EIS's Summary along with an electronic copy or electronic access to the document (23 CFR 771.125(g) and 40 CFR 1502.19). Printed copies of the Final EIS should be made available to those entities on the distribution list that specifically requested printed copies.

If the errata sheet approach is used (Section 5.6.1), only the comments on the Draft EIS, the responses to comments, and the errata sheet(s) must be distributed; however, the entire document with a new cover page must be filed with the EPA as the Final EIS.

A notice of availability of the Final EIS must be published in local newspapers (see Chapter 7 for more information regarding notices), and the Final EIS must be made available for public review at the DOT&PF region office and other public locations (see 23 CFR 771.125(g)). Usually, copies must be provided free of charge; alternatively, with SEO concurrence, copies can be provided at the cost of printing, or requestors can be directed to a public location where the document can be viewed (23 CFR 771.125(f)).

5.7. Record of Decision

If DOT&PF does not combine the Final EIS and ROD in a single document (See Section 5.8) then DOT&PF must prepare a ROD selecting a project alternative. The ROD may be signed no earlier than 30 days after publication of the Final EIS notice in the *Federal Register* or 90 days after publication of a notice for the Draft EIS, whichever is later. The ROD represents DOT&PF's final decision on the project.

The ROD presents the selected alternative and the basis for its selection as specified in 40 CFR 1505.2. It briefly describes each alternative and explains the balancing of values that formed the basis of the alternative selection. The ROD must also identify the environmentally preferred alternative(s) and – if a different alternative is selected – state the reasons why the environmentally preferred alternative was not selected. The ROD summarizes any mitigation measures that will be incorporated in the project and documents any required Section 4(f) approval.

A ROD should identify and respond to all substantive comments received on the Final EIS.

5.7.1. ROD Review and Approval

A ROD should be submitted to the SEO for review and approval along with the Final EIS. The REM and Statewide Environmental Program Manager each perform a QC review of the ROD to confirm that it meets NEPA requirements and DOT&PF standards, and is ready for final approval. The ROD must be provided to LAW for legal review upon the completion of the REM and Statewide Environmental Program Manager QC reviews.

Chapter 11 provides details on the QC and approval process. No additional approvals may be given for the project, except administrative activities such as those taken to secure further project funding until the ROD has been signed.

5.7.2. ROD Distribution

Although not formally required, it is advisable to publish notice of a ROD in the same manner as the Final EIS. The ROD should be circulated to the same entities that received a copy of the Final EIS (23 CFR 771.127), to the extent practicable.

5.8. Combined Final EIS/Record of Decision

MAP-21 Section 1319(b) (codified at 23 USC 139(n)(2)) directs the lead transportation agency, to the maximum extent practicable, to combine the Final EIS and ROD into a single document unless: (A) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or there is a significant new circumstance or information relevant to environmental concerns and that bears on the proposed action or the impacts of the proposed action.

To take advantage of this approach, DOT&PF must have identified a preferred alternative in the Draft EIS. In addition, DOT&PF must have provided notice that the Final EIS and ROD will be combined on the cover of the Draft EIS. For additional information on the combined Final EIS/ROD, see USDOT's Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews.

The REM and SEO determine whether to combine the Final EIS and ROD based on the specifics of the proposed action, with input from the cooperating agencies involved, and after consulting the USDOT's Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews.

When a combined Final EIS/ROD is prepared, the applicable requirements for both a Final EIS and ROD must be met except to the extent those requirements directly conflict with MAP-21 Section 1319. The combined Final EIS and ROD shall be distributed to all agencies and individuals who provided substantive comments on the Draft EIS or who requested a copy (40 CFR 1502.19).

The errata sheets provisions of MAP-21 and the combined FEIS/ROD provisions can be utilized together, as long as the conditions for the use of errata sheets are met (See Section 5.6.1). When both provisions are used together, the combined final NEPA document would consist of a Draft EIS, errata sheets, responses to Draft EIS comments, information required in an Final EIS, and ROD.

5.9. Limitation of Claims Notice

23 USC 139(l)(1) establishes a 150-day statute of limitations (SOL) on legal claims against USDOT and other federal agencies for certain environmental and other approval actions, if specific circumstances apply. A Limitation of Claims Notice must be placed in the *Federal Register* for the 150-day SOL to apply. Publication in the *Federal Register* starts the clock for the SOL. DOT&PF prepares the notice and transmits it to FHWA for placement in the *Federal Register*.

SOL notices should list or describe all permits, licenses, and approvals by federal agencies that relate to and are within the scope of the project and are final as of the date of the notice. The SOL notice should include the key laws under which the federal agencies took final action (*PROPOSED REVISED GUIDANCE FOR PUBLIC COMMENT, ENVIRONMENTAL REVIEW PROCESS GUIDANCE,* Appendix D: FHWA Guidance on the Statute of Limitations (SOL) provision under 23 U.S.C. Section 139(l) (Question D-5)).

SOL Notices require legal sufficiency review (23 USC 139(*l*)). The region Environmental Impact Analyst will prepare the SOL for the REM's review and submittal to the Statewide Environmental Program Manager for review and submittal to LAW for the legal sufficiency review.

5.10. Supplemental EIS

According to the CEQ NEPA Regulations (40 CFR 1502.9(c)(1)), agencies "shall prepare supplements to either draft or final environmental impact statements if:

- The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

The following is noted in CEQ NEPA's 40 Most Frequently Asked Questions, Guidance (46 FR 18026):

> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.

When developing a supplemental Draft or Final EIS follow the procedures, exclusive of scoping, for developing the Draft and Final EISs presented earlier in this chapter. The procedures for public and agency review and comment, DOT&PF review and approval, and quality control review also apply to the supplemental Draft and Final EISs.

Technical Appendix

FHWA NEPA regulations on preparing EISs can be found at 23 CFR 771, Environmental Impact and Related Procedures.

The complete Council on Environmental Quality regulations for implementing NEPA can be found at 40 CFR 1500-1508.

FHWA's "Efficient Environmental Review Process" is designed to improve and streamline project-specific environmental decision-making. For more information, see 23 USC 139.

Guidance regarding environmental and Section 4(f) document preparation and processing can be found in FHWA Technical Advisory 6640.8A.

One Federal Decision, FHWA resources on Executive Order 13807

6. Re-evaluation

6.1. Introduction
6.2. Circumstances Requiring a Re-evaluation
6.3. Consultation
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6.5. Re-evaluation Documentation
6.6. When a New Environmental Document Is Required
6.7. Re-Evaluation Quality Control (QC) Review

6.1. Introduction

Re-evaluation is a post-approval review of a project's environmental documentation to determine if the conclusions of the original environmental document remain valid. Re-evaluations are required by Federal Highway Administration (FHWA) National Environmental Policy Act (NEPA) regulations (23 Code of Federal Regulations [CFR] 771.129) to determine whether a new environmental document or whether a supplemental environmental document is required. Re-evaluations may occur multiple times on a project as it advances from environmental review through to construction.

FHWA regulations in 23 CFR 771.129 set forth the requirements and a timeframe for written evaluations of Environmental Impact Statements (EISs) and for consultation procedures for all classes of environmental documentation: Categorical Exclusions (CEs), Findings of No Significant Impact (FONSIs), and Draft, Final, and Supplemental EISs. The text of the regulation is below:

> § 23 CFR 771.129 Re-evaluations.
>
> (a) A written evaluation of the draft EIS will be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.
>
> (b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications, and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.
>
> (c) After approval of the ROD, FONSI, or CE designation, the applicant shall consult with the Administrator prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

A re-evaluation is not a NEPA document. It is an evaluation of the validity of a project environmental document and decision. In addition, re-evaluations ensure project compliance with all applicable laws and regulations prior to a project advancing to the next major phase.

In order to determine if the original NEPA document and decision remain valid, a re-evaluation must verify that the original NEPA document is complete and considered all laws, regulations, executive orders and directives presently required for a NEPA document. Based upon that review, a re-evaluation may:

- Conduct studies or analyses not required at the time of the original NEPA document
- Update or confirm previously performed analyses, or
- Require additional
  - environmental studies and documentation
  - consultation with agencies
  - public involvement

If during the course of preparing a re-evaluation it is determined that there are increased, new or previously unevaluated impacts due to project changes, it may be necessary to prepare a new environmental document. There are only two possible outcomes of the re-evaluation effort, as determined in the re-evaluation document: the environmental document and decision

remains valid; or, the environmental document and decision is no longer valid.

6.2. Circumstances Requiring a Re-evaluation

Four circumstances require a re-evaluation:

- Three or more years have passed since the approval of the environmental decision document, or approval of the last major step to advance the project, and the project is advancing to the next major step (23 CFR 771.129(b)). This includes if three years have passed since the issuance of a Draft EIS without the submittal of a Final EIS.
- Modifications to the project result in an appreciable change (see Section 6.2.1) in the environmental consequences, environmental commitments, or mitigation measures.
- Changes to laws or regulations potentially affect the conclusions of the original environmental document.
- The project, or a phase of the project, is proceeding to the next major federal approval (final design, right of way acquisition, construction) (23 CFR 771.129(c)).

Depending on the specific circumstances surrounding the re-evaluation, field review and additional environmental studies may be required.

A re-evaluation may be required when appreciable changes occur during any phase of a project, including during construction. Appreciable changes to a project during construction (see Section 6.2.1) must be included in the analysis to determine whether the original environmental document and decision remain valid when considering the potential cumulative effects of the project changes.

When a project is re-evaluated, the entire project evaluated in the original NEPA document must be reviewed. The re-evaluation should focus on any appreciable changes to the project, its setting, impacts, or new environmental issues that have emerged since approval of the original environmental document.

6.2.1. Appreciable Project Changes

Common examples of appreciable project changes include:

- Changes in project engineering/design
- Changes to project limits
- Changes in scope
- Changes in environmental setting or circumstances, including changes in laws and regulations
- Changes in the nature and severity of environmental impacts
- Changes to environmental commitments, including avoidance, minimization, and/or mitigation

Appreciable project changes may require field review and additional analyses to evaluate the environmental implications of the change. An appreciable project change during construction may necessitate the halting of construction in certain areas. Additional analyses may be presented in the re-evaluation document to demonstrate the validity of the original environmental document.

6.2.2. Three-year Time Period for an EIS

In accordance with 23 CFR 771.129(a), a written evaluation of a Draft EIS is required if the Final EIS is not submitted within 3 years of the circulation of the Draft EIS. Similarly, under 23 CFR 771.129(b), a written evaluation of a Final or Supplemental EIS is required if major steps to advance the project (e.g., authority to undertake final design, acquire right-of-way, or approve plans, specifications, and estimates) have not occurred within 3 years of the approval of the Final EIS, Supplemental EIS, or the last major FHWA approval. The purpose of the written evaluation is to determine whether the EIS remains valid or whether a new or supplemental EIS is required.

6.2.3. Project Proceeding to Next Major Step

Following the approval of a CE, FONSI, or ROD, FHWA regulations (23 CFR 771.129(c)) require a consultation prior to requesting any major approvals (e.g., final design, right-of-way acquisition, or construction) to establish whether the approved environmental document or CE designation remains valid for the requested action. The regulations also require all consultations be documented when determined necessary by FHWA. Under the NEPA Assignment Program (see Chapter 1), this consultation occurs with the NEPA Program Manager rather than with the FHWA. Consultation is documented as described in Section 6.3, and Section 6.4 below.

6.3. Consultation

The Regional Environmental Manager (REM) consults with the NEPA Program Manager before beginning work on a project re-evaluation. The consultation process ensures that the REM and the NEPA Program Manager agree on the reason for and the type of re-evaluation. This consultation will also ensure that the possible need for a new environmental document is considered.

The consultation can be by phone or email, and may be documented within the email transmitting the re-evaluation form. If consultation is occurring because of changes to the project, the REM and NEPA Program Manager should discuss the types of project changes and determine the best course of action, including the possible need for a form-documented re-evaluation or a new environmental document.

6.4. Project Phasing

On large projects that are phased for construction, the re-evaluation should focus its analysis on the continuing validity of the original environmental document by considering whether the proposed action is accurately examined in the overall project as approved in the original document. The analysis must consider not only the project phase or portion for which the approval or authorization is being requested, but also those portions in design, in construction, and those portions already constructed. Linear projects divided into phases for design and construction after environmental approval must be considered in their entirety. All portions of the project will be reviewed for any appreciable project changes.

The re-evaluation will include analysis of all phases of project development, including those phases already constructed or currently under construction, in enough detail to determine whether:

- Unexpected environmental impacts occurred as a result of the construction that may influence future project decisions
- Unexpected impacts occurred that should be mitigated during future phases of the project
- Previous construction mitigation achieved the expected results
- Any proposed mitigation measures were implemented

The REM will ensure that the re-evaluations are coordinated with the design and construction managers of each project phase.

6.5. Re-evaluation Documentation

The Alaska Department of Transportation and Public Facilities (DOT&PF) uses two types of re-evaluations:

- Expedited Re-evaluation
- Form-Documented Re-evaluation

The REM should review all requests for Authority to Proceed (ATP) for major approvals to assess whether an expedited or a form-documented re-evaluation is recommended. See the *Alaska Highway Preconstruction Manual* 4.20.1.2 for additional information on the ATP.

As described in Section 6.3, REM consultation with the Statewide NEPA Manager is required before beginning work on a re-evaluation in order to determine the type of re-evaluation needed. All questions in the re-evaluation should be answered from the perspective of reporting the changes from the original environmental document.

If NEPA was completed under a different project number (i.e., a primary or parent project), the re-evaluation document must include references to the original environmental document project number and the current project (i.e., the ancillary or child project) that is being re-evaluated.

6.5.1. Expedited Re-evaluations

An expedited re-evaluation is a tool that allows efficient project advancement while ensuring and documenting the validity of the environmental document and decision.

Expedited re-evaluations are conducted when:

- Less than three years have passed since approval of the NEPA decision document or prior re-evaluation.
- The project is advancing to the next major step
- Modifications to the project do not result in a change in the environmental consequences, environmental commitments, or mitigation measures

An expedited re-evaluation is typically not appropriate when project changes result in increased environmental impacts. Any major project changes,

especially those resulting in increased or new environmental impacts, require either a form-documented re-evaluation or a new environmental document, depending upon the specific circumstances.

An *Expedited Re-evaluation Approval Form* documents re-evaluations that qualify for this type of approval. This form is required for all expedited re-evaluation approvals. The analysis in the Expedited Re-evaluation Form should focus on the impacts of the changed aspects of the project. This is presented in a written format, rather than a checklist.

Approval Process

The same position that approved the original document is authorized to approve the re-evaluation, except where a CE no longer meets the conditions of a programmatic approval.

If the environmental document being re-evaluated was a CE project approved under a Programmatic Approval and such an approval still applies, the REM is authorized to approve the expedited re-evaluation. The REM emails a copy of the written approval to the NEPA Program Manager, and includes a copy in the region project file. The REM may delegate approval authority to a senior analyst. If the senior analyst is unable to perform the delegated duties, approval authority would transfer to a NEPA Manager.

When no Programmatic Approval applies, the NEPA Program Manager has approval authority for the CE re-evaluation. The REM reviews the form for content accuracy, signs and forwards it to the NEPA Program Manager for approval. The NEPA Program Manager signs *Expedited Re-evaluation Approval Form*, and provides a copy of the approved form to the REM to include in the region project file.

If the environmental document being re-evaluated is a FONSI or ROD, the Statewide Environmental Program Manager is authorized to sign an approved *Expedited Re-evaluation Approval Form* or delegate FONSI signature authority to a NEPA Program Manager. A copy of the approved form is provided to the REM to include in the region project file.

6.5.2. Form-Documented Re-evaluations

A form-documented re-evaluation is a tool to formally and systematically review all of the environmental consequence categories and commitments to ensure that the conclusions reached in the original environmental document and decision are still valid.

The *Environmental Re-evaluation Form* is used to document these re-evaluations.

Form-documented re-evaluations are required in the following circumstances:

- Three or more years have passed since the approval of the NEPA decision document, or approval of the last major step to advance the project, and the project is advancing to the next major step (23 CFR 771.129(b)). This includes if three years have passed since the issuance of a draft EIS without the submittal of a final EIS.
- Modifications to the project result in a change in the environmental consequences, environmental commitments, or mitigation measures.

A form-documented re-evaluation may not be appropriate when there are multiple modifications to a project that affect the environmental consequences, environmental commitments, or mitigation measures. In such circumstances, a new *Categorical Exclusion Documentation Form* or other NEPA decision document may be appropriate.

Format and Content

The *Environmental Re-evaluation Form* is used to document the changes and any new information identified since approval of the environmental document. The *Environmental Re-evaluation Form* documents the review of all originally analyzed environmental resources and consequences, and any subsequent ones.

The *Environmental Re-evaluation Form* should include an analysis of all project changes since the original environmental document approval, not only changes since the most recent re-evaluation. The REM must ensure completion of necessary field reviews, additional environmental studies, and coordination with other agencies, as appropriate, to address any new impacts or issues. The results of additional analyses and coordination are documented in the form and appendices.

Approval Process

The same position that approved the original document is authorized to approve the re-evaluation, except where a CE no longer meets the conditions of a Programmatic Approval.

When the *Environmental Re-evaluation Form* is complete, the Environmental Impact Analyst signs the document as the preparer, and provides it to the

Engineering Manager for review and signature. The Engineering Manager- reviewed form is then provided to the REM for review and approval.

If the environmental document being re-evaluated was a CE project approved under a Programmatic Approval and such an approval still applies, the REM is authorized to approve the *Environmental Re-evaluation Form*. The REM emails a copy of the written approval to the NEPA Program Manager, and includes a copy in the region project file. The REM may delegate approval authority to a senior analyst. If the senior analyst is unable to perform the delegated duties, approval authority would transfer to a NEPA Manager.

When no Programmatic Approval applies, the NEPA Program Manager has approval authority for the CE re-evaluation. The REM reviews the form for content accuracy, then signs and forwards it to the NEPA Program Manager for approval. The NEPA Program Manager signs the *Environmental Re-evaluation Form*, and provides a copy of the approved form to the REM to include in the region project file.

If the environmental document being re-evaluated is a FONSI or ROD, the Statewide Environmental Program Manager is authorized to sign an approved *Environmental Re-evaluation Form* or delegate FONSI signature authority to the NEPA Program Manager. A copy of the approved form is provided to the REM to include in the region project file.

6.6. When a New Environmental Document Is Required

In some cases a re-evaluation may reveal the need for a new environmental document. This occurs if there have been appreciable changes to the project that make the original environmental determination no longer valid.

In these situations, the REM should consult with the NEPA Program Manager to determine the appropriate course of action. A new Class of Action determination may be required prior to the preparation of a new environmental document (see Chapter 2).

6.7. Re-Evaluation Quality Control (QC) Review

The NEPA Program Manager selectively conducts a QC review of submitted re-evaluation documentation.

The QC review confirms that:

- The original environmental document remains valid
- The document meets the conditions of the appropriate Programmatic Approval, if applicable

The NEPA Program Manager will work with the REM to resolve any concerns identified in the QC review.

Technical Appendix

DOT&PF re-evaluation and expedited re-evaluation forms are available on the Statewide Environmental Office Resources webpage.

FHWA 2009 FAQs about NEPA Re-evaluations: Part 1 and Part 2. These FAQs are not regulation or formal FHWA guidance, but provide useful advice on re-evaluations.

In 2008, AASHTO published Re-evaluations of NEPA Documents, which provides an overview of re-evaluation practices across state DOTs. It includes several court cases summaries relating to the differing legal interpretations of the use of re-evaluations to satisfy NEPA requirements.

In August 2019, FHWA, FTA, and FRA released Joint Guidance for NEPA Re-Evaluation to provide clarity and consistency to the re-evaluation process consistent with their regulations.

7. Public and Agency Involvement

7.1. Introduction
7.2. Federal Requirements for Public and Agency Involvement
7.3. DOT&PF Public Involvement Requirements and Recommendations
7.4. Categorical Exclusions
7.5. Environmental Assessment
7.6. Environmental Impact Statement
7.7. Documentation

7.1. Introduction

Public and agency outreach is a legal requirement under the National Environmental Policy Act (NEPA) and many other laws and regulations. The regulatory purpose of public and agency involvement is to:

- Engage with agencies and the interested public on potential environmental impacts of major actions
- Collect input and integrate feedback in decision-making
- Involve the public and agencies in the decision-making process

However, public and agency involvement is about more than merely complying with legal requirements. For transportation projects, it is about giving the public and agencies a meaningful opportunity to influence transportation decisions in a manner that reflects community values. An open exchange of information between transportation users and government officials leads to better decision-making.

The Alaska Department of Transportation and Public Facilities (DOT&PF) implements a public involvement program that encourages and solicits public input and provides the opportunity for the public to become fully informed about a proposed project. In addition to the requirements for public involvement delineated in the NEPA Assignment Program Memorandum of Understanding (MOU) and this manual, DOT&PF also has approved plans for public involvement in its Civil Rights Office and Alaska Highway Preconstruction Manual (HPCM), which are consistent with the requirements of 23 CFR 771.111 and DOT&PF policy. Note that when requirements from these DOT&PF resources overlap, the more extensive process will apply. Required public involvement processes should be combined and coordinated with the entire NEPA process, as appropriate.

7.1.1. Civil Rights Office

DOT&PF's Civil Rights Office maintains a Title VI Program Plan and a Section 504/ADA Workplan containing specific public involvement required language and processes (periodically updated), and the Civil Rights Office should be regularly consulted for compliance with the current program plans. References to the Civil Rights Office procedures are included in this chapter. Where the Title VI Program Plan or Section 504/ADA Workplan requires additional requirements or process than this manual, the more extensive process will apply.

7.1.2. Alaska Highway Preconstruction Manual

DOT&PF's public involvement procedures are approved by the Federal Highway Administration (FHWA) and have historically been included in Chapter 5, Public Involvement and Agency Coordination, of the HPCM. References to the HPCM Public Involvement and Agency Coordination are included in this chapter. However, if the HPCM's Public Involvement and Agency Coordination Chapter requires a longer review period or additional processes than described in this chapter, the more extensive process will be required.

7.1.3. NEPA Assignment Program MOU

The NEPA Assignment Program MOU (Parts 3.1.2, 3.1.3, 3.2.5 and 3.2.6) requires DOT&PF to include the following disclosure as part of agency outreach and public involvement procedures, including any Notice of Intent (NOI) or scoping meeting notes, as well as on the cover page, in a way that is conspicuous to the reader, of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), Record of Decision (ROD), biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the NEPA Assignment Program MOU, and for memoranda corresponding to any Categorical Exclusion (CE) determination it makes:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to*

23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.

7.2. Federal Requirements for Public and Agency Involvement

This section provides a brief overview of the different federal requirements that govern public and agency involvement during the environmental review process. Understanding the legal requirements provides a good basis for understanding the agency outreach and public involvement process. Required public involvement processes should be combined and coordinated with the entire NEPA process, as appropriate.

7.2.1. National Environmental Policy Act

NEPA mandates that federal agencies encourage and facilitate public involvement in decisions that affect the quality of the human environment (40 Code of Federal Regulations [CFR] 1500.2(d)). By making information available to public officials and citizens before decisions are made, the NEPA process is intended to improve the decision-making process by fostering a better understanding of the environmental consequences of proposed federal actions. The NEPA process is centered on providing good information to the public and decision makers. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment (40 CFR 1500.1(c))

Council on Environment Quality NEPA Regulations

The Council on Environmental Quality (CEQ) regulations for implementing NEPA, found at 40 CFR Parts 1500-1508, establish procedures for preparing environmental documents and requirements for administering the NEPA process, including the process for inviting comments, defining agency roles and responsibilities, and addressing interagency disputes. Parts 1500 through 1504 address general NEPA requirements including:

- Public and agency involvement from scoping through the final EIS
- Lead agencies and cooperating agencies
- Public availability of environmental documents and response to public comments received
- Public notices, meetings, and hearings

40 CFR 1506.6 presents specific public involvement requirements, including:

- Providing public notice of public hearings, meetings, and availability of environmental documents to those who may be interested or affected
- Holding public hearings or public meetings when appropriate and in accordance with agency requirements
- Soliciting information from the public
- Ensuring public availability of environmental documents, the comments received, and any underlying documents pursuant to the Freedom of Information Act (FOIA)

Federal Highway Administration NEPA Regulations

FHWA regulations for implementing NEPA are found at 23 CFR 771, Environmental Impact and Related Procedures. Section 771.105(c) establishes FHWA policy that public involvement and a systematic interdisciplinary approach are essential elements of developing proposed projects. Section 771.111 provides guidance on early agency and public engagement in the environmental review process and prescribes requirements for State Departments of Transportation to develop their own public involvement/public hearing procedures. These procedures must provide for:

- Coordination of public involvement and any required public hearings with the entire NEPA process.
- Early and continuing opportunities for public involvement to identify project impacts.
- Public hearings or the opportunity for public hearings for any Federal-aid project that requires significant amounts of right-of-way; substantially changes the layout or function of connecting roadways or the facility being improved; has a substantial adverse impact on abutting property, or otherwise has a significant social, economic, environmental, or other effect; or if a public hearing is in the public interest.
- Reasonable notice of any public hearings or opportunity for public hearings, including the availability of information and information required to comply with public involvement

requirements of other laws, Executive Orders (EOs), and regulations.

- Explanation of specified information at a public hearing, as appropriate:
  - Project purpose and need, and consistency with local planning
  - Project alternatives and major design features
  - Social, economic, and environmental impacts of the project
  - Relocation assistance and the right-of-way acquisition process
  - Procedures for making oral and written public comments
- Submittal to FHWA of a transcript of any public hearing or certification that a public hearing opportunity was offered when required, along with copies of all written public comments. [Under NEPA Program Assignment, the region must provide the Statewide Environmental Office (SEO) a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.]
- Public notice and an opportunity for public comment on a Section 4(f) *de minimis* impact finding.

Public involvement requirements for different types of environmental documents: CEs (23 CFR 711.117), EAs/FONSIs (23 CFR 771.119 and 23 CFR 771.121), and EISs/RODs (23 CFR 771.123, 23 CFR 771.125, and 23 CFR 771.127) are described below in Section 7.4, Section 7.5, and Section 7.6.

FHWA Guidance

FHWA's *Guidance for Preparing and Processing Environmental and Section 4(f) Documents*, Technical Advisory 6640.8A is not regulatory but provides helpful guidance on a number of topics, including distribution of environmental documents and handling comments and responses.

7.2.2. Additional Public and Agency Involvement Required Actions Under the NEPA Umbrella

When considering the proposed action, identify issues that may be important to the potentially affected population and relevant agencies. Additional public and/or agency outreach may be required if there are potential impacts to the following:

Section 4(f) of the Department of Transportation Act of 1966 (23 USC 138 and 49 USC 303)

Publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites (See Chapters 8.6.1 and 10).

- Prior to making a *de minimis* finding for parks, recreation areas, and wildlife and waterfowl refuges, public notice and an opportunity for public review and comment are required (23 CFR 774.5(b)).
- Prior to making a *de minimis* finding for historic sites, State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (if involved) must be consulted, and a public notice must be completed (36 CFR Part 800).

  It is recommended the public notification process for a *de minimis* finding be:
  - Combined with the Notice of Availability for the EA or Draft EIS
  - Made available at project public meetings and hearings, and at the same locations as the NEPA documents

Section 106 of the National Historic Preservation Act (36 CFR Part 800)

Section 106 public and agency outreach requirements include identifying consulting parties and conducting formal Section 106 consultation; providing the public with information about the project and its potential effects on historic properties; and seeking public comment (See Chapters 10 and 8.6.1).

Floodplain Management (Executive Order 11988 and USDOT Order 5650.2)

If the project has the potential to impact a floodplain, DOT&PF is required to provide opportunity for early public review and comment, including identification of floodplain encroachments in public presentations, and disclosure of any potential significant encroachments in public notices such as the Notice to

Begin Engineering and Environmental Studies, public hearing notices, notices offering opportunity for a hearing, and Notice of Availability.

Protection of Wetlands (Executive Order 11990)

The opportunity for public review of potential impacts to wetlands may occur through a statement in public notices such as the Notice to Begin Engineering and Environmental Studies, public hearings, and Notice of Availability that identifies potential impacts to wetlands.

Federal Actions to Address Environmental Justice in Minority and Low-Income Populations

DOT&PF must address Environmental Justice (EJ). If a project involves potential impacts on minority and low-income populations, DOT&PF must, as part of public outreach:

- Provide meaningful opportunities for public involvement to minority and low-income populations (USDOT Order 5610.2(a), 5(b)(1))
- Provide access to information regarding potential impacts to minority and low-income populations (USDOT Order 5610.2(a), 5(b)(2))
- Solicit input from affected minority and low-income populations in considering alternatives (USDOT Order 5610.2(a), 5(c)(4))

Further direction is given in USDOT's EJ Strategy, specifically Section II (A-3), which encourages coordination with community leaders to develop outreach plans, and exploration of traditional and nontraditional outreach strategies to ensure participation. CEQ Guidance on EJ provides a list of options to consider during public involvement planning in order to overcome potential linguistic, institutional, cultural, economic, historical, or other potential barriers to public participation (Section III.C.2, Public Participation).

Improving Access to Services for Persons with Limited English Proficiency (LEP)(Executive Order 13166)

- Requires federal agencies to provide meaningful access to LEP populations. EO 13166 is an implementing regulation under Title VI (EO 13166, Section 1). If a project has potential impacts to LEP individuals, DOT&PF must provide meaningful access to those individuals throughout the NEPA process.
- The U.S. Department of Justice's (USDOJ's) LEP Guidance describes a four-factor analysis that can be used to determine what steps should be taken to provide meaningful access for LEP persons and to develop an LEP outreach program (USDOJ LEP Guidance and USDOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons).

Right-of-way Acquisition and/or Relocation (Uniform Act)

A public hearing or the opportunity for a public hearing is required for any federal-aid highway project that bypasses or goes through a city, town, or village; and must do the same for any Interstate Highway System project. Title 23 U.S. Code (USC) 128

Efficient Environmental Reviews for Project Decisionmaking (23 USC 139)

For transportation projects requiring an EIS, review 23 USC 139 for any additional public and agency involvement process requirements.

7.2.3. Tribal Consultation

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires that USDOT honor any requests for government-to-government consultation, and is intended to strengthen the relationship between Indian tribes and the U.S. government.

While DOT&PF is authorized to consult with tribes under the standard Section 106 process, FHWA retains responsibility for direct government-to-government consultation with tribes in accordance with 36 CFR 800.2(c)(2)(ii)(C) and (D), and Part 3.1.3 of the NEPA Assignment Program MOU. Tribes have the right to request government-to-government consultation with FHWA at any time during the project development process. The region should immediately notify SEO if a tribe requests government-to-government consultation.

If a tribe requests formal government-to-government consultation, DOT&PF will first seek clarification from the tribe on whether they wish to pursue consultation with the state or government-to-government consultation with FHWA. If a tribe specifically wants to conduct project level consultation in formal government-to-government consultation with FHWA, DOT&PF will provide the tribe with contact information for the FHWA AK Division Administrator. The DOT&PF Statewide

Environmental Program Manager will send an email and place a telephone call to the FHWA AK Division Administrator notifying them of the tribe's request.

After notifying FHWA of the tribe's request, the DOT&PF will provide FHWA with the project information necessary for effective consultation with the tribe. FHWA will work with the tribe to determine how much involvement (if any) the tribe wants from DOT&PF during consultation. If the tribe wants to consult with FHWA only, the consultation process will proceed without DOT&PF involvement. If DOT&PF is to be involved, FHWA and the tribe will specify the terms of DOT&PF's involvement.

If DOT&PF is involved in the consultation process with FHWA and the tribe, DOT&PF will be responsible for documenting in the project file the details of the consultation process and any agreements reached. If the consultation process is between FHWA and the tribe only without DOT&PF participation, FHWA will provide DOT&PF with details of their consultation efforts and any agreements reached between the two parties. Consultations may relate to tribally confidential information. Documentation of consultation must appropriately restrict access to, or exclude details on, any such information (See Chapter 10.6).

7.2.4. Other Federal Laws that May Affect Outreach

In addition to NEPA and Presidential EOs, there are several other federal laws that affect how public and agency outreach should be conducted for NEPA projects. DOT&PF must meet these requirements and should consider them when developing the PIP.

Title 49 CFR, Subtitle A, Part 24, the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act)

If property acquisition is anticipated as part of the project, DOT&PF makes its right-of-way brochures available to the public at public hearings.

Title VI of the 1964 Civil Rights Act

Title VI of the 1964 Civil Rights Act requires that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (42 USC 2000(d)).

The DOT&PF Civil Rights Office, Title VI of the Civil Rights Act of 1964 & Environmental Justice, webpage is a resource to support compliance with applicable state and federal laws that govern public participation. The office maintains a standard statement that must be published with public meeting/hearing notices to meet Title VI requirements (DOT&PF Title VI Nondiscrimination Program Plan). Contact the Civil Rights Office to for the current approved language.

At public events for projects, DOT&PF sign-in sheets include a voluntary self-identification for gender and race per 23 CFR 200.9(b)(4) (also refer to the DOT&PF Title VI Nondiscrimination Program Plan, p. 26 and p. 38-40). Once the event is complete, the completed sign-in sheets and a Title VI Report should be filed with the Civil Rights Office Title VI specialist (DOT&PF Title VI Nondiscrimination Program Plan, p.26 and p. 38-40). Although not required, the Civil Rights Office highly encourages that DOT&PF's Title VI Brochure be made available to the public at public meetings and hearings.

Americans with Disabilities Act of 1990

The DOT&PF Civil Rights Office Americans with Disabilities Act (ADA) webpage provides resources for compliance with the ADA Act of 1990, as amended, which prohibits the exclusion of individuals with disabilities from participation in the services, programs, or activities of a public entity. In addition, it encourages the engagement of people with disabilities. It is DOT&PF's policy to ensure that communication with persons with disabilities is as effective as communication with others (DOT&PF ADA Workplan, X. Communications, p. 10). When public meetings and events are planned, public notices must include DOT&PF standard language to offer assistance to individuals with disabilities (DOT&PF ADA Workplan, XI. Procedures for Ensuring Accessibility for Public Meetings, p.11). Contact the Civil Rights Office to get the current approved language. All public hearings must be held in accessible facilities. Although not a requirement, it is highly encouraged by the Civil Rights Office that all public meeting facilities be ADA-accessible when possible and that all project websites be ADA-compliant.

7.3. DOT&PF Public Involvement Requirements and Recommendations

The DOT&PF HPCM is the FHWA approved manual for developing and designing federal-aid highway program projects in Alaska; the HPCM Chapter 5, Public Involvement and Agency Coordination, discusses the following topics:

- Project Development activities, including:
  - Required preparation of a Public Involvement Plan (PIP) for each project that addresses state and federal public involvement requirements and identifies responsibility for implementation of the PIP (engineering manager and REM must concur on the PIP)
  - Maintenance of a master list containing the addresses and contacts for all agencies by the Environmental Section of each region.
- Public involvement activities, including:
  - Public Meetings
  - Notice of Opportunity for Public Hearing
  - Changes in Scope/Public Hearing Opportunity
  - Public Hearings (notice and conduct of)

There are defined minimum requirements for public and agency involvement in the preparation of an EA or EIS. Public and agency involvement in the preparation of a CE is commensurate with a project's type, complexity, and potentially affected environmental resources.

Requirements

- DOT&PF follows the public hearing requirements specified in 23 CFR 771.111(h), FHWA Environmental Impact Related Procedures
- Unless the project is a CE, there must be, at a minimum, an opportunity for a public hearing during the environmental process.
- There must be early public involvement for an EA or EIS
- Prior to formal public hearings, DOT&PF will provide public outreach via one or more of the following activities:
  - An informal public meeting or workshop
  - Conduct face-to-face meetings with interested parties
  - Communication with affected businesses and residents
  - Provide project data for public review at locations and times convenient for the public
  - Provide radio, television and other available media source, project announcements, including news releases, in conjunction with public meetings
  - Schedule public meetings within accessible facilities at locations and times to allow for the most public participation
  - Post meeting notices within the study area
- Publish notices in the Alaska Online Public Notices, and in local or regional newspapers, and include information required to satisfy public notice requirements for state and federal permits, and federal regulations listed in Section 7.2To satisfy the requirements to hold a public hearing:
  - Hold a public hearing, or
  - Publish two notices of opportunity for public hearing, and hold a public hearing if any written requests are received that cannot be resolved by contact with the requesting party.

See Section 7.5.6 for more information on Notices of Opportunity for Public Hearing and additional public hearing requirements.

Recommendations

- Hold a second public hearing for a project with long-term design activities or when design changes result in a re-evaluation of the environmental document.
- Hold a public meeting or workshop for CE projects.

7.3.1. Public Involvement Plan

The HPCM, Public Involvement and Agency Coordination chapter, establishes the PIP requirements for each project, including during the preliminary engineering and NEPA (pre-development) stages of the project.

During development of the PIP, the items below may be considered as part of shaping public and agency

outreach. None of these are required, but all represent best practice.

Potentially Affected Population: When considering the project area and proposed action, an initial list of stakeholders who may have an interest in the project or be affected by the project can be developed. At this stage, one should also consider if there are any EJ/LEP populations that may be affected. Groups to consider include:

- Local, state, and federal government agencies
- Elected officials
- Native Tribes
- Native corporations and associations
- User groups (e.g., airlines, trucking firms)
- Other interest groups (e.g., local Chambers of Commerce, ADA advisory groups, Associated General Contractors, Trucking Association)
- Environmental organizations
- The public
- Property owners and businesses
- Community groups or organizations (e.g., community councils, special interest groups, faith-based organizations)

Issues: When considering the proposed action, identify issues that may be important to the potentially affected population and relevant agencies. Additional public and/or agency outreach may be required if there are potential impacts to the following:

- Publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites (Section 4(f))
- Historic properties (Section 106)
- Wetlands (EO 11990)
- Floodplains (EO 11988)
- LEP persons (EO 12898)
- Disproportionately high and adverse impacts to EJ populations (EO 13166)
- Federally recognized tribes (EO 13175)
- Right-of-way acquisition and/or relocation (Uniform Act)

Level of Controversy: For each issue and potential stakeholder, DOT&PF may consider the level of interest or controversy (i.e., is the issue of some concern, of moderate concern, or of high concern?) and may wish to provide additional outreach opportunities for projects that may be of higher concern or may affect a greater number of stakeholders. Gauging the potential level of controversy is helpful when developing the scope of an outreach program in order to offer the appropriate level of engagement.

The results of these analyses can inform the public and agency outreach program and create the foundation for the PIP.

7.4. Categorical Exclusions

Based on the absence of significant impacts, public involvement for a CE is typically commensurate with a project's type, complexity, and potentially affected environmental resources. DOT&PF may publish a Notice to Begin Engineering and Environmental Studies to inform the public and agencies of its intent to begin environmental review of a project, even though this Notice is not required for a CE. Prior to publication, the Notice to Begin Engineering and Environmental Studies will be reviewed by the REM.

A CE does not require a public hearing or the opportunity for a public hearing. However, a public meeting or public hearing may be held if a project may have an adverse effect on an environmental resource or the project is controversial.

7.5. Environmental Assessment

The information presented below describes public and agency involvement requirements and DOT&PF practices for EA projects. For more information on preparing an EA, refer to Chapter 4 of this manual.

7.5.1. Notice to Begin Engineering and Environmental Studies

A Notice to Begin Engineering and Environmental Studies may be published to inform the public and agencies of DOT&PF's intent to begin environmental review of a project. This notice may be published in a local newspaper, sent within a project mailer to appropriate project area zip codes, and/or published online on the State of Alaska Online Public Notices website. Prior to publication, the Notice to Begin

Engineering and Environmental Studies will be reviewed by the REM, and must be approved by the NEPA Program Manager.

7.5.2. Public Involvement Plan

A PIP should be developed for an EA. Refer to Section 7.3.1 above for considerations in developing the PIP, and to the following sections for the required NEPA steps.

7.5.3. Scoping

Scoping is the term DOT&PF uses to describe early EA activities that engage agencies and the public in:

- Determining the scope of environmental issues to be addressed
- Identifying the alternatives and measures that may mitigate adverse environmental impacts
- Identifying other environmental requirements that should be performed concurrently with the EA (23 CFR 771.119 (b))

Agency consultation must begin at the earliest appropriate time during the EA process (23 CFR 771.119(b)). Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements (23 CFR 771.111(a)(1)). It also aids in identifying environmental impacts, determining alternatives and mitigation, establishing permit requirements, and anticipating issues or concerns that may affect the project design, cost, and scheduling.

There are no mandated scoping requirements for an EA. DOT&PF general practice for EAs is to identify agencies with jurisdiction over resources potentially affected by the proposed project and to distribute scoping letters to those agencies to introduce the project and solicit input. Copies of agency scoping letters and other substantive contacts with agencies and other stakeholders are also maintained in the project file. The EA must include summaries of public engagement activities and the results of agency coordination (23 CFR 771.119(b)). Public scoping meetings may also be held and, if held, should be noticed in the same manner as described in the HPCM Public Involvement and Agency Coordination chapter, Notice to Begin Engineering and Environmental Studies. Refer to HPCM Public Involvement and Agency Coordination chapter, Public Meeting / Open House, below for details on holding public meetings.

7.5.4. Public Meeting / Open House

A public meeting or open house is held by the project team to inform the public about a project, and to solicit project comments and concerns. Public meetings may be held during scoping or for circulation of an environmental decision document.

Public notice is required for NEPA-related public meetings in the same manner as described for a Notice of Availability above (40 CFR 1506.6(b)). When a public meeting or open house is held, refer to Section 7.2.4 for details on meeting Title VI and ADA requirements and recommendations for planning providing notice of the event. When the public event is complete, a memo to the project file should be prepared that summarizes the event and the nature of public comments received (HPCM).

If a public meeting or open house is held in conjunction with a public hearing or opportunity for public hearing, follow the requirements described in Section 7.5.6, below.

7.5.5. Notice of Availability and EA Distribution

DOT&PF will issue a public Notice of Availability once the SEO has approved the EA for distribution. The Notice of Availability briefly describes the project and its impacts, and specifies the locations where the EA can be reviewed. The region will distribute copies of the approved EA to the appropriate agencies for their review and comment and will publish the Notice of Availability by the following methods as appropriate:

- In local newspapers, if any
- In the Alaska Online Public Notices
- By mail or email
- By other methods, as appropriate

The region will make the approved EA available for public review as follows:

- By request
- Online (e.g., project websites, Facebook)
- At local libraries, if any
- At DOT&PF region and SEO offices

- At other locations, as appropriate (e.g., community centers)

It is recommended that public and agency review occur concurrently. The EA is made available for review for a minimum of 30 days from the date the Notice of Availability was published (23 CFR 771.119(e)). A 30-day review period is standard, but may be reduced or increased in rare circumstances with SEO approval.

If the project has potential impacts to floodplains, wetlands, Section 4(f) properties, and/or Section 106 properties, consider incorporating language in the Notice of Availability to cover public notification requirements for these topics. The Notice of Availability shall include language from the Civil Rights Office to address Title VI compliance and ADA accessibility (see Section 7.2.4, above). The REM is responsible for transmitting the draft Notice of Availability text to the SEO for review and approval for publishing.

The Notice of Availability must be mailed to those who request it (40 CFR 1506.6(b)(1)) and should be published in a local newspaper, if any, and sent by DOT&PF to affected federal, state, and local government entities and state intergovernmental review contacts (23 CFR 711.119(d),(e),(f)). The project team will determine the appropriate notification media based on the project's potential impacts and affected populations. FHWA guidance encourages distribution of the EA to agencies known to have interest or special expertise relative to the project, as identified during scoping, and to any agency that has permitting authority (T 6640.8A (IV)(A)).

Final technical studies may be made available for public or agency review with the EA, with the exception of technical studies and other documentation regarding cultural resources (e.g., Section 106 consultation materials) containing sensitive information, which may be restricted. The Environmental Impact Analyst or REM will consult with the region Cultural Resource Specialist for consistency with DOT&PF's *Cultural Resources Confidentiality Guidelines* before allowing public or agency review of materials containing potentially sensitive information.

The HPCM Public Involvement and Agency Coordination chapter requires that notices be combined when applicable. DOT&PF may publish a combined Notice of Availability and Notice of Public Hearing/Notice of Opportunity for Public Hearing, when applicable.

7.5.6. Public Hearing

Planning

A public hearing is a formal meeting required by FHWA regulations, as described below, with specific requirements that must be met. SEO is responsible for the decision to hold a public hearing. While the degree of public participation and agency involvement and the means of soliciting input for EAs are commensurate with the project type and complexity, an EA project will include, at a minimum, the opportunity for a public hearing during the project development process.

If DOT&PF determines that a public hearing or opportunity for a public hearing is required in accordance with 23 CFR 771.111(h)(2)(iii) (see Section 7.2.13, above), planning should begin as early as possible. The HPCM requires formal public hearings to be preceded by public outreach activities (see suggested list of activities in HPCM).

If DOT&PF anticipates a request for a public hearing or meeting, a combined open house and public hearing, then both a public meeting and public hearing may be held. The format of the hearing can be either a formal hearing or an "open forum hearing." A formal public hearing must include a court reporter who prepares a written transcript, and usually includes a hearing officer and panel to receive comments. An "open forum" hearing allows interested parties to comment orally before a court reporter without a public audience (for more information see FHWA Transportation Planning Capacity Building: Planning for a Better Tomorrow).

Notice of Opportunity for Public Hearing

The following content should be included in the Notice of Opportunity:

- NEPA Assignment Program MOU required disclosure, as follows:

  The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.

- Explanation of the procedure to request a public hearing
- Specification of the timing of a request for a public hearing:
  - Not more than 21 days after the publication of the first notice and not more than 14 days after the publication of the second notice
  - Deadline for the request for a public hearing
- Statement that the hearing is "for the purpose of considering the economic, social, and environmental effects of the project and its consistency with the goals and objectives of such urban planning as has been carried out by the community"
- Description of the proposed project and a map or graphic
- Contact person and phone number
- Location of the following information:
  - Drawings, maps, plans, reports, or other project information
  - Environmental documents
  - Written views from agencies, private groups, and individuals

The Notice of Opportunity for Public Hearing must be published:

- Twice: two notices of opportunity
- By the following methods as appropriate:
  - In local newspapers, if any
  - In the Alaska Online Public Notices
  - By mail or email
  - By other methods, as appropriate

The Notice of Opportunity may be published jointly with the Notice of Availability, and if so must meet the same publication standards and be distributed to the same parties listed above for Notice of Availability (40 CFR 1506.6(b); see Section 7.5.45).

All information referenced in the Notice of Opportunity must be made available for copying and/or public inspection; the information may be made available on a project website. Following publication, a copy of the Notice of Opportunity for Public Hearing should be provided to the SEO, the federal funding agency (i.e., FHWA) and the Commissioner's office (as per the HPCM). If no requests for a public hearing are received during the time specified in the notice, this should be documented in the project files.

Notice of Public Hearing

In addition to meeting NEPA requirements, a Notice of Public Hearing is required to provide the information necessary to comply with the public involvement requirements of other laws, EOs, and regulations (23 CFR 771.111(h)(2)(iv)). The Notice of Public Hearing may be published jointly with the Notice of Availability, and must meet the same publication standards and be distributed to the same parties listed above for Notice of Availability (40 CFR 1506.6(b); see Section 7.5.45).

The HPCM Public Involvement and Agency Coordination chapter identifies additional content requirements for a Notice of Public Hearing:

- Background information required for a Notice of Opportunity of Public Hearing as described above
- The procedure for submitting written comments
- The project's purpose and need, alternatives, and tentative schedules for right-of-way acquisition and construction
- Indication that relocation assistance programs will be discussed when applicable
- Mandatory ADA text and other notices required by regulation (e.g., floodplains, wetlands, Section 106)

When a public hearing will be held for an EA, 23 CFR 771.119(e) requires that the public receive notice at least 15 days in advance of the hearing. The notice should announce the availability of the EA and tell where the EA can be obtained or reviewed. The hearing should be advertised in the same manner as the Notice of Availability. The notice also must state the deadline for submitting comments, which is 30 days from the availability of the EA, unless DOT&PF determines for good cause that a different period is warranted (23 CFR 771.119(e)). The HPCM Public Involvement and Agency Coordination chapter notes that the final date for submitting comments shall be at least 10 days after the public hearing.

A Notice of Public Hearing will be:

- Published at least twice in a local or regional newspaper: First publication 30 to 40 days prior to hearing; Second publication 5 to 12 days prior to hearing
- Published in the Alaska Administrative Journal
- Published in the Alaska Online Public Notices
- Mailed to appropriate agencies, local public officials and public advisory groups, property owners, and community groups
- Provided to the federal funding agency (i.e., FHWA), the commissioner's office, and the Regional Director

Conducting the Public Hearing

Public hearings have requirements that do not apply to public meetings. According to 23 CFR 771.111(h)(2)(v), public hearings must explain:

(A) The project's purpose and need and consistency with local planning;

(B) Project alternatives and major design features;

(C) Project impacts;

(D) Relocation assistance and the right-of-way acquisition process; and

(E) Procedures for oral and written public comments.

The HPCM Public Involvement and Agency Coordination chapter provides additional guidance on conducting public hearings, including compiling attendance lists, providing pre-addressed envelopes to submit written comments, developing graphics, providing ADA-compliant auxiliary aids and services, holding meetings in accessible facilities during convenient times, and providing additional ways to submit comments. All written and oral public statements made at the public hearing will become part of the project record. To build awareness among the public that their comments and any information given to the project team are subject to FOIA, when requesting comments it is advisable to include language that states: "All public comments received will become part of the public record and may be subject to Freedom of Information Act requests."

For all assigned projects developed under the NEPA Assignment Program, the region must provide SEO a transcript of each public hearing and certification that a required hearing or hearing opportunity was offered, along with copies of all written comments from the hearing and received during the comment period (23 CFR 771.111(h)(2)(vi)).A copy must be placed in the region project file. The HPCM Public Involvement and Agency Coordination chapter directs that a public hearing record, summary of testimony, analysis of comments, and any recommendations should be prepared and given to the engineering manager, who distributes the information.

7.5.7. Comment Response

Any comments received, and responses to those comments, must accompany the Final EA (23 CFR 771.119(g)); comments and responses are typically placed in an appendix. If the EA was revised as a result of a comment, the response should indicate where in the Final EA changes were made.

7.5.8. Availability of FONSI

Public circulation is not required for the FONSI, but a Notice of Availability must be sent to involved agencies and state intergovernmental review contacts and be made available to the public upon request (23 CFR 771.121(b)). While not specifically required, it is standard practice to publish the Notice of Availability in the same media outlets used to distribute the Notice of Availability and EA (see Section 7.5.4).

7.6. Environmental Impact Statement

Public and agency involvement is an integral part of the EIS process. Because an EIS involves issues and impacts of greater magnitude than other classes of action, public and agency involvement is usually more robust and additional steps are required. The enhanced public involvement requirements are intended to increase engagement with both agencies and the public and to support early identification, and efficient resolution, of issues that could delay project approval.

FHWA Technical Advisory 6640.8A provides detailed guidance on the preparation of the Notice of Intent (NOI), the scoping process, and the information that should be included in the EIS.

7.6.1. Efficient Environmental Review Process

Congress included a number of environmental streamlining provisions in the 2005 transportation funding act referred to as the Safe, Accountable,

Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Notable among these is Appendix A, Section 6002, "Efficient Environmental Review Process," codified at 23 USC 139. The 2012 transportation funding act, Moving Ahead for Progress in the 21st Century (MAP-21), and the 2015 Fixing America's Surface Transportation Act (FAST Act) modified the environmental review process enacted with SAFETEA-LU. The modified process is mandatory for EISs with a Notice of Intent (NOI) dated after August 10, 2005; it is optional (but not frequently used) for EAs. Title 23 USC 139 environmental review process requirements include the following:

- The USDOT is the lead agency for projects under 23 USC 139(c). DOT&PF is the lead agency under 23 USC 139(c) and the NEPA Assignment Program MOU, for projects designed and constructed by DOT&PF.
- The lead agency must invite all federal, state, local, and tribal government agencies that may have an interest in the project to be participating agencies (23 USC 139(d)).
- Agencies defined as participating and cooperating agencies are required to carry out their obligations under other applicable laws concurrently and in conjunction with their NEPA review in a timely and environmentally responsible manner (23 USC 139(d)(7)).
- To the maximum extent practicable, all permits and reviews for a transportation project are to rely on a single NEPA document developed by the lead agency; that NEPA document is to be sufficient to satisfy the requirements for any federal approval or other federal action for the project, including federal agency permits (23 USC 139(d)(8)).
- The lead agency must develop a coordination plan for public and agency participation and comment in the environmental review process; the plan must include a schedule (23 USC 139(g)).
- Participating agencies and the public must be given an opportunity for input in the development of the project purpose and need and the range of alternatives to be considered (23 USC 139(f)).
- The lead agency is to collaborate with participating agencies on the appropriate methodologies to be used and the level of detail for the analysis of project alternatives (23 USC 139(f)(4)(C)).
- The lead agency and participating agencies are to work cooperatively to identify and resolve issues that could delay the completion of the environmental review process or result in denial of any approvals required for the project under applicable laws. Title 23 USC 139(h) provides an issue identification and resolution process, including referral to the CEQ and imposing financial penalties.
- There is a 150-day statute of limitations for project judicial review, provided a notice of final agency action is published in the Federal Register (23 USC 139(l)).
- A single document that includes both the Final EIS and the Record of Decision (ROD) should be used, unless:
    - The final EIS makes substantial changes to the proposed project relevant to environmental or safety concerns.
    - There are significant new circumstances or information relevant to environmental concerns that bears on the proposed project or the impacts of the proposed project (23 USC 139(n)).

Additional guidance on complying with the 23 USC 139 environmental review process can be found in the FHWA and Federal Transit Authority SAFETEA-LU Environmental Review Process Final Guidance and USDOT's Interim Guidance on Map-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews.

Participants in the Environmental Review Process

Lead Agency: Under 23 USC 139, USDOT (FHWA for most DOT&PF projects) serves as the lead federal agency for projects, and DOT&PF, as the direct recipient of federal-aid highway funds, is required to be a joint lead agency (23 USC 139(c), SAFETEA-LU Environmental Review Process Final Guidance, question 16). Because of NEPA Assignment, DOT&PF serves both roles under 23 USC 139. DOT&PF SEO is the lead agency under 23 USC 139(c) and the NEPA Assignment Program MOU, for projects designed and constructed by DOT&PF.

Other federal, state, or local governmental entities may act as joint lead agencies at the discretion of DOT&PF. For more information on this topic, see the FHWA/Federal Transit Administration SAFETEA-LU Environmental Review Process Final Guidance.

In compliance with 23 USC 139, DOT&PF must initiate the efficient environmental review process by inviting federal, state, tribal, regional, or local agencies that have jurisdiction or expertise or will comment on the project to be participating or cooperating agencies.

Participating Agencies: In order to enhance interagency coordination and identification of issues of concern, 23 USC 139 created a new category of involvement in the environmental review process, termed the "participating agency." The intent of this category is to encourage agencies at all levels of government with an interest in the project to be active participants in the NEPA evaluation. Under 23 USC 139, any federal or non-federal agency that "may have an interest in the project" is required to be invited to become a participating agency in the project environmental review process (23 USC 139(d)). Participating agency invitation letters are required to be sent within 45 days of NOI publication and are to include a deadline for response. Thirty days is a common response deadline. Any federal agency invited to be a participating agency will be designated as a participating agency unless it declines, in writing, stating that the invited agency: (1) has no jurisdiction or authority with respect to the project, (2) has no expertise or information relevant to the project, and (3) does not intend to submit comments on the project.

State and local agencies invited to be participating agencies will be designated as participating agencies only if they respond affirmatively in writing.

Cooperating Agencies:
A federal participating agency may also be designated as a cooperating agency under NEPA (40 CFR 1501.6 and 23 CFR 771.111(d)). A cooperating agency is defined as any federal agency with jurisdiction by law or special expertise with respect to any environmental impact that should be addressed in the EIS. The selection and responsibilities of a cooperating agency are described in 40 CFR 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency (40 CFR 1508.5). Any such federal agency is to be invited to be a cooperating agency. Note that any cooperating agency would also meet the definition of a participating agency and is to be invited, in writing, to serve both roles.

For more information regarding 23 USC 139, see Section 7.6.2, below.

7.6.2. Initiation of 23 USC 139 Environmental Review Process

As the first step in the 23 USC 139 environmental review process, the project sponsor (typically DOT&PF) is required to notify FHWA that the review process is being initiated. Under the NEPA Assignment Program, the REM sends this notification to the Statewide Environmental Program Manager. The notification includes the type of work, its termini, length, and general location, as well as the federal permits and approvals anticipated to be necessary for the proposed project (23 USC 139(e)). The draft NOI may be used for this purpose as long as it contains the required notification information.

7.6.3. Notice of Intent

A NOI is the official notification that a federal agency is beginning the process to prepare an EIS. DOT&PF develops a NOI for publication in the *Federal Register* after it has consulted with any other project sponsor, initiated the 23 USC 139 environmental review process, and reached its decision to prepare an EIS (23 CFR 771.123). Since only federal agencies may publish notices in the *Federal Register*, under the NEPA Assignment Program DOT&PF will continue to submit the NOI to FHWA for publication. CEQ regulations require that the NOI include the following (40 CFR 1508.22):

- NEPA Assignment Program MOU required disclosure, as follows:

  The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.

- A description of the proposed project
- A description of potential alternatives, including the no-build alternative

- Information regarding the scoping process, including when and where scoping meetings (if any) will be held
- The name and address of a contact person at DOT&PF who can answer questions about the proposed project and EIS

To use the NOI as the 23 USC 139 initiation of environmental review, it must include:

- The type of work
- The proposed project's termini, length, and general location
- Other anticipated federal approvals required for the project, such as permits

The NOI should also be made available locally, through sources such as a local or regional newspaper, as part of a project mailer to appropriate project area zip codes, and/or published online on the State of Alaska Online Public Notices website.

For additional guidance on the content and format of an NOI, see the FHWA Technical Advisory T 6640.8A, Appendix B.

7.6.4. Coordination Plan

As required by 23 USC 139, DOT&PF develops a coordination plan for public and agency participation during the environmental review process (23 USC 139(g)). The coordination plan describes how agencies and the public will participate and comment during project environmental review. The coordination plan must be in place within 90 days of NOI publication. An environmental review schedule is required as part of the coordination plan, and should be established after consultation with, and concurrence of, each cooperating and participating agency. The schedule and any adjustments to it must be provided to all participating agencies and made available to the public. The coordination plan will include appropriate elements of the PIP. Refer to Section 7.3.1 for PIP considerations, and to the following sections for the required agency and public coordination under 23 USC 139.

7.6.5. Scoping

Scoping is the process through which a federal lead agency solicits input from agencies, other stakeholders, and the public regarding the scope and the significant issues to be analyzed in depth in the EIS (40 CFR 1501.7). It starts after the NOI is published in the *Federal Register*. The scoping process is used to identify the project purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS (23 CFR 771.123(b) and 40 CFR 1501.7). The public and participating agencies must be given the opportunity to provide input on the development of the purpose and need and the range of alternatives (23 USC 139(f)).

Participating agency invitations, as required by 23 USC 139(d), are sent out early in the scoping process. CEQ regulations (40 CFR 1501.7) also require the lead agency to invite the participation of affected federal, state, and local agencies, affected Indian tribes, the project proponent, and other interested parties in the EIS process.

Through collaboration with participating and/or cooperating agencies, DOT&PF will develop methodologies to be used to analyze alternatives (23 USC 139(f)(4)(C)). DOT&PF makes the ultimate decision on the methodologies to employ, taking into account participating agency expertise.

Public meetings are not required as part of the scoping process but are commonly held and serve as an excellent tool for sharing information with agencies and the public and for receiving input. If held, public scoping meetings should be noticed in a local or regional newspaper, sent within a project mailer to appropriate project area zip codes, and/or published online on the State of Alaska Online Public Notices website. It is standard practice to include the same information and distribution list used for a Notice of Availability (see Section 5.5.6).

7.6.6. Draft EIS Notice of Availability and Circulation

Notice of Availability

After the Draft EIS is prepared, DOT&PF must make it available and solicit comments. A Notice of Availability is filed with the U.S. Environmental Protection Agency (EPA) for publication in the *Federal Register* (40 CFR 1506.9). The REM is responsible for transmitting the draft Notice of Availability text to the SEO for review and approval for publishing through FHWA. The Notice of Availability specifies the locations where the EIS can be reviewed (*required*: DOT&PF regional office; *optional*: local public library, DOT&PF website, community center, and other similar locations). The Notice of Availability will also identify the public

comment period for the EIS, which will not be fewer than 45 days and not more than 60 days, unless SEO establishes a different deadline, with the agreement of all participating agencies. DOT&PF may also extend the comment deadline for good cause (23 USC 139(g)(2)). The notice will state where comments are to be sent (23 CFR 771.123(i)).

If the project has impacts to floodplains, wetlands, Section 4(f) properties, and/or Section 106 properties, consider incorporating language in the Notice of Availability to cover public notification requirements for these topics (see Section 7.2.4, above). The Notice of Availability should include standard language from the Civil Rights Office to address Title VI compliance and ADA accessibility (see Section 7.2.4 above).

The Notice of Availability for the Draft EIS should also be published locally in locations such as a local or regional newspaper, within a project mailer to appropriate project area zip codes, and/or on the State of Alaska Online Public Notices website.

The HPCM Public Involvement and Agency Coordination chapter requires that notices be combined when applicable. It is DOT&PF standard practice to publish a combined notification for a Notice of Availability and Notice of Public Hearing, if one is held.

Circulation

The Draft EIS must be made available to the public and circulated to agencies for comment no later than the time the Draft EIS is filed with the EPA for *Federal Register* publication (23 CFR 771.123(g)). The Draft EIS is transmitted to public officials, interest groups, and members of the public known to have an interest in the proposed project; federal, state, and local agencies with jurisdiction or expertise, and/or that have been designated as participating or cooperating agencies; and affected state and federal land management agencies (see 23 CFR 771.123(g)). DOT&PF must request comments from appropriate state and local agencies, affected Indian tribes, and any agency that has requested to receive EISs on actions of the kind proposed (40 CFR 1503.1). The Draft EIS transmittal letter and the Draft EIS must identify where comments are to be sent (23 CFR 771.123(i)).

7.6.7. Public Hearing

FHWA's public involvement requirements (23 CFR 771.111(h)) dictate that one or more public hearings or opportunity(s) for a public hearing(s) be held for projects on which an EIS is prepared. The HPCM Public Involvement and Agency Coordination chapter directs that a second public hearing should be considered for all projects with long-term design activities or where concepts change after the initial hearing, resulting in reevaluation of the environmental document. The requirements listed under Section 7.5.6 apply to public hearings or opportunities for public hearings for EIS documents. In addition, whenever a public hearing is held, the Draft EIS must be available at the public hearing and for a minimum of 15 days in advance of the public hearing (23 CFR 771.123(h)).

7.6.8. Comment Response

The Final EIS is required to discuss all substantive comments received on the Draft EIS, include responses to those comments, and summarize public involvement (23 CFR 771.125(a)). Comment responses are to be written in an appropriate and respectful manner and adequately address the issue or concern raised by the commenter or, when substantive comments do not warrant further response, explain why they do not warrant further response and provide sufficient information to support that position.

7.6.9. Distribution of the Final EIS

The Final EIS is distributed to all agencies, organizations, and individuals who have jurisdiction, provided substantive comments on the Draft EIS, or requested a copy; the EIS must be distributed no later than the time the document is filed with the EPA (23 CFR 771.125(g)). Usually, copies must be provided free of charge; alternatively, copies can be provided at the cost of printing, or requestors can be directed to a public location where the document can be viewed (23 CFR 771.125(f)).

Every reasonable effort is to be made to resolve interagency disputes before approving the Final EIS (23 CFR 771.125(a)(2)).

The Notice of Availability of the Final EIS must be published in local newspapers (see Section 7.5.4, for details), and the Final EIS made available for public review at the DOT&PF region office and other public locations (see 23 CFR 771.125(g)).

7.6.10. Record of Decision

Although not formally required, it is advisable to publish notice of a ROD in the same manner as the Final EIS. If a revised ROD is subsequently published, it should be circulated to the same entities

that received a copy of the Final EIS (23 CFR 771.127), to the extent practicable.

If all conditions of MAP-21 Section 139(b) relating to a combined Final EIS and ROD (see Chapter 6) are not met, the Final EIS and ROD will be issued separately. If issued separately, the ROD cannot be issued until a minimum of 30 days have passed since the Final EIS became available.

7.6.11. Limitation of Claims Notice

Title 23 USC 139(l)(1) establishes a 150-day statute of limitations (SOL) on legal claims against USDOT and other federal agencies for certain environmental and other approval actions, if specific circumstances apply. A Limitation of Claims Notice must be placed in the *Federal Register* for the 150-day SOL to apply. Publication in the *Federal Register* starts the clock for the SOL. As with other *Federal Register* notices, DOT&PF prepares the notice and transmits it to FHWA for placement in the *Federal Register*.

7.7. Documentation

Documentation is an essential part of NEPA. The documentation and record keeping of public outreach is as important as the outreach itself. Because NEPA is a procedural law, public and agency outreach documentation should be preserved, as it may be critical information in the event of litigation.

A formal transcript of any public hearings must be prepared and included in the project files (23 CFR 771.111(h)(vi)).

Although not required, it is DOT&PF standard practice to prepare a Scoping Summary Report at the end of the scoping process. The Scoping Summary Report provides a comprehensive record of the scoping process and of the results of scoping, including significant issues to be addressed in the Draft EIS, alternatives, and purpose and need. If prepared, the Scoping Summary Report should include copies of all outreach materials prepared, certification of publication for all public notices, and copies of all public and agency comments received.

A Draft EIS must include copies of correspondence with agencies and the public, and its public and agency comments and coordination section must summarize the coordination process, including scoping, meetings, and the key input received from the public and agencies. Standard DOT&PF practice is to prepare appendices that include complete records on public and agencies requests for participation and comment, copies of all outreach materials prepared, certifications of publication for all public notices, and copies of public and agency comments received. The Environmental Impact Analyst or REM will consult with the region Cultural Resource Specialist for consistency with DOT&PF's *Cultural Resources Confidentiality Guidelines* before allowing public or agency review of materials containing potentially sensitive information.

A Final EIS must summarize public involvement, and discuss substantive comments on the EIS and respond to all substantive comments (23 CFR 771.125(a)(1); 40 CFR 1503.4(a-b). Additional public and agency outreach that occurred between the Draft and Final EIS should be appended to the comments and responses and other relevant documentation to the Final EIS.

The ROD should identify and respond to all substantive comments received on the Final EIS if not combining Final EIS and ROD.

All public involvement materials developed for the project; comments and responses; and correspondence with agencies and the public are to be placed appropriately in the project file.

Technical Appendix

Council on Environmental Quality

The complete CEQ regulations for implementing NEPA can be found at 40 CFR 1500-1508.

CEQ Guidance Regarding NEPA Regulations. These documents provide the CEQ's guidance on approaches to carrying out various aspects of NEPA, including public involvement.

CEQ Memorandum on Scoping Guidance.

CEQ Guidance on EJ describes potential innovative outreach measures that may be used to reach minority and low-income populations.

DOT&PF

Alaska Highway Preconstruction Manual (HPCM) is the guidance document for developing and designing highway and road projects in Alaska.

DOT&PF Civil Rights Office website contains the DOT&PF VI Program Plan which identifies its requirements for complying with Title VI including those for public involvement.

DOT&PF SEO website has environmental program and resource information and forms, including the Section 106 PA

EPA

EJSCREEN: Environmental Justice Screening and Mapping Tool

Executive Orders

EO 12898, Environmental Justice, Sec. 5-5, describes public participation and access to information.

EO 13166, Limited English Proficiency, Sec. 4. Consultations, describes stakeholder outreach and input.

EO 11990 Protection of Wetlands describes the requirement for early public involvement.

EO 11988 Floodplain Management includes the requirement for early public involvement.

EO 13175 Consultation and Coordination With Indian Tribal

FHWA

FHWA NEPA regulations can be found at 23 CFR 771, Environmental Impact and Related Procedures. These include requirements for public and agency outreach.

FHWA "Efficient Environmental Review Process" is designed to improve and streamline project-specific environmental decision-making. It includes provisions for agency and public involvement. For more information, see 23 U.S.C. 139.

Public and agency outreach guidance can be found in FHWA Technical Advisory 6640.8A.

FHWA has developed a number of guidance documents for public and agency involvement. These include

- Public Involvement Techniques for Transportation Decisionmaking
- Public Involvement and its Role in Project Development
- Developing and Advancing Effective Public Involvement and Environmental Justice Strategies for Rural and Small Communities
- Public Involvement/Public Participation web page

FHWA Section 4(f) Policy Paper includes guidance on Section 4(f) outreach.

FHWA How to Engage Low-Literacy and LEP Populations in Transportation Decision-Making provides guidance on designing and implementing effective public involvement for projects that may affect these populations.

USDOT LEP Guidance describes the four-factor analysis that can be used to determine the need for and design of an LEP outreach program.

Section 106

The National Historic Preservation Act of 1966 (as amended through 2006).

Section 106 implementing regulations can be found at 36 CFR Part 800.

The FHWA Environmental Review Toolkit for Historic Preservation provides information on methods and analyses regarding Section 106 compliance activities.

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8. Section 4(f) and 6(f)

8.1. Introduction
8.2. Key Definitions
8.3. Section 4(f) Applicability
8.4. Identification of Section 4(f) Properties
8.5. Determining Section 4(f) Use of Land
8.6. Process and Documentation for Section 4(f) Approval
8.7. Section 6(f) and Other Federal Grant Programs (23 CFR 774.5(d))

8.1. Introduction

Section 4(f) is a federal environmental protection statute specific to U.S. Department of Transportation (USDOT) projects. This statute prohibits using land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites for transportation projects unless specific criteria are satisfied.

Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which established the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites in transportation project development. The law, now codified in 49 USC 303 and 23 USC 138, is implemented by the Federal Highway Administration (FHWA) through the regulation 23 Code of Federal Regulations (CFR) 774.

The Alaska Department of Transportation and Public Facilities (DOT&PF) has assumed the FHWA's responsibility for Section 4(f) approvals under the National Environmental Policy Act (NEPA) Assignment Program Memorandum of Understanding (MOU) between FHWA and DOT&PF. Because FHWA's Section 4(f) approval has been assigned by FHWA, and assumed by DOT&PF, the term "Administration" must be read as "DOT&PF" in the Section 4(f) requirements of the FHWA regulations. These regulations (23 CFR 774.3) state:

> The Administration may not approve the use, as defined in §774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.
>
> (a) The Administration determines that:
>
> (1) There is no feasible and prudent avoidance alternative, as defined in §774.17, to the use of land from the property; and
>
> (2) The action includes all possible planning, as defined in §774.17, to minimize harm to the property resulting from such use; or
>
> (b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in §774.17, on the property.

This chapter defines specific terms and describes the process of documenting any proposed use of property protected under Section 4(f). Useful tools to supplement the information in this chapter are the FHWA Section 4(f) Policy Paper and FHWA Environmental Review Toolkit.

This chapter covers four main topics:

- Section 4(f) Applicability (Section 8.3)
- Identification of Section 4(f) Properties (Section 8.4)
- Determining Section 4(f) Use of Land (Section 8.5)
- Process and Documentation for Section 4(f) Approval (Section 8.6)

This chapter also briefly addresses a related section of another law, the Land and Water Conservation Fund (LWCF) Act of 1965. This law provides for federal funding of outdoor recreation areas and facilities. Lands that have benefitted from the LWCF are virtually always subject to Section 4(f). Section 6(f) of the LWCF Act includes a provision that any park or recreation area funded through the Act cannot be converted to other uses, including transportation use, unless replaced with an equivalent outdoor recreation area. Section 6(f) is addressed in Section 8.7.

8.2. Key Definitions

Definitions for key terms applicable to FHWA Section 4(f) implementation regulations are found at 23 CFR 774.17. References to "Administration" must be read

as "DOT&PF" since Section 4(f) approval authority has been assigned by FHWA to DOT&PF. The following definitions provide foundational knowledge for understanding this chapter:

Section 4(f) property: Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national State, or local significance.

[See also Section 8.4.1.]

Use: Except as set forth in §§774.11 and 774.13, a "use" of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in §774.15.

[See also Section 8.5.]

Official(s) with Jurisdiction:

(1) In the case of historic properties, the official with jurisdiction is the SHPO [State Historic Preservation Officer] for the State wherein the property is located or, if the property is located on tribal land, the THPO [Tribal Historic Preservation Officer]. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act [NHPA], then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP [Advisory Council on Historic Preservation] is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

***de minimis* impact:**

(1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

[See further discussion in Section 8.6.1.]

Feasible and prudent avoidance alternative:

(1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

[See further discussion in Section **Error! Reference source not found.**.]

All possible planning: All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under §774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with §771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under §774.3(b).

(5) A *de minimis* impact determination under §774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

[See further discussion in Section 8.6.5.]

8.3. Section 4(f) Applicability

DOT&PF is responsible for determining whether Section 4(f) applies and, if so, what approval option is appropriate. The potential for a Section 4(f) use must be analyzed in all situations where project activities are on, or adjacent to, a Section 4(f) resource. In these circumstances, consultation with the NEPA Program

Manager and documentation of the Section 4(f) consultation is required.

It is important to identify publicly owned parks, recreation areas, wildlife and waterfowl refuges, and historic sites early in project development. Determining whether proposed project activities would constitute a use of Section 4(f) properties should begin as soon as possible thereafter. If a Section 4(f) use may occur, it is essential to alert the project manager and preliminary design personnel of the need to begin looking for engineering solutions to either avoid Section 4(f) use or seek a *de minimis* impact solution. If it is possible to avoid use of any Section 4(f) property, the entire process in this chapter can be bypassed, likely with a no use determination, which may save considerable project time and funds.

8.3.1. Section 4(f) Process Outline

Federal regulations and DOT&PF procedures dictate the process by which the Section 4(f) analysis for a project occurs. The steps in this process are outlined below:

1. **Identify properties:** Determine whether Section 4(f) applies to a property that is in, or adjacent to, the project area (See Section 8.4). This step may require consultation with official with jurisdiction (OWJ).
2. **Determine whether use will occur:** Determine whether the project activities will result in a Section 4(f) use. Determine whether an exception to requiring a Section 4(f) approval applies (See Section 8.5
3. **Select approval option:** If a Section 4(f) use may occur and an exception does not apply, determine what type of analysis and approval is appropriate: *de minimis* impact finding, Programmatic 4(f) Evaluation, or Individual 4(f) Evaluation (See Section 8.6). Identify whether Section 6(f) applies (See Section 8.7).
4. **Conduct analysis:** Conduct and document Section 4(f) analysis appropriate for the approval option, publish public notices as applicable and consult with OWJ.
5. **Approval:** Circulate, review, and approve Section 4(f) documentation.

The steps required to complete the Section 4(f) process will vary and are determined in consultation between the Regional Environmental Manager (REM) and the NEPA Program Manager. Steps 1 through 3 are completed through early consultation with the NEPA Program Manager. Steps 4 and 5 are completed only when the NEPA Program Manager determines that a Section 4(f) approval is required.

8.3.2. Section 4(f) Consultation

The Environmental Impact Analyst is responsible for the analysis of whether Section 4(f) properties other than National Register of Historic Places (NRHP) eligible properties are present and whether a Section 4(f) use will occur. The presence of NRHP-eligible properties is the result of the Section 106 process. If there are no Section 4(f) properties present, the Environmental Impact Analyst can document this in the environmental document and project file, and no further documentation is needed.

If Section 4(f) properties are present, or if there is a question as to whether Section 4(f) applies to a particular property, then consultation with the NEPA Program Manager regarding applicability is required. The Environmental Impact Analyst prepares the information described below for each property, and provides it to the REM for consultation with the NEPA Program Manager. Prior to the consultation, it is helpful for the REM to discuss with the NEPA Program Manager what information may be necessary, including:

1. **Section 4(f) property identification**
    a. **Description.** Include the location of all existing and planned activities, facilities, features, and attributes (e.g., baseball diamonds, tennis courts).
    b. **Detailed Map of Property.** The map or drawing should be of sufficient scale to identify the relationship of the project activities to the property. Determine the property boundary, size (i.e., acres, square feet) and location of the affected property (e.g., maps, photographs, sketches).
    c. **Ownership and Property Type.** Ownership (e.g., city, borough, state), type of property (e.g., park, recreation, refuge, historic), and applicable information relating to the ownership of the land (e.g., lease, easement, covenants, restrictions, conditions, including forfeiture).

d. **Property Function.** Include current and planned activities (e.g., baseball, swimming, tennis, golf).

e. **Access**. Access (e.g., pedestrian, vehicular) and usage (e.g., approximate number of users, visitors a year).

2. **Project Effect Discussion**. Discuss how the project will affect the property, including direct and indirect effects. Provide enough information to determine whether each type of Section 4(f) use may occur (permanent, adverse temporary occupancy, and constructive).
3. **Section 106 Finding**. If the property is on or eligible for listing on the NRHP, discuss what Section 106 finding the Professionally Qualified Individual (PQI) determined applies to the project (i.e., no historic properties affected, no adverse effect, adverse effect) and provide the Section 106 finding concurrence from the SHPO or THPO.

The consultation with the NEPA Program Manager is required before continuing the Section 4(f) project work. For example, this consultation is required *before* DOT&PF consults with the OWJ over a Section 4(f) resource.

The consultation must include sufficient information for the NEPA Program Manager to determine:

- Whether Section 4(f) is applicable to the property.
- Whether a Section 4(f) use will occur, or an exception to a Section 4(f) approval applies.
- Which type of Section 4(f) approval option (*de minimis* impact finding, Programmatic Evaluation, Individual Evaluation) should be pursued, if there is a Section 4(f) use.

The NEPA Program Manager is responsible for making these determinations for each Section 4(f) property. Therefore, there may be multiple determinations for a project, depending on the number of properties.

Consultation Outcomes and Documentation

Consultation with the NEPA Program Manager must be done in writing via email for documentation purposes. Supporting documentation may be attached to the email as necessary.

Section 4(f) Does Not Apply: When the NEPA Program Manager determines that Section 4(f) does not apply to a property, the determination will include the resource name and the reasons for the conclusion. The consultation email, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Section 4(f) No Use: When Section 4(f) applies to a property and the NEPA Program Manager determines that the project will not result in a use of that property, the consultation will conclude with the statement:

> *DOT&PF has determined that the proposed project will not use this Section 4(f) property. Therefore, the requirements of Section 4(f) do not apply.*

The consultation email, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Exceptions to Section 4(f) Approval: When Section 4(f) applies to a property and the NEPA Program Manager determines that an exception to a Section 4(f) approval applies (See Section 8.5.2), additional coordination with the OWJ may be required. In this circumstance, the NEPA Program Manager will ask the region to obtain the required written concurrence or non-objection from the OWJ and forward it to the NEPA Program Manager to conclude the consultation. If no coordination with the OWJ is required, the NEPA Program Manager may approve the exception. The NEPA Program Manager consultation response regarding an exception to Section 4(f) approval will cite the appropriate exception and include the statement:

> *DOT&PF has determined that the proposed project meets an exception to a Section 4(f) approval. Therefore, the requirements of Section 4(f) do not apply.*

All correspondence with the NEPA Program Manager and OWJ, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Section 4(f) Approvals: When Section 4(f) applies to a property and the NEPA Program Manager determines that a Section 4(f) approval is required for use of a Section 4(f) property, the NEPA Program Manager will identify the appropriate type of Section

4(f) approval in the consultation. The consultation correspondence is placed in the region project file.

Only after receiving this written determination should the appropriate Section 4(f) documentation be prepared. Each Section 4(f) approval type has a different process and documentation requirements, as described in the following sections:

- de minimis impact finding (Section 8.6.1)
- Programmatic Section 4(f) Evaluation (Section 8.6.2)
- Individual Section 4(f) Evaluation (Section 8.6.6)

The Section 4(f) approval process must be complete prior to approval of the environmental document.

8.4. Identification of Section 4(f) Properties

8.4.1. What is a Section 4(f) Property?

A Section 4(f) property is land designated as or functioning as a publicly owned park, publicly owned recreation area, publicly owned wildlife or waterfowl refuge, or a publicly or privately owned historic site.

To be protected by Section 4(f), the property must also have national, state, or local significance as determined by the OWJ. Rules for Section 4(f) protection are different for historic sites than for parks, recreation areas, and wildlife and waterfowl refuges. The applicability of Section 4(f) to a property is determined in accordance with 23 CFR 774.11 and as described below in Sections 8.4.2and 8.4.3. If there is a question regarding applicability of Section 4(f) to a property, the NEPA Program Manager makes this determination during consultation (See Section 8.3).

8.4.2. Determining Section 4(f) Applicability for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges (23 CFR 774.11)

Section 4(f) protections apply to a park, recreation area, waterfowl refuge, or wildlife refuge when the property is:

1. Publicly owned
2. Generally open to the public
3. Significant as determined by the OWJ

FHWA Section 4(f) Policy Paper Section 3.1 and the "additional examples" (Questions 14-31) provide helpful information.

Publicly Owned: A park, recreation area, or wildlife and waterfowl refuge must be publicly owned to be protected by Section 4(f). Section 4(f) normally does not apply to parks, recreation areas, or wildlife and waterfowl refuges owned by private institutions and individuals, even if these areas are open to the public. A property can be considered publicly owned if a governmental body has a sufficient proprietary interest in the land. In addition to fee simple title (ownership of all land rights), governmental proprietary interests that may be considered public ownership for the purposes of Section 4(f) include conservation easements, public easements in perpetuity, certain lease agreements, or government requirements that provide for public recreation. Determining whether Section 4(f) applies in these situations is very fact specific (See FHWA Section 4(f) Policy Paper, Question 1A.). Coordinate with the NEPA Program Manager for project-specific questions about what constitutes public ownership.

Open to the Public: Section 4(f) applies only to parks, recreation areas, or wildlife and waterfowl refuges that are open to the general public. However, it is FHWA policy that refuges need not always be open to the general public, if management for the protection of wildlife closes all or a portion of the refuge. Similarly, parks that are open only during daytime hours generally qualify for Section 4(f) protection. However, publicly owned lands that are open to only a segment of the public, such as some military recreation lands, generally are not considered Section 4(f) properties. See FHWA Section 4(f) Policy Paper, Section 3.1, note 6 for more information.

Significant (as determined by OWJ (49 USC 303(c)): A resource that is clearly a Section 4(f) property, such as a designated state or national park or a national wildlife refuge, is generally presumed to be significant. Section 4(f) will not typically apply to a resource if the OWJ determines that the property, considered in its entirety, is not significant. Management plans regarding the land and its significance, if available and up to date, are important and should be reviewed. Only in cases where the significance of the property is in question is it necessary to consult with the OWJ to determine property significance. If a determination from the OWJ cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant. Except for certain multiple-use lands,

significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Public Multiple-Use Land: Where public lands (e.g., state or national forests) are managed for multiple uses, Section 4(f) applies only to those portions that function for or are designated in the management plan as being for significant park, recreation, or wildlife and waterfowl refuge purposes. Incidental, secondary, occasional, or dispersed recreational activities do not constitute a major recreational purpose and should not result in a finding that Section 4(f) applies. Broad multiple-use management prescriptions or classifications that include management for recreation typically are not designated recreation areas and are not Section 4(f) properties. The OWJ determines whether a specific area of multiple-use land is a park, recreation area, or wildlife and waterfowl refuge and whether it is significant, but DOT&PF reviews any such determination to ensure it is reasonable. See also the FHWA Section 4(f) Policy Paper, Question 4 for more information. The NEPA Program Manager approves any such review.

8.4.3. Determining Section 4(f) Applicability for Historic and Archaeological Sites (23 CFR 774.11) (23 CFR 774.17)

Section 4(f) applies to historic sites of national, state, or local significance. FHWA regulations (23 CFR 774.17) define "historic site" as follows:

> For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Historic properties are identified during the Section 106 process (See Chapter 10). Since the Section 106 process may result in the identification of previously unreported historic properties, and/or in determinations of eligibility for properties whose NRHP-eligibility status was unknown or has changed, it is completed prior to the Section 4(f) determination. The Section 106 process results in conclusions about the project's effect on historic properties which may also be relevant for Section 4(f) purposes. Findings of Effect are categorized as No Historic Properties Affected, No Historic Properties Adversely Affected; and Adverse Effect. Section 4(f) applies to historic sites regardless of public or private ownership and regardless of whether the property is open to the public. Section 4(f) also applies to archaeological sites discovered during construction unless exempted (See Section 8.5.2).

Significance: Significance typically is indicated through the Section 106 process (eligible for inclusion on the NRHP is presumed to mean significant). Section 4(f) applies only to historic properties on or eligible for the NRHP. In rare cases, DOT&PF may determine the application of Section 4(f) appropriate for a site which has been determined not eligible for the NRHP, when an official formally provides information to indicate that the historic site is of local significance, as described in FHWA Section 4(f) Policy Paper, Question 2A.

Historic Districts: Within an historic district, Section 4(f) applies to those properties that contribute to the eligibility of the historic district, as well as to any individually eligible properties within the district. Elements within the boundaries of an historic district are assumed to contribute unless they have an official determination of eligibility as non-contributing. See FHWA Section 4(f) Policy Paper, Question 2B for more information.

8.4.4. Situations Where Detailed Identification of Section 4(f) Properties is Not Required

On rare occasions, the detailed identification of Section 4(f) properties required by Section 8.3.2 may be omitted for projects that exclusively consist of activities with a very low probability of having a Section 4(f) use. Low risk projects are those that would not have a Section 4(f) use even if there is an identified resource adjacent to the project. This risk analysis will examine the nature of the activity (ex. pavement striping of an existing road, guardrail replacement, crack sealing, light bulb replacement, etc.) and the probability for that project to have a Section 4(f) use. Identification of each Section 4(f) resource adjacent to the project will not be required under these circumstances.

The determination that a project has a low probability to affect Section 4(f) properties and detailed identification of Section 4(f) properties is not required must be made by the NEPA Program Manager. The REM, in coordination with the Environmental Impact Analyst, should consult with the NEPA Program

Manager to determine applicability of this approach. The consultation must include sufficient information for the NEPA Program Manager to determine:

- Project activities have a very low probability of having a Section 4(f) use; and
- The project consists exclusively of very low probability activities.

Consultation with the NEPA Program Manager must be done in writing via email for documentation purposes. Supporting documentation may be attached to the email as necessary. The consultation email must be attached to the environmental document and placed in the region project file.

8.5. Determining Section 4(f) Use of Land

8.5.1. Types of Use

According to 23 CFR 774.17, use is defined as:

> Except as set forth in §§774.11 and 774.13, a "use" of Section 4(f) property occurs:
>
> (1) When land is permanently incorporated into a transportation facility;
>
> (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or
>
> (3) When there is a Constructive Use of a Section 4(f) property as determined by the criteria in §774.15.

The project team, including the NEPA Program Manager, will discuss and determine early in project development whether a Section 4(f) use is likely to occur (Refer to Section 8.3).

A Section 4(f) property (e.g., a historic site) may not always have a previously identified property boundary and it may be necessary to establish a reasonable boundary through discussion with the OWJ. Efforts to define boundaries should begin as soon as it is determined likely that the property is protected by Section 4(f) and that it may not have a clear boundary. The REM or Environmental Impact Analyst is responsible for contacting the OWJ. For historic Section 4(f) resources, the PQI, in coordination with the REM or Environmental Impact Analyst, is responsible for contacting the OWJ.

Permanent Incorporation. Permanent incorporation of land into a transportation facility occurs when all or a portion of a Section 4(f) property is acquired for a project. This can occur when DOT&PF will acquire all property rights (fee simple title) or a property interest that allows permanent access onto the property, such as a permanent easement for highway construction, maintenance, or other transportation-related purpose. See FHWA Section 4(f) Policy Paper, Section 3.2 for more information.

Adverse Temporary Occupancy. A Section 4(f) use occurs when there is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservation purpose.[1] If the temporary occupancy of land satisfies the five conditions identified by FHWA regulations (23 CFR 774.13(d)), then the occupancy can be determined to be so minimal as to not constitute a use within the meaning of Section 4(f). If the project cannot meet these conditions, the temporary occupancy is adverse and constitutes a Section 4(f) property use. See Section 8.5.2(d).

Constructive Use (23 CFR 774.15). A Constructive Use occurs when a transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the activities, features, or attributes of the property are substantially impaired. The FHWA Section 4(f) Policy Paper (Section 3.2) states "As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost."

A Constructive Use finding is quite rare, because "substantial impairment" of a Section 4(f) property based on proximity impacts such as noise, vibration, or changes in access is rare, and because mitigation measures may bring impact levels below a Constructive Use threshold. A Constructive Use finding requires an Individual Section 4(f) Evaluation. Per Part 3.2.8 of the NEPA Assignment Program MOU between FHWA and DOT&PF, consultation with FHWA is required when DOT&PF determines a

[1] Preservation purpose: "It is declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites" (23 USC 138(a)).

Constructive Use. The NEPA Program Manager undertakes the consultation with FHWA.

FHWA regulations outline the situations where the Administration has determined a Constructive Use occurs (23 CFR 774.15(e)) and does not occur (23 CFR 774.15(f)).

If it is determined that the proximity impacts do not cause substantial impairment, the Statewide Environmental Office (SEO) can reasonably conclude that there will be no constructive use. Consideration of proximity impacts and the potential for Constructive Use is documented in the consultation with the NEPA Program Manager or the Section 4(f) approval, as determined appropriate by the NEPA Program Manager. FHWA regulations (23 CFR 774.15) and FHWA Section 4(f) Policy Paper (Section 3.2 and Question 7) provide substantial additional information.

If there is no permanent incorporation of a portion of Section 4(f) property, and no adverse temporary occupancy of Section 4(f) property, and no proximity impacts to Section 4(f) property, then the SEO can reasonably conclude that there will be no use of a Section 4(f) property. Documentation of SEO's determination of no use of a Section 4(f) property must be maintained in the project files as the determination of compliance with the requirements of Section 4(f).

8.5.2. Exceptions

There are several "exceptions to the requirement for Section 4(f) approval" listed at 23 CFR 774.13. These are reproduced in full below. References to "Administration" in the below reproduction of 23 CFR 774.13 must be read as "DOT&PF" since Section 4(f) approval authority has been assigned by FHWA to DOT&PF. The NEPA Program Manager makes the final decision regarding application of an exception to a specific project or alternative, as described in Section 8.3. These exceptions include:

(a) The use of historic transportation facilities in certain circumstances:

(1) Common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108.

(2) Improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers, including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of railroad or rail transit line elements, except for:

i) Stations;

ii) Bridges or tunnels on railroad lines that have been abandoned, or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers; and

iii) Historic sites unrelated to the railroad or rail transit lines.

(3) Maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of historic transportation facilities, if the Administration concludes, as a result of the consultation under 36 CFR 800.5, that:

i) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or this work achieves compliance with Section 106 through a program alternative under 36 CFR 800.14; and

ii) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion that the proposed work does not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or the Administration concludes this work achieves compliance with 54 U.S.C. 306108 (Section 106) through a program alternative under 36 CFR 800.14.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s)

with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in §774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

(1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;

(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;

(4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and

(5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

(e) Projects for the Federal lands transportation facilities described in 23 U.S.C. 101(a)(8).

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

(1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241-1251, with the exception of those trail segments that are historic sites as defined in §774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

Where stated above, certain exceptions require consultation with the OWJ, and may require the OWJ to agree in writing with the provisions of the exception to Section 4(f) approval. Consultation with the OWJ occurs only after the NEPA Program Manager agrees that the exception would apply and asks the region to obtain concurrence.

8.6. Process and Documentation for Section 4(f) Approval

When use of a Section 4(f) property is anticipated, every effort should be made to avoid or minimize that use. The extent of documentation, coordination, and time required for a Section 4(f) approval is commensurate with the extent of the use. This section addresses process and documentation for the various use approval options.

Section 4(f) evaluation and approval options include:

- *De minimis* impact finding
- Programmatic Section 4(f) evaluation
- Individual Section 4(f) evaluation

The fundamental differences between a *de minimis* impact finding and preparing a Programmatic or Individual Section 4(f) Evaluation are whether or not an avoidance alternatives analysis must be prepared and requirements for public notice and comment. An avoidance alternatives analysis is required for a Programmatic or Individual Section 4(f) Evaluation. An avoidance alternatives analysis is not required for a *de minimis* impact finding. A public notice and public comment period is required for an Individual Section 4(f) Evaluation, *de minimis* impact finding, or Programmatic Section 4(f) Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property.

The Section 4(f) process for a project is discussed in the NEPA document, and documentation attached as an appendix.

Roles and Responsibilities. If Section 4(f) properties are present, or if there is uncertainty regarding Section 4(f) applicability to a particular property, typical Section 4(f) documentation and approval process roles and responsibilities are as follows:

- The Environmental Impact Analyst prepares information (See Section 8.3) and approval recommendations for each property and provides it to the REM for consultation with the NEPA Program Manager.
- The REM reviews the documentation and recommends approvals to the NEPA Program Manager.
- The NEPA Program Manager:
  - Reviews the documentation and provides overall guidance
  - Makes applicability and use determinations
  - Approves *de minimis* impact findings and Programmatic Section 4(f) evaluations
- The Statewide Environmental Program Manager approves Individual Section 4(f) evaluations.

The NEPA Assignment Program MOU (Part 3.2.5) requires the following language be included on the cover page of each Section 4(f) evaluation in a way that is conspicuous to the reader:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 USC 327 and a Memorandum of Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.*

8.6.1. De Minimis Impact Finding

"*De minimis* impact" is defined in Section 8.2, and at 23 CFR 774.17. A *de minimis* impact finding is documented on either the *Section 4(f) De Minimis Impact Finding Form for Parks, Recreation Areas, and Wildlife & Waterfowl Refuges*, or the *Section 4(f) De Minimis Impact Finding Form for Historic Sites.* Both forms are accessible from the SEO Resources web page. When there are two or more properties with *de minimis* impacts, a separate *de minimis* impact finding is made for each property.

***De Minimis* Impact Finding for a Park, Recreation Area, or Wildlife and Waterfowl Refuge**

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures) results in a determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or wildlife and/or waterfowl refuge for protection under Section 4(f).

The public must have the opportunity to review and comment on the effects of the project on the Section 4(f) property, after which the OWJ over the property must provide written concurrence [23 CFR 774.5(b)(2)].

Public Review and Comment (23 CFR 774.5(b)(2))

The public must have an opportunity to review and comment on the DOT&PF's intention to approve *de minimis* impacts findings for parks, recreation areas, and wildlife and waterfowl refuges. This public notice should be combined with other required NEPA process public notices, but at least a two week review and comment period is required for a proposed *de minimis* impact findings notice. However, if the Alaska Highway Preconstruction Manual's Public Involvement and Agency Coordination Chapter requires a longer period or additional processes, the more extensive process will be required. The public comment period must be completed prior to any concurrency by OWJ ((774.5(b)(2)(i)&(ii) and 49 USC 303(d)(3)(A))

Public notices for a proposed *de minimis* impact finding must include the information described below. The NEPA Manager must approve all Section 4(f) public notices prior to publication.

The public notice shall:

1. State in the heading "Notice of Proposed *de minimis* Section 4(f) Finding" along with the project name and number.
2. Discuss that the DOT&PF intends to make a finding that the proposed project will not adversely affect the activities, features, and attributes of the Section 4(f) property after consideration of impact avoidance, minimization, and mitigation or enhancement measures and consultation with the OWJ.
3. Note that the DOT&PF is requesting public comments on an intended *de minimis* Section 4(f) Impact Finding for the proposed project and identify the property that is protected under Section 4(f) of the USDOT Act of 1966.
4. Describe the potential impacts to the property.
5. Include the following language in a way that is conspicuous to the reader, per the requirement in the NEPA Assignment Program MOU (Part 3.2.5):

   The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 USC 327 and a Memorandum of Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.

Process

1. **Identify:** Determine whether the project's impacts may have a *de minimis* impact on the Section 4(f) property that is a publicly owned park, recreation area, or wildlife and waterfowl refuge.
2. **Official with Jurisdiction consultation:** Contact the OWJ to determine whether there is agreement regarding the project's effects on the property.
3. **Public Notice:** Publish public notice in newspapers of record. The REM prepares and issues the public notice upon approval from the NEPA Program Manager.
4. **Written concurrence:** The region prepares the required *de minimis* documentation including compilation of comments received and draft responses for NEPA Program Manager review prior to requesting written concurrence from the OWJ that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f) and that they are aware of DOT&PF's intent to make a *de minimis* impact finding. OWJ concurrence may occur on the *de minimis* Impact Finding form after the public notice period has ended.
5. **Approval:** The completed Section 4(f) *de minimis* Impact Finding form and supporting documentation are signed by the REM. In order for the NEPA Program Manager to approve the *de minimis* impact finding, the public notice period must be complete and the OWJ must have concurred in writing.

***De Minimis* Finding for A Historic Site**

De minimis impacts on historic sites are based upon the finding of either "no adverse effect" or "no historic properties affected" in compliance with Section 106 regulations (36 CFR 800).

SHPO and Public Review and Comment (23 CFR 774.5(b)(1))

For a *de minimis* impact finding for historic sites, the Section 4(f) public notice and comment period is satisfied by compliance with 36 CFR 800. The Environmental Impact Analyst, REM, and project manager must work closely with a DOT&PF PQI for historic site identification and Section 106 findings.

For the NEPA Program Manager to approve a *de minimis* impact finding for a historic site:

- The consulting parties identified in accordance with 36 CFR part 800 must have been consulted.
- The DOT&PF must have notified the SHPO of their intent to issue a *de minimis* impact finding based on their Section 106 concurrence. This may be done within the Section 106 findings letter. The following parties may also require notification, depending on their involvement with the project:
  - THPO (or Tribal representative if no THPO)
  - ACHP (when ACHP is participating in Section 106 process)
  - National Park Service (NPS) (when a National Historic Landmark is involved)
- The pertinent SHPO or THPO must have concurred with the Section 106 finding in writing (and the ACHP must provide written concurrence if they are participating in the Section 106 process)

Process

1. **Identify:** Determine whether there are any historic sites, through the Section 106 process. Determine whether the project's impacts may have a *de minimis* impact on the Section 4(f) property that is a historic site.
2. **Section 106 Finding and *de minimis* Concurrence:** SHPO/THPO must concur with a finding of either "no adverse effect" or "no historic properties affected" in compliance with Section 106 regulations; **and** SHPO/THPO must be notified of DOT&PF's intent to issue a *de minimis* impact finding based on the Section 106 finding concurrence.
3. **Approval:** The completed *de minimis* Impact Finding form and supporting documentation are signed by the REM and approved by the NEPA Program Manager.

8.6.2. Programmatic Section 4(f) Evaluation (23 CFR 774.3)

A Programmatic Section 4(f) Evaluation is a time-saving procedural alternative to preparing an Individual Section 4(f) Evaluation, but can only be used under certain circumstances, as outlined in the five Nationwide Programmatic Section 4(f) Evaluations below. FHWA's online Environmental Review Toolkit is a useful resource for this topic. The REM consults with the NEPA Program Manager to determine if this is appropriate.

The approved *Programmatic Section 4(f) Evaluation* Forms are available on the SEO website to document the Programmatic Section 4(f) approval. Prompts within the forms help the Environmental Impact Analyst and REM through the analysis process. In addition to the information in this chapter, the FHWA Section 4(f) regulations (23 CFR 774) and FHWA Section 4(f) Policy Paper should be consulted during preparation of a Programmatic Section 4(f) Evaluation. The SEO forms are based on the five Nationwide Programmatic Section 4(f) Evaluations available for use:

1. Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges.
2. Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.
3. Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites.
4. Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.
5. Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property.

These Programmatic Section 4(f) Evaluations apply only to projects meeting the applicability criteria stipulated in each programmatic evaluation, and must explicitly document the basis for determining that the project meets the applicability criteria. All possible planning to minimize harm (including, but not limited to, mitigation measures) must be incorporated into the proposed action. This is determined through consultation with the OWJ over the Section 4(f) resource and must be documented in the region project file.

Programmatic Section 4(f) Evaluations require consideration of the same steps found in an Individual

Section 4(f) Evaluation, including consideration of "feasible and prudent avoidance alternatives" and "all possible planning" to minimize harm (as defined in Section 8.2) and may require an assessment of least overall harm, discussed below and in Section 8.6.4.

Public Involvement for Programmatic Evaluations. The only programmatic evaluation that identifies public involvement requirements is the Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property Programmatic Evaluation; however, typically public involvement associated with Section 106 or NEPA provides opportunities for public input on the Section 4(f) Evaluation. This programmatic evaluation requires public involvement consistent with FHWA's NEPA public involvement requirements at 23 CFR 771.111. A Draft Section 4(f) evaluation may be part of an EA or Draft EIS, as applicable, and may be released for review and comment as part of the NEPA document. If there is no NEPA public involvement, the public involvement requirement will be satisfied by public notice and at least a two week review and comment period. However, if the Alaska Highway Preconstruction Manual's Public Involvement and Agency Coordination Chapter requires a longer period or additional processes, the more extensive process will be required.

Programmatic Section 4(f) Evaluation Approval Process

The Environmental Impact Analyst and REM complete the programmatic evaluation form, in consultation with the NEPA Program Manager. Consultation with the OWJ is required for Programmatic Evaluations.

The REM certifies the Section 4(f) Evaluation to recommend its approval. The NEPA Program Manager determines that a project meets the criteria and procedures of the specific Programmatic Section 4(f) Evaluation and approves the evaluation. If agreement of the OWJ is required, final approval by the NEPA Program Manager occurs after such agreement is secured in writing.

8.6.3. Feasible and Prudent Alternatives

Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, DOT&PF must determine that no feasible and prudent avoidance alternative exists before approving the use of such land (23 CFR 774.3). Feasible and prudent avoidance alternatives are those that avoid using any Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 CFR 774.17) (Part 3.3.3.1, FHWA Section 4(f) Policy Paper).

To determine whether a feasible and prudent avoidance alternative exists, it is necessary to first identify a reasonable range of project alternatives including those that avoid using Section 4(f) property. The no-action or no-build alternative should be included in the reasonable range of project alternatives as it is also an avoidance alternative. Reasonable alternatives that meet the purpose and need of the project should be considered. Potential avoidance alternatives may include one or more of the following:

1) **Location Alternatives** - Re-routing of the entire project along a different alignment
2) **Alternative Actions** - Another mode of transportation (rail transit or bus service), or another action that does not involve construction (implementation of transportation management systems)
3) **Alignment Shifts** - Re-routing of a portion of the project to a different alignment to avoid a specific resource
4) **Design Changes** - A modification of the proposed design in a manner that would avoid impacts (reducing the proposed median width, construction of a retaining wall, or incorporation of design exceptions)

The goal is to identify alternatives that would not use any Section 4(f) property. A determination of a *de minimis* impact for a specific Section 4(f) property may be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*. (Part 3.3.3.1, FHWA Section 4(f) Policy Paper)

Once the potential avoidance alternative(s) have been identified, then it is necessary to determine whether avoiding the Section 4(f) property is feasible and prudent for each potential avoidance alternative. Both the feasibility and the prudence of each potential avoidance alternative must be considered in order to determine whether there are other severe problems of a magnitude that

substantially outweighs the importance of protecting the Section 4(f) property.

A Feasible and prudent avoidance alternative is defined by 23 CFR 774.17 as:

(1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is required, and all efforts to avoid the Section 4(f) property(ies) should be described. This description should clearly explain the process that occurred and its results. It is appropriate to maintain detailed information in the project file with a summary in the Section 4(f) evaluation. The information may be contained in a technical report that is summarized and referenced in the Section 4(f) evaluation. The discussion must be organized within the Section 4(f) evaluation in a manner that allows the reader to understand the full range of potential avoidance alternatives identified, and the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence.

Even if all of the alternatives use a Section 4(f) property, there is still a duty to try to avoid the individual Section 4(f) properties within each alternative. (Part 3.3.3.1, FHWA Section 4(f) Policy Paper)

8.6.4. Alternative with Least Overall Harm (FHWA Section 4(f) Policy Paper)

If there is no feasible and prudent avoidance alternative, DOT&PF may then approve the alternative that causes the least overall harm in light of Section 4(f)'s preservation purpose. If the assessment of overall harm finds that two or more alternatives are substantially equal, DOT&PF can approve any of those alternatives. This analysis of alternative with least overall harm is required when multiple alternatives that use Section 4(f) property remain under consideration.

To determine which of the alternatives would cause the least overall harm, the seven factors set forth in 23 CFR 774.3(c)(1) must be considered:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities,

attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

Through consideration of these seven factors, DOT&PF may determine that a serious problem as identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination provides DOT&PF with a way to compare and select between alternatives that would use different types of Section 4(f) properties when competing assessments of significance and harm are provided by the officials with jurisdiction over the impacted properties. In evaluating the degree of harm to Section 4(f) properties, DOT&PF is required by the regulations to consider any views expressed by the OWJ over each Section 4(f) property. If an OWJ states that all resources within that official's jurisdiction are of equal value, FHWA may still determine that the resources have different value if such a determination is supported by information in the project file. Also, if the OWJ(s) over two different properties provide conflicting assessments of the relative value of those properties, FHWA should consider the officials' views but then make its own independent judgment about the relative value of those properties. Similarly, if the OWJ(s) decline to provide any input at all regarding the relative value of the affected properties, FHWA should make its own independent judgment about the relative value of those properties.

DOT&PF is required to demonstrate how the seven factors were compared to determine the least overall harm alternative (See 23 CFR 774.7(c)). The draft Section 4(f) evaluation will disclose the various impacts to the different Section 4(f) properties and the relative differences among alternatives regarding non-Section 4(f) issues, including the extent to which each alternative meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included. After circulation of the draft Section 4(f) evaluation in accordance with 23 CFR 774.5(a), FHWA will consider comments received on the evaluation and finalize the comparison of all factors listed in 23 CFR 774.3(c)(1) for all the alternatives. The analysis and identification of the alternative that has the overall least harm must be documented in the final Section 4(f) evaluation (See 23 CFR 774.7(c)). In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).

8.6.5. All Possible Planning to Minimize Harm

Once it has been determined that there are no feasible and prudent alternatives to avoid the use of Section 4(f) property, the project approval process for an individual Section 4(f) evaluation requires the consideration and documentation of all possible planning to minimize harm to Section 4(f) property (See 23 CFR 774.3(a)(2)). *All possible planning*, defined in 23 CFR 774.17, means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1).

Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the OWJ(s). These include the SHPO and/or THPO for historic properties or officials owning or administering the resource for other types of Section 4(f) properties. (FHWA Section 4(f) Policy Paper)

8.6.6. Individual Section 4(f) Evaluation

DOT&PF must prepare an Individual Section 4(f) Evaluation if the NEPA Program Manager has determined the following:

There will be a Section 4(f) use of a property and

(1) No exceptions to the requirement for Section 4(f) approval apply,

(2) A *de minimis* impact finding is not appropriate, and

(3) None of the Programmatic Section 4(f) Evaluations are appropriate.

Individual Section 4(f) Evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative. They must also summarize the results of all possible planning to minimize harm (23 CFR 774.7(a)).

Individual Section 4(f) Evaluations are prepared in two distinct stages: Draft and Final. The purpose of the Draft Individual Section 4(f) Evaluation is to discuss the information that will ultimately support a decision made in the final evaluation. The Final Individual Section 4(f) Evaluation must document the analysis and identification of the alternative that has the least overall harm in light of the statute's preservation purpose. If the analysis concludes that there is no feasible and prudent alternative, then DOT&PF may approve, from among the alternatives that use Section 4(f) property, only the alternative that causes the least overall harm.

Coordination (23 CFR 774.5(a))

The FHWA Section 4(f) Policy Paper recommends that preliminary coordination with the OWJ(s), Department of the Interior, and as appropriate with the Department of Agriculture and Department of Housing and Urban Development should occur before the circulation of the Draft Individual Section 4(f) Evaluation and that follow-up coordination *must* occur to address issues that are raised during review of the draft evaluation. Coordination must occur and be documented before the Final Individual Section 4(f) Evaluation can be approved. An analysis and response to comments received must be included. A minimum of 45 days shall be provided for receipt of comments.

Draft Individual Section 4(f) Evaluation

The following information is required for a Draft Individual Section 4(f) Evaluation (23 CFR 774.7). Depending on the specific circumstances of the project and the Section 4(f) properties, the order of this information may change, but the content is still required:

- **Description of the proposed project**, including an explanation for the proposed project purpose and need. Purpose and need information is required when identifying a potential avoidance alternative for consideration as a feasible and prudent avoidance alternative.

- **Description of each Section 4(f) property** that would be used by any of the alternatives under consideration, including property size; location; ownership; function; activities; features; attributes; relationship to other similar lands in the vicinity; if there are any leases or other ownership agreements; unusual characteristics; and a map or maps.

  For historic properties, this information could be extracted from Determinations of Eligibility. Some or all of this information may already have been collected for determining the applicability of Section 4(f), as described in Section 8.4.3.

- **Description of the uses of the Section 4(f) property** or properties by any alternative under consideration. This section should be sufficiently detailed, including what type of use occurs (land that is permanently incorporated into the transportation facility), whether one of the five criteria for temporary occupancy cannot be met, or whether a Constructive Use occurs (See Section 8.5.1). It is also important to discuss the degree of use, including whether any of the property's activities, facilities, or attributes are affected and how. Both permanent and temporary uses should be discussed. Quantify as many impacts as possible, such as noise, visual, or access. Maps and graphics are desirable, since this information will be reviewed by people who are not familiar with the project area.

  For historic properties, the Section 106 Determination of Effect can be one source of this information, but care should be taken not to directly substitute Determination of Effect language for description of Section 4(f) use, since different criteria are used in the two different laws.

- **Identification and evaluation of avoidance alternatives** that would avoid the Section 4(f) property. See Section 8.6.3.

  Each avoidance alternative should be evaluated to determine feasibility and prudence. Do not state

that the avoidance alternatives are not feasible and prudent in the draft document.

- **Discussion of measures to minimize harm to the Section 4(f) Property**. Discuss all possible planning for measures that are available to minimize the impacts on the property. Document all efforts undertaken even if they seem relatively minor. Summarize and refer readers to the main body of the environmental document as appropriate. *All possible planning* means all reasonable measures identified in the Draft Individual Section 4(f) Evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project (23 CFR 774.17 *All Possible Planning* definition). The following should also be documented:
    - The views of the OWJ(s) regarding the planning measures to minimize harm or mitigate impacts
    - Whether the cost of any mitigation measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and considering the benefits of the proposed mitigation measures
    - Any impacts or benefits of proposed mitigation measures to communities or environmental resources outside of the Section 4(f) property
- **Development of preliminary least overall harm analysis.** Least overall harm entails balancing the harm to the Section 4(f) property with other impacts and costs. More detail about least overall harm analyses are included in the Final Individual Section 4(f) Evaluation section, below. For the Draft Section 4(f) Evaluation, this information is included, but no conclusions are drawn.
- **Coordination.** Draft Individual 4(f) Evaluations must be circulated to the U.S. Department of the Interior (DOI) and shared with the OWJ(s), including Consulting Parties (for historic properties). Describe the results of meetings and correspondence with the OWJ(s) over the Section 4(f) property. For recreational properties, this includes the Parks Manager for the agency who owns the land. For historic properties, this includes the SHPO and Consulting Parties.

Final Individual Section 4(f) Evaluation

The Final Individual Section 4(f) Evaluation must contain:

- **All of the information included in the Draft Individual Section 4(f) Evaluation,** but modified as necessary to reflect responses to any comments received during the circulation of the Draft Individual Section 4(f) Evaluation.
- **Basis for concluding that there are no feasible and prudent alternatives.** Remember that *the feasible and prudent standard applies only to avoidance alternatives*. It does not apply when choosing among alternatives that use a Section 4(f) property.

  If no feasible and prudent avoidance alternatives exist, then there are two options:
    - If only one alternative that uses a Section 4(f) property remains under consideration, document all possible planning to minimize harm.
    - If two or more alternatives that both use one or more Section 4(f) properties remain under consideration, document the least overall harm analysis.
- **Least Overall Harm Analysis and Concluding Statement.** This section must be included in the Final Individual Section 4(f) Evaluation if the analysis in the preceding section concludes that there is no feasible and prudent avoidance alternative, and there are two or more alternatives that use a Section 4(f) property.

  If there is no feasible and prudent alternative to avoid harm to the Section 4(f) property, then only the alternative that causes the least overall harm in light of the statute's preservation purpose can be chosen. To determine which of the alternatives causes the least overall harm, compare and consider the seven factors listed below. These factors involve balancing competing and conflicting considerations—some of the factors may weigh in favor of an alternative, while other factors may weigh against it (23 CFR 774.3(c)(1)):
    - Ability to mitigate adverse impacts to each Section 4(f) property

- Relative severity of the remaining harm, after mitigation, to the protected activities and attributes or features
- Relative significance of each Section 4(f) property
- Views of the officials with jurisdiction over each Section 4(f) property
- Degree to which each alternative meets the purpose and need
- After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f)
- Substantial differences in costs among alternatives

The identification of the alternative that has the least overall harm must be documented in the Final Individual Section 4(f) analysis.

Include the concluding statement in the Final Individual Section 4(f) Evaluation and the final NEPA decision document (Finding of No Significant Impact or Record of Decision) only. The concluding statement should:

- Describe the basis for concluding that the proposed action or preferred alternative includes all possible planning to minimize harm to the Section 4(f) property.
- Provide an appropriate summary of the formal coordination with the headquarters office of DOI and, as appropriate, the involved offices of the U.S. Department of Agriculture and the U.S. Department of Housing and Urban Development (HUD).

The following language should be included in the concluding statement:

> *"Based on the above considerations, there is no feasible and prudent alternative to the use of land from [name the Section 4(f) property(ies)]. The proposed action includes all possible planning to minimize harm to [name the Section 4(f) property(ies)] resulting from such use and causes the least overall harm in light of the statute's preservation purpose."*

- **Document coordination with the official with jurisdiction over the property**—the DOI and, as appropriate, the U.S. Department of Agriculture (for National Forest System Lands) and HUD (property for which HUD funding was used). Note: The DOI has 45 days to respond; if the DOI does not reply within 45 days, then you must wait another 15 days before proceeding without their comments; 23 CFR 774.5(a).
- The focus of this section of the manual is on coordination with these agencies regarding Section 4(f), not coordination with them in general. Coordination with these agencies is the responsibility of DOT&PF as assigned by the FHWA. The FHWA Section 4(f) Policy Paper recommends that preliminary coordination with these agencies should occur before the circulation of the Draft Individual Section 4(f) Evaluation and that follow-up coordination *must* occur to address issues that are raised during review of the draft evaluation. Coordination must occur and be documented before the Final Individual Section 4(f) Evaluation can be approved. An analysis and response to comments received must be included.
- Document coordination on:
  - Significance of the property
  - Primary purpose of the land
  - Proposed use and impacts
  - Proposed measures to avoid and/or minimize harm

Legal Sufficiency Review

As required by FHWA regulations at 23 CFR 774.7(d), the Final Individual Section 4(f) Evaluation shall be reviewed for legal sufficiency. This is accomplished by the Alaska Department of Law (LAW) before the evaluation is approved. Legal sufficiency review consists of the following steps:

- The SEO will submit the Final Individual Section 4(f) Evaluation to LAW.
- LAW will prepare and submit to SEO written comments/suggestions, as appropriate, to improve the document's legal defensibility (these comments would be protected by attorney-client privilege and would not be shared outside of DOT&PF).

- The reviewing attorney will be available to discuss resolution of comments/suggestions with the SEO and the region.
- Once LAW is satisfied that its comments/suggestions have been addressed to the maximum extent reasonably practicable, LAW will provide the SEO with written documentation that the legal sufficiency review is complete.
- The Statewide Environmental Program Manager will not approve the Final Individual Section 4(f) Evaluation before receiving written documentation that the legal sufficiency review is complete.

8.7. Section 6(f) and Other Federal Grant Programs (23 CFR 774.5(d))

In some circumstances, Section 4(f) properties are protected under Section 6(f) of the LWCF Act or other federal grant programs. FHWA's Section 4(f) regulations acknowledge these issues and require coordination with the appropriate federal agency.

8.7.1. Land and Water Conservation Fund Act, Section 6(f)

The LWCF Act of 1965 is Public Law 88-578, as amended (Chapter 2003 in 54 USC). Its accompanying regulations are at 36 CFR 59. The Act states:

> No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if the Secretary finds it to be in accord with the then-existing comprehensive statewide outdoor recreation plan and only upon such conditions as the Secretary deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location (54 USC 200305(f)(3)).

When outdoor recreation land is proposed for conversion, the law and regulations set out a process between individual states and the U.S. government, and formal communication is between these two entities. The NPS is the agency that represents the federal government. The Alaska Division of Parks and Outdoor Recreation (DPOR) represents the state. By regulation (36 CFR 59.3(b)), communication from the applicant (DOT&PF) with the NPS about Section 6(f) goes through DPOR. The NPS provides substantial information about Section 6(f) in its Land and Water Conservation Fund State Assistance Program manual.

Section 6(f) and Section 4(f) are separate laws, and their requirements will be completed separately. Among other differences, Section 6(f) is distinguished from Section 4(f) in that it applies to any project involving a conversion of Section 6(f) property, whether or not the project uses federal funding or requires USDOT approval. However, when a transportation project is federally funded and requires the conversion of recreation or park property covered by Section 6(f), the project also is likely to involve Section 4(f).

Identification and Coordination

Early in project development, if there is park or recreational land in the project area, the Environmental Impact Analyst consults with the DPOR Grants Administrator to inquire about the presence of Section 6(f) property. If such property exists, the Grants Administrator can provide maps and further information about the portion of the part or facility encumbered by Section 6(f) grant conditions. If Land and Water Conservation funds were used to purchase all or part of the property or to make improvements to the property, then Section 6(f) may apply to any use of the property, even if the funds were used for an improvement in a discrete area of the property unaffected by the project.

Land Replacement Requirement

During the preliminary design and environmental phase, the REM or designee consults with the Grants Administrator of the Section 6(f) property to identify replacement property of equal value, location, and usefulness. DOT&PF then prepares a land replacement plan demonstrating that the Section 6(f) replacement property is acceptable to the land manager and meets nine substantive prerequisites in regulations (36 CFR 59.3). The plan includes any conditions agreed to by both parties.

According to the regulations, with few exceptions "once the conversion has been approved, replacement property should be immediately acquired" (36 CFR 59.3(c)). NPS will not approve conversion until all NEPA and Section 4(f) requirements, if appropriate,

have been satisfied (36 CFR 59.3(b)(6)&(7)). If the project is funded through a USDOT agency and if the property has been determined to be a Section 4(f) property as well as a Section 6(f) property, the Section 4(f) and Section 6(f) requirements intersect.

Depending on the project, the convergence of the approvals may mean the Section 4(f) analysis is dependent upon the outcome of the Section 6(f) conversion agreement, and both requirements will need to be completed simultaneously. Because of the 6(f) requirement to immediately acquire the replacement property, DOT&PF may need to complete advance acquisition of the replacement property before opening the project's right-of-way phase or may need to use state funds for the purchase. When a Section 6(f) property is identified, it is essential to immediately consult with the DOT&PF Right-of-Way Chief and NEPA Program Manager regarding the requirements of Section 6(f). The REM or designee coordinates early with DPOR in the property conversion transaction to avoid project delays.

Assuming that Section 4(f) has been found to apply to a Section 6(f) property, all other Section 4(f) requirements apply. For example, DOT&PF must avoid the 6(f) property unless there is no feasible and prudent avoidance alternative or DOT&PF finds the impact to be a *de minimis* impact. The Section 6(f) plan and conversion agreement typically will contribute to Section 4(f) findings, such as *de minimis* impact and "all possible planning" findings. Therefore, the Section 6(f) agreement typically is documented also as part of the Section 4(f) approval.

8.7.2. Other Federal Grant Programs

Other federal grant programs or lands with federal encumbrances may have their own requirements relating to converting property to a different use. Section 4(f) regulations at 23 CFR 774.5(d) state that, when such encumbrances are identified, coordination with the appropriate federal agency is required in part to determine if any requirements may apply to converting the property to a different function. Regardless of whether a transportation project is federally funded, any such conversion requirement may apply. If a conversion requirement does apply, it must be satisfied whether or not a Section 4(f) approval is needed. The most obvious grant programs are:

- Federal Aid in Wildlife Restoration Act, as amended, also known as the Pittman-Robertson Act (16 USC 669). The act can provide funding for "wildlife-associated recreation," such as trails, target ranges, and observation blinds.
- Federal Aid in Sport Fish Restoration Act, as amended, also known as the Dingell-Johnson Act (16 USC 777 et seq). The act can provide for funding of boating/fishing access.

Administrative requirements of both laws are in DOI regulations at 50 CFR 80.

These programs are managed by the U.S. Fish and Wildlife Service through its Wildlife & Sport Fish Restoration Program, which allocates funds to states. On the state side, the funds are managed by the Alaska Department of Fish and Game.

The regulations at 50 CFR 80.14(b) state that, when real property passes from management control of the State fish and wildlife agency, control must be restored or the property must be replaced using non-Federal funds not derived from (fishing or hunting) license revenues. For documenting a replacement agreement for property that would be converted to non-fish or -wildlife use, it is recommended that the Environmental Impact Analyst or REM consult with the Alaska Department of Fish and Game's Sport Fish Division or Wildlife Conservation Division.

Technical Appendix

Resources available for acquiring an understanding of Section 4(f) include:

- The law, as amended, presented in U.S. Code: 49 USC 303 and 23 USC 138.
- FHWA Section 4(f) regulations: 23 CFR 774.
- FHWA Section 4(f) Policy Paper (July 20, 2012)—essential reading for further guidance on Section 4(f), with multiple examples.
- FHWA Section 4(f) Tutorial—ten key topics explained.
- DOT&PF Statewide Environmental Office Section 4(f) web page—with further information links and forms to use in documenting Section 4(f) use.

Resources available for an understanding of Section 6(f) and other federal recreation grants include:

- Section 6(f) law, as amend, presented in U.S. Code: 54 USC (Section 2003).
- Section 6(f) regulations: 36 CFR 59
- Federal Aid in Wildlife Restoration Act, as amended, also known as the Pittman-Robertson Act (16 USC 669-669i).
- Federal Aid in Sport Fish Restoration Act, as amended, also known as the Dingell-Johnson Act (16 USC 777 et seq).
- Department of the Interior regulations for the wildlife and sport fish restoration acts: 50 CFR 80
- U.S. Fish and Wildlife Service guidance: Wildlife & Sport Fish Restoration Program.

9. Endangered Species Act and Marine Mammal Protection Act

9.1. Introduction
9.2. Identification of Protected Species and/or Habitat
9.3. Determinations of Effect under ESA
9.4. ESA Section 7 Consultation Process
9.5. Preparation of the Biological Assessment
9.6. Incidental Take Statements/Authorizations
9.7. Preparation of the Incidental Harassment Authorization, Letter of Authorization, or Marine Mammal Protection Act Application
9.8. NEPA Documentation

9.1. Introduction

This chapter describes the procedures for complying with the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), including integration of the two processes. The ESA was enacted in 1973 to provide for the conservation of species that are threatened or endangered (T&E) throughout all, or a significant portion of, their range. The ESA also provides for the conservation of the ecosystems on which these species depend. The MMPA was enacted in 1972 and protects all marine mammals, regardless of their status under the ESA.

9.1.1. Consultation Requirements

Section 7 of the ESA requires federal action agencies to consult with the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) on proposed actions that may affect ESA-listed T&E species or their designated critical habitat. Section 7 of the ESA also requires federal action agencies to confer with USFWS or NMFS (the Service[1]) on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the ESA, or actions that may result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Though consultation is not required under the MMPA for non-T&E marine mammals, early coordination with NMFS is recommended to determine if MMPA authorization is needed.

The purpose of consultation for T&E species is to ensure that any federal action authorized, funded, or carried out is not likely to jeopardize the continued existence of any T&E species or result in the destruction or adverse modification of critical habitat, unless the agency has been granted an exception for such action. The Code of Federal Regulations (CFR) at 50 CFR 402 provides the implementing regulations for interagency cooperation with respect to Section 7. Both Services follow the same Section 7 consultation process and use the same Consultation Handbook for guidance.

9.1.2. Definitions of Take

Both the ESA and MMPA prohibit the "take" of species under their protection. The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." In the definition of take, the term "harm" is defined to include significant habitat modification or degradation, and "harass" is defined as actions that disrupt normal behavior patterns (50 CFR 10). The MMPA defines take as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S. Code [USC] 31.1362 (13)).

9.1.3. Authorization of Take

For T&E species and marine mammals, it may be necessary to obtain incidental take authorization under both the ESA and MMPA. In these cases, MMPA compliance is integrated into the ESA Section 7 consultation process. This should be taken into account in the project's timeline.

9.2. Identification of Protected Species and/or Habitat

Early in the environmental process the Environmental Impact Analyst will determine whether a T&E species, proposed species, or designated or proposed critical habitat may be present in the project "action area" (i.e., all areas

[1] The term "the Service" is used in this manual to refer to NMFS or the USFWS, as appropriate.

directly or indirectly affected by the action as defined by 50 CFR 402.02). The Environmental Impact Analyst will also determine whether any marine mammals may be present in the action area. A proposed action must be considered along with any interrelated and interdependent actions.

Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

The following online tools are available to identify T&E species, proposed species, marine mammals, and designated and proposed critical habitat:

- The NMFS Marine Mammal Species Range and Critical Habitat Interactive Map (also called the NMFS ESA/MMPA Mapper)
- The USFWS Information for Planning and Consultation tool

9.3. Determinations of Effect under ESA

When a T&E or proposed species or designated or proposed critical habitat may be present in the action area, the Environmental Impact Analyst must evaluate the best available information and determine the proposed action's potential effects. The effects resulting from each component of the project must be considered when making an effect determination, as each component of a project may affect a T&E species differently. Common components of an Alaska Department of Transportation and Public Facilities (DOT&PF) project include, but are not limited to: earthwork (e.g., grading, cutting, or filling); vegetation removal or clearing; in-water work (e.g., culvert replacement or fill placement); and construction activities that considerably increase noise above background levels (e.g., blasting or pile driving).

In addition, the Environmental Impact Analyst must consider how proposed impact avoidance and minimization measures might change the impacts of the proposed action. Common avoidance and minimization measures include, but are not limited to: timing restrictions; exclusion zones; noise mitigation measures; and restoration of areas disturbed by the project (e.g., re-vegetation or removal of temporary fill).

Analysis of the effects will result in one of three possible determinations: No Effect; May Affect, Not Likely to Adversely Affect; or May Affect, Likely to Adversely Affect.

9.3.1. No Effect

A "No Effect" determination is appropriate if the proposed action and its interrelated or interdependent actions will not directly or indirectly affect a T&E species or designated critical habitat. In this case, consultation with the Service is not required.

9.3.2. May Affect, Not Likely to Adversely Affect

"May Affect, Not Likely to Adversely Affect" is the appropriate determination when the proposed action may affect T&E species or designated critical habitat, but potential effects would be discountable, insignificant, or completely beneficial.

- Discountable effects are those that are extremely unlikely to occur.
- Insignificant effects:
  - Relate to the size of the impact and are those that are undetectable, not measurable, or so minor that they cannot be meaningfully evaluated;
  - Should never reach the scale where take occurs; and
  - With regard to critical habitat, are those that are so temporary and/or minor that no discernible impact on the physical and biological features of the habitat would occur.
- Beneficial effects are contemporaneous positive effects without any adverse effects on the species or their habitat.

In the case of a "may affect, not likely to adversely affect" determination, the Regional Environmental Manager (REM) or Environmental Impact Analyst proceeds with informal consultation with the Service. For informal consultation, the REM must send the first letter requesting informal consultation, but can designate an Environmental Impact Analyst as the point of contact for the Service for the remainder of the informal consultation. The REM must be copied on all correspondence, including email. The REM is ultimately responsible for

ensuring informal consultation is complete. Procedures for informal consultation are provided in Section 9.4.1.

Note that, during the informal consultation process, the determination of effect may change at the discretion of the Service.

9.3.3. May Affect, Likely to Adversely Affect

"May Affect, Likely to Adversely Affect" is the appropriate determination if the proposed action would adversely affect T&E species or their designated critical habitat. Adverse effects are those resulting directly or indirectly from the proposed action or its interrelated or interdependent actions, and include impacts that are not discountable, insignificant, or completely beneficial. When the overall effect of the proposed action is beneficial to the T&E species, but may also result in some adverse effects during implementation (e.g., habitat restoration), the proposed action is "likely to adversely affect" the T&E species and/or its critical habitat. When a "likely to adversely affect" determination is made, formal ESA Section 7 consultation is required and the Service is responsible for completing a Biological Opinion (BO) on the proposed action. The analysis described in the BO is used by the Service to determine whether the action is likely to jeopardize the continued existence of a T&E species. Procedures for formal consultation are provided in Section 9.4.2, Formal Consultation.

9.4. ESA Section 7 Consultation Process

The need for and level of consultation are based on the Environmental Impact Analyst's determination of effect as shown in Table 9-1. When consultation is needed, first identify which agency has jurisdiction over the listed or proposed species or designated/proposed critical habitat. In Alaska, the USFWS has management authority over the northern sea otter (*Enhydra lutris*), polar bear (*Ursus maritimus*), and Pacific walrus (*Odobenus rosmarus*). NMFS has management authority over listed marine fish and all marine mammals other than those managed by USFWS. Free-swimming sea turtles and sea turtles caught in fishing gear are also managed by NMFS, whereas sea turtles on Alaska's beaches are managed by the USFWS. All other listed species are under USFWS management authority. For a complete list of ESA-listed species in Alaska refer to the Service's websites provided in the Technical Appendix.

Table 9-1.
Section 7 ESA Effects Determination Options

Species/Critical Habitat Status	Determination	Level of Consultation
Any	No effect	Not needed
Listed/Designated	May affect, not likely to adversely affect	Informal
	May affect, likely to adversely affect	Formal
Proposed	May affect[a]	Conference

[a] The consultation document may also provide a conditional or provisional effect determination in the event that the listing of species or designation of critical habitat changes prior to project completion.

9.4.1. Informal Consultation (50 CFR 402.13)

Informal consultation with the applicable Service is required when a project "may affect, but not likely to adversely affect" a T&E species or designated critical habitat under NMFS or USFWS jurisdiction. Informal consultation begins when DOT&PF submits a written request (this could be an email) to the Service to obtain concurrence with a finding of "may affect, not likely to adversely affect." The REM must send the first letter requesting informal consultation, but can designate an Environmental Impact Analyst as the point of contact for the Service for the remainder of the informal consultation. The REM must be copied on all correspondence, including email.

As part of the informal consultation request, DOT&PF must provide all relevant information to support the determination, including but not limited to:

- The project location and description of the action area
- A description of the project's activities (including any pile driving or blasting)
- Proposed avoidance and minimization measures
- T&E species or designated critical habitat that may occur within the action area
- Anticipated impacts on the T&E species or designated critical habitat
- Effects determination for T&E species and/or critical habitat
- Any supporting documentation

Descriptions and analysis of project activities resulting in potential noise impacts on marine mammals (if applicable) must include specific details regarding local environmental conditions, materials and methods used, and estimates of noise propagation distances from the sound source.

During informal consultation, an Environmental Impact Analyst may serve as the point of contact for the Service at the discretion of the REM, although all correspondence with the Service, including email, must be copied to the REM. The REM is ultimately responsible for ensuring informal consultation is complete. Although a timeframe for informal consultation is not mandated by regulation, the Service will respond within 30 calendar days when possible. The Service may request more information or may require discussions regarding DOT&PF's proposed avoidance and minimization measures and/or other conservation requirements prior to making a finding. The REM and, as appropriate, the Environmental Impact Analyst are responsible for responding to any requests from the agencies. If the Service concurs with the "may affect, but not likely to adversely affect" finding, the informal consultation is complete. If the Service does not concur and finds that the action "may affect, is likely to adversely affect," DOT&PF will need to enter into formal consultation. This may occur, for example, when adverse effects on T&E species and/or critical habitats are unavoidable or when DOT&PF is unable to commit to the Service's recommended measures to avoid adverse impacts.

9.4.2. Formal Consultation (50 CFR 402.14)

Formal consultation with the Service is required when a proposed project "may affect, and is likely to adversely affect" a T&E species or designated critical habitat. During formal consultation, the REM serves as the point of contact for the Service and must sign any formal correspondence to the Service. The NEPA Program Manager must be copied on all correspondence and be invited to participate in any relevant meetings or field reviews with the Service. Preparation of a Biological Assessment (BA) is required before formal consultation can be initiated. DOT&PF may agree to provide the Service with an informal draft BA for their review and comment prior to formally submitting the BA. Procedures for preparing a BA are discussed in Section 9.5.

Formal consultation is initiated when DOT&PF submits a request for formal consultation along with a BA to the Service. Within 30 working days of submission, the Service should provide acknowledgment of the consultation request, advise DOT&PF of any data deficiencies, and request either missing data or a written statement that the data are not available. If the Service requests additional information, the REM and Environmental Impact Analyst will coordinate compiling the pertinent information, and the REM will provide a written response to the Service.

After receiving all pertinent information, the Service has 90 days to conclude consultation. The Service will determine whether the proposed activity is likely to jeopardize the continued existence of a T&E species, or destroy or adversely modify its critical habitat. The time period to make this determination may be extended for complex or large-scale projects, and the 90-day period is suspended if the Service requires more information. After concluding consultation, the Service then has 45 days to write a BO. Formal consultation terminates with the issuance of the BO. Re-initiation of consultation may be required at any time, until the project is completed, if one of the re-initiation requirements is triggered. See Section 9.4.3.

If the Service determines that the action is not likely to jeopardize the species or adversely modify critical habitat, the Service will prepare a BO that includes any "reasonable and prudent measures" and "terms

and conditions" developed by DOT&PF and incorporated into the project and any conservation recommendations suggested by the Service. The BO also includes an Incidental Take Statement (ITS) to authorize the estimated take of each T&E species. Before formally issuing the BO, the Service should first provide a draft BO to afford DOT&PF the opportunity to review the reasonable and prudent measures, and terms and conditions before the BO is signed. Conservation measures from the Service are typically associated with EFH. Formal consultation is terminated with the issuance of the BO.

If the Service determines the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"), the project cannot proceed as designed. "A 'jeopardy' BO shall include any reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives" (50 CFR 402.14(h)(3)).

Conferences (50 CFR 402.10) are required if an action is likely to jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed critical habitat, although DOT&PF as the designated federal action agency may determine conferencing is advantageous even if this threshold is not anticipated. Conferences may be informal or formal, depending on the level of project impacts on proposed species or habitat. It is highly advisable to conference with the Service for any project that affects a proposed species or proposed critical habitat, as proposed species may become listed during the project development process. DOT&PF staff should follow the same procedures for conferences as for consultations.

9.4.3. Circumstances Requiring Re-initiation of Consultation

Informal Consultations: Informal consultation must be re-initiated if any of the following occur:

- A new species is listed, or critical habitat designated, that may be affected by the action.
    - Note: in this case, if the proposed project will not have an effect, re-initiation of consultation is not necessary. The analysis should be documented in the project file.
- New information reveals effects of the action that may affect T&E species or critical habitat in a manner, or to an extent, not previously considered.
- The identified action is subsequently modified in a manner that causes an effect to the T&E species or critical habitat that was not considered in the consultation.

Formal consultations: Per 50 CFR 402.16, re-initiation of formal consultation on a previously reviewed action is required if any of the following occur:

- The amount or extent of take specified in the ITS is exceeded.
- New information reveals effects of the action that may affect T&E species or critical habitat in a manner, or to an extent, not previously considered.
- The identified action is subsequently modified in a manner that causes an effect to the T&E species or critical habitat that was not considered in the consultation, and may include a reduction in impacts.
- A new species is listed or critical habitat is designated that may be affected by the action.

During formal consultation, the REM serves as the point of contact for the Service and must sign any formal correspondence to the Service. The NEPA Program Manager must be copied on all correspondence and be invited to participate in any relevant meetings or field reviews with the Service.

9.5. Preparation of the Biological Assessment

A BA is an ESA consultation document that defines the proposed action and analyzes impacts on T&E species and their habitat. A BA is typically prepared for formal consultation; BAs may also be prepared for informal consultation, although a less extensive document is generally sufficient for informal consultation. The BA may be prepared by an Environmental Impact Analyst or a consultant, and must follow the Service's guidance. The BA must be reviewed and approved by the REM and NEPA Program Manager prior to submission to the Service. When a consultant prepares the BA, the Environmental Impact Analyst will review the

consultant's work prior to submitting the BA to the REM and NEPA Program Manager for review, comment, and approval. The REM is responsible for transmitting the approved BA to the Service.

The NEPA Assignment Program Memorandum of Understanding (MOU) (Part 3.2.5) requires the following language be included on the cover page of each BA in a way that is conspicuous to the reader:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.*

The BA includes an evaluation of all potential effects of the action (including interrelated and interdependent actions) on the T&E species and critical habitat found in the action area. To evaluate cumulative effects, required only for formal consultation, the BA should also describe any non-federal activities that are reasonably certain to occur within the action area that are likely to affect the species. The preparer must use the best available scientific and commercial data, and include the information required by regulation (50 CFR 402.12(f)). The Environmental Impact Analyst should coordinate with the project design team to verify that appropriate mitigation measures and best management practices have been included in the BA's description of the proposed action. The BA must provide all the relevant information necessary to assist the Service in evaluating whether the proposed action is likely to jeopardize the continued existence of a T&E species, or destroy or adversely modify its critical habitat.

9.6. Incidental Take Statements/Authorizations

Under the MMPA, the Service issues Incidental Take Authorizations (ITAs) that permit the incidental, but not intentional, take of marine mammals under certain circumstances that are codified in 50 CFR 18.27. For T&E marine mammals, incidental take under both the ESA and MMPA may need to be authorized. The ITA process for T&E marine mammals under the MMPA is linked to the ESA consultation process. Take under the MMPA must be authorized, and the MMPA authorization process nearly completed, before an ITS can be authorized under the ESA. The timelines for completing ESA consultation and the MMPA authorization process are therefore interrelated. Coordination is required within each agency between the branch that implements the ESA and the branch that implements the MMPA. Discussions with the Service regarding both laws should occur early in the project development process for any project in which both ESA consultation and an MMPA ITA are anticipated.

9.6.1. ESA Incidental Take Statement

If the proposed action is anticipated to result in incidental "take" (e.g., harassment, harm) of a T&E species, DOT&PF makes a "may affect, likely to adversely affect" determination in the ESA consultation document prepared for the project (e.g., BA). If, upon review of the consultation document, the Service concurs with this determination, they will issue an ITS as part of the BO completed for the proposed action. The ITS quantifies the amount of "take," either to individuals or to habitat area as a surrogate.

If the proposed action results in the "take" of a marine mammal listed under the ESA, an ITA must also be requested in accordance with the MMPA.

9.6.2. MMPA Incidental Take Authorization

With some exceptions, most activities, federal or otherwise, that "take" marine mammals are subject to take prohibitions under the MMPA. An ITA is required whether or not a marine mammal is listed under the ESA.

The MMPA does not require a determination of effect. The MMPA prohibits take of marine mammals, but the Service may make exceptions for certain situations. If take of a marine mammal has the potential to occur, DOT&PF must apply for an ITA under the MMPA. Determining whether take could occur requires an analysis of how the proposed action may impact marine mammals, their habitats, and the availability of marine mammals for subsistence uses (where relevant). Harassment is defined under the MMPA as "any act of pursuit, torment, or annoyance" of a marine mammal. Harassment is further categorized as Level A or Level B:

- Level A harassment has the potential to injure a marine mammal or marine mammal stock in the wild.

- Level B harassment has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering, but does not have the potential to injure a marine mammal or marine mammal stock in the wild.

DOT&PF actions that have the potential to affect marine mammals include those that produce underwater noise during construction. In considering acoustic impacts on marine mammals, the Environmental Impact Analyst should refer to NMFS' Marine Mammal Acoustic Technical Guidance for calculating estimated sizes of the Level A (injury) harassment zones based on project-specific noise estimates and marine mammal functional hearing groups. Other resources in the NMFS West Coast Region's Marine Mammal ESA Section 7 Consultation Tools may also be helpful in considering noise impacts on marine mammals.

9.7. Preparation of the Incidental Harassment Authorization, Letter of Authorization, or Marine Mammal Protection Act Application

Two types of ITA can be obtained under the MMPA: the Incidental Harassment Authorization (IHA) and the Letter of Authorization (LOA). Both authorizations allow the incidental, but not intentional, take of small numbers of marine mammals by harassment during the course of an activity. An IHA is issued for a period of up to 1 year, and must be reapplied for in subsequent years. For projects of longer duration, Incidental Take Regulations can be promulgated for a specified activity in a specified geographic region for up to 5 years. An LOA can then be requested each year from the Service to carry out these activities.

To obtain an ITA under the MMPA from NMFS, an application must be submitted to the Division Chief of the Office of Protected Resources in Silver Spring, Maryland. At a minimum, applications for IHAs should be submitted 6 to 9 months in advance of the intended project start date, and applications for LOAs should be submitted 12 to 18 months in advance. The ITA application can be completed by an Environmental Impact Analyst or a consultant, and must include 14 specific pieces of information, as identified below. The application must be reviewed and approved by the REM and NEPA Program Manager before the REM transmits the application to NMFS. An ITA application is designed to provide a detailed explanation of the proposed action, the action's anticipated effects on marine mammals and/or their habitats, the availability of marine mammals for subsistence uses, and the methods of mitigating, monitoring, and reporting on the effects of the action. Detailed descriptions of the 14 required components for applications to NMFS can be found on the NMFS ITA website.

The 14 required components are:

- Description of Specified Activity
- Dates and Duration, Specified Geographic Region
- Species and Numbers of Marine Mammals
- Affected Species Status and Distribution
- Type of Incidental Taking Authorization Requested
- Take Estimates for Marine Mammals
- Anticipated Impact of the Activity
- Anticipated Impacts on Subsistence Uses
- Anticipated Impacts on Habitat
- Anticipated Effects of Habitat Impacts on Marine Mammals
- Mitigation Measures
- Arctic Subsistence Plan of Cooperation
- Monitoring and Reporting
- Suggested Means of Coordination

To obtain an ITA under the MMPA for species managed by the USFWS, an application must be submitted to USFWS Marine Mammals Management in Anchorage. USFWS generally follows the same application format as NMFS; however, USFWS recommends contacting them directly before the ITA process is initiated.

The authorization process for both USFWS and NMFS involves development of a detailed marine

mammal monitoring and mitigation plan (4MP). The 4MP provides a detailed description and methodology for the implementation of mitigation measures and for the monitoring and reporting of project activities. The 4MP is generally submitted to the Service after the IHA or LOA application has been reviewed by the Service, so that any agency concerns or mitigation methods can be incorporated into the monitoring program strategy.

Once an application is received by the Services it is reviewed for completeness. The application and the proposed authorization for an IHA are published in the *Federal Register* for a mandatory 30-day public comment period. The Service then reviews the public comments, the ESA findings, and its own NEPA findings on the proposed IHA, and makes a final determination on issuance or denial of the IHA. For Incidental Take Regulations and LOAs, there are generally two public comment periods: one for the application and information that should be considered in developing the proposed rule (typically 30 days), and a second for the proposed rule and preliminary determination (typically 30 to 60 days). The Service reviews the public comments, the ESA findings, and its own NEPA findings on the proposed LOA, and makes a final determination on issuance or denial of the rulemaking for the regulations.

9.8. NEPA Documentation

The analysis of impacts on T&E species and any Section 7 consultations must be completed and included in the NEPA document as part of DOT&PF's NEPA responsibilities. Section 7 consultations can lengthen the NEPA completion timeline significantly, and therefore consultation with the Service should begin as early as possible. The Environmental Impact Analyst must provide support for any determinations of effect made by DOT&PF. When the proposed action "may affect, but is not likely to adversely affect," a T&E species or its designated critical habitat, the Environmental Impact Analyst is required to attach informal consultation documentation and concurrence from the Service to the NEPA document. When the proposed action "may affect, and is likely to adversely affect" a T&E species, the NEPA document cannot be approved until the BO is issued. In the NEPA document, the Environmental Impact Analyst is required to summarize the impacts to T&E species or its designated critical habitat; describe any avoidance and minimization measures, including conservation measures and other requirements provided by the Service to be implemented; and incorporate by reference the BO and BA, and retain these documents in the region project file. If a project re-evaluation is required and it is determined that the changes to the project may affect the BO analysis, an updated BA is submitted to the Service and an updated BO is required prior to the approval of a re-evaluation.

Technical Appendix

Endangered Species Act:
https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf

Endangered Species Consultation Handbook (used by NMFS and USFWS):
https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf

ESA Section 7 Implementing Regulations in 50 CFR 402:
http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title50/50cfr402_main_02.tpl

Marine Mammal Protection Act of 1972, as amended:
https://www.fws.gov/international/pdf/legislation-marine-mammal-protection-act.pdf

NMFS Endangered Species in Alaska:
https://www.fisheries.noaa.gov/alaska/endangered-species-conservation/endangered-threatened-and-candidate-species-alaska

NFMS Section 7 Consultations in Alaska:
https://www.fisheries.noaa.gov/alaska/consultations/section-7-consultations-alaska

NMFS Marine Mammal Species Range and Critical Habitat Interactive Map (Habitat Mapper):
https://alaskafisheries.noaa.gov/mapping/esa/

NMFS National Critical Habitat website:
http://www.nmfs.noaa.gov/pr/species/criticalhabitat.htm

USFWS Consultation website:
https://www.fws.gov/alaska/pages/endangered-species-program/consultation-endangered-species

USFWS Endangered Species website:
https://www.fws.gov/alaska/pages/endangered-species

USFWS Endangered Species in Alaska:
https://www.fws.gov/alaska/pages/endangered-species-program

USFWS Information for Planning and Conservation:
https://ecos.fws.gov/ipac/

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10. Cultural Resources

10.1. Introduction
10.2. Regulatory Context
10.3. Cultural Resources Professionals
10.4. Project Reviews under the Section 106 PA
10.5. Additional Situations Covered under the Section 106 PA: Emergency Projects, Discoveries, and Encountering Human Remains
10.6. Confidentiality and Project Documentation
10.7. Coordinating with NEPA
10.8. Project Updates and Re-evaluations

10.1. Introduction

This chapter describes the process and procedures necessary for the Alaska Department of Transportation and Public Facilities (DOT&PF) to comply with Section 106 of the National Historic Preservation Act (NHPA), as amended, for all Federal-Aid Highway Program (FAHP) projects. The NHPA regulations at 36 Code of Federal Regulations (CFR) Part 800 define the overall process for historic property identification and evaluation, determination of project effects on those properties, and resolution of adverse effects on historic properties. This process is commonly referred to as the Section 106 process. The DOT&PF conducts the Section 106 process for FAHP projects in accordance with a programmatic agreement (PA) (Section 106 PA) that streamlines Section 106 project review and approval. Section 106 results are also integrated into the National Environmental Policy Act (NEPA) documentation for the project.

In addition to introducing Section 106, this chapter discusses other laws and regulations associated with cultural resources; cultural resources professionals in the Section 106 process; project reviews under the PA; additional situations covered under the PA; confidentiality and project documentation; coordination of Section 106 with NEPA; and procedures for project updates and re-evaluations.

10.2. Regulatory Context

DOT&PF is required to comply with a number of laws, regulations, and executive orders related to cultural resources.

[1] The most common federal regulation associated with cultural resources and transportation projects is Section 106, which requires federal agencies to consider the effects of their project activities on historic properties. Provided below is a definition of historic properties and a summary of the Section 106 process and other cultural resources laws, regulations, and executive orders that apply to FAHP projects.

10.2.1. Section 106 of the NHPA

Section 106 of the NHPA of 1966, as amended, and its implementing regulations in 36 CFR 800, requires federal agencies to take into account the effects of their undertakings on historic properties. An undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, or that requires a federal permit, license, or approval (36 CFR 800.16(y)). Historic properties are defined as any prehistoric or historic district, site, building, structure, object, or property of traditional religious and cultural importance to an Indian tribe included in, or eligible for inclusion in, the National Register of Historic Places (NRHP; 36 CFR 800.16(l)). Section 106 also requires federal agencies to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on undertakings. The objective of the Section 106 process is to balance the needs of federal agencies and their undertakings with historic preservation concerns and to resolve potential conflicts between the two. The NHPA regulations also provide guidance on coordinating the Section 106 process with NEPA (36 CFR 800.8).

[1] Cultural resources as the term is used in this chapter refers to physical evidence or a place of past human activity including any site, object, district, landscape, or structure; or a place of traditional religious and cultural significance to a group of people traditionally associated with it. The term is not interchangeable with "historic properties" as defined 36 CFR 800.16(l).

Section 106 requires agencies to consult with the State Historic Preservation Officer (SHPO), Tribes,[2] the ACHP (when participating), and other interested consulting parties regarding project effects on historic properties. Consulting parties include, but are not limited to, representatives of local governments; other Alaska Native organizations; individuals or organizations with a demonstrated interest in the project or its effects to historic properties; and the public. Consultation is defined as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process" (36 CFR 800.16(f)) and is always to be conducted in an open and good faith manner. Consultation varies depending on the federal agency's planning process and the nature of the project and its effects.

Under 36 CFR 800.14(a), federal agencies can develop alternate procedures to implement Section 106, which allows for streamlining the Section 106 process. The Federal-Aid Highway Program in Alaska operates under a such a PA, the *First Amended Programmatic Agreement…Regarding Implementation of Section 106 of the National Historic Preservation Act for the Federal-Aid Highway Program in Alaska*, (November 1, 2017) (Section 106 PA). The Section 106 PA establishes and streamlines the DOT&PF historic properties compliance process for FAHP projects. See Section 10.4 for information on applying the Section 106 PA to DOT&PF FAHP projects.

10.2.2. Other Cultural Resources Laws, Regulations, and Executive Orders

In addition to the NHPA, FAHP projects may also be required to comply with other cultural resources laws, regulations, and executive orders. While the NHPA is the principal statute concerning cultural resources, it is also important to evaluate proposed projects in the context of the other applicable laws for cultural resources. The passage of NEPA in 1969 established a national environmental policy that includes an environmental review process that requires federal agencies to consider the effects of proposed federal actions on the human and natural environment, including cultural resources. This is generally handled through the Section 106 process and reported on in the project NEPA document. Other cultural resources laws, regulations, statutes, and executive orders that may apply to FAHP projects include:

- Alaska Historic Preservation Act (AHPA)[3]
- Archaeological Resources Protection Act of 1979 (ARPA)
- American Indian Religious Freedom Act
- Native American Graves Protection and Repatriation Act
- Department of Transportation Act, Section 4(f)
- Executive Order 11593 (Protection and Enhancement of the Cultural Environment)
- American Antiquities Act of 1906
- Executive Order 13007 (Indian Sacred Sites)
- Alaska Statutes (AS) 11.46.482(a)(3), AS 12.65.5, and AS 18.50.250

Environmental Impact Analysts need to coordinate with DOT&PF Professionally Qualified Individuals (PQIs) to identify which cultural resources laws are applicable to their specific projects.

10.3. Cultural Resources Professionals

Project-level cultural resources review requires coordination with a set of cultural resources professionals who meet the Secretary of the Interior (SOI) Professional Qualifications Standards for cultural resources specialties (Appendix A to 36 CFR 61). Detailed below are the cultural resources

[2] According to 36 CFR 800.16(m), for purposes of Section 106, "*Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S. Code 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Therefore, ANSCA corporations are included in Section 106 consultation.

[3] The AHPA (Alaska Statute [AS] 41.35.010-41.35.240) was enacted to locate, preserve, study, exhibit, and evaluate the cultural resources of Alaska. Specifically, AS 41.35.070, *Preservation of historic, prehistoric, and archeological resources threatened by public construction* pertains to project development and construction. Compliance with Section 106 will generally cover compliance with AS. 41.35.070 on FAHP projects.

professionals who are generally included in DOT&PF's Section 106 compliance activities.

10.3.1. DOT&PF Professionally Qualified Individuals

DOT&PF PQIs (PQIs) are responsible for the Section 106 review of FAHP projects and serve as the principal cultural resources specialists for DOT&PF. PQIs meet one or more of the SOI Professional Qualification Standards. Each DOT&PF region has at least one PQI to assist with projects within the region; PQIs work in the Statewide Environmental Office (SEO) as well. The SEO PQIs represent DOT&PF as a whole and work directly with other state and federal agencies for cultural resources compliance and policy development for DOT&PF. The PQIs have a thorough understanding of DOT&PF's policies and procedures regarding cultural resources. The PQI is the primary point of contact for all Section 106 activities, and coordination with the PQI during the early stages of project scoping is essential for meeting Section 106 compliance and consultation requirements. The PQI role is further defined in the Section 106 PA and in Section 10.4.1.

10.3.2. State Historic Preservation Officer

As detailed in 36 CFR 800.2(c)(1), the SHPO advises and assists federal agencies in carrying out their Section 106 responsibilities. The SHPO reflects the interests of the state and its citizens in the preservation of their cultural heritage and helps ensure that historic properties are taken into consideration in project planning. In Section 106 review, the SHPO plays a key role in the consultation process. In Alaska, the SHPO also acts as the Chief of the Office of History and Archaeology (OHA) within the Department of Natural Resources Division of Parks and Outdoor Recreation. The OHA Review and Compliance Section includes a designated liaison for review of DOT&PF projects who works directly with DOT&PF on FAHP projects. OHA also provides programs to encourage the preservation and protection of the cultural resources of Alaska. The PQIs are the primary point of contact with the SHPO and the DOT&PF liaison for all transportation projects.

10.3.3. Project Cultural Resources Consultants

Project cultural resources consultants are private contractors meeting SOI standards for cultural resources disciplines. Project cultural resources consultants generally have a broad background and knowledge of cultural resources laws and regulations; general knowledge of Alaska prehistory, history, and architectural history; and familiarity with federal and state policies related to the identification, evaluation, treatment, and management of cultural resources.

Cultural resources consultants may be contracted by DOT&PF on a project-by-project basis to assist DOT&PF in meeting Section 106 compliance requirements. Project cultural resources consultants play an important role in project-level cultural resources review as they may assist the PQI and project team by conducting cultural resources field investigations, reporting, and other cultural resources tasks as needed.

10.4. Project Reviews under the Section 106 PA

FHWA and DOT&PF developed the Section 106 PA to govern compliance with Section 106 for FAHP projects in Alaska. The NEPA Assignment Program MOU assigns certain responsibilities to DOT&PF to carry out Section 106 activities on FAHP projects. The Section 106 PA describes DOT&PF's implementation of the process for these responsibilities, including initiation of the Section 106 process, identification and evaluation of historic properties, findings of effect, and resolutions of adverse effect.

Under the Section 106 PA, there are two compliance paths: streamlined review and the standard[4] Section 106 consultation process as described in 36 CFR 800 and as delineated in Appendix D of the Section 106 PA. It is essential that Environmental Impact Analysts work closely with their region's PQI(s) on PA compliance activities for FAHP projects early in the planning process to determine the appropriate compliance path.

Environmental Impact Analysts should continue to coordinate with the PQI(s) throughout project planning until PA compliance requirements are met. In addition, Environmental Impact Analysts should

[4] The term "standard" 106 consultation as used here refers to the provisions of 36 CFR 800. 3- 800. 7 as applied in Appendix D of the Section 106 PA. This term is employed for convenience, to differentiate the process from streamlined review.

note that future project changes may require updating the Section 106 review (see Section 10.8).

10.4.1. Streamlined Review: Programmatic Allowances (PA Appendix B)

Applicability and Summary of Streamlined Review Process

The Section 106 PA established two tiers of "Programmatic Allowances" to streamline review of certain types of undertakings which have low or no potential to affect historic properties and do not require further consultation under Section 106. Identification of Programmatic Allowances is undertaken by the appropriate PQI. Project review under the streamlined process occurs when the PQI determines that a project qualifies as either a Tier 1 or a Tier 2 Programmatic Allowance. To qualify for the streamlined process, the entire project must consist of activities covered on the current Tier 1 and/or Tier 2 list and meet any other associated conditions (see Section 106 PA, Appendix B).

When a project is determined by a PQI to qualify as a Tier 1 Allowance, the project is documented to the project file using the Streamlined Project Review Screening Record form (Streamlined Review form) in Appendix C of the Section 106 PA (see Streamlined Review Form, below). Tier 2 Allowances are for projects requiring additional screening by the PQI, and must meet general conditions stipulated in Appendix B. As with projects that qualify under Tier 1 Allowances, projects qualifying under Tier 2 Programmatic Allowances must be documented to the project file through the Streamlined Review form in Appendix C of the Section 106 PA.

If any element of the project does not meet the streamlined review requirements outlined in Appendix B, the project must undergo standard Section 106 consultation per Section 10.4.2 unless the review deals with a project update to a previously reviewed project (see Section 10.8). Environmental Impact Analysts should recognize that a project could change status and no longer qualify for the streamlined review process if activities are later added that are not covered under the Programmatic Allowances. The project would then require review under standard Section 106 consultation (Section 10.4.2). It is recommended that Environmental Impact Analysts review Appendix B of the Section 106 PA in its entirety for more detailed information on Programmatic Allowances and the streamlined process, and coordinate with their PQI when there are project changes. Appendix B of the Section 106 PA governs the streamlined process; the summary presented here does not supersede the information in Appendix B.

Roles under Streamlined Review

The PQI determines whether project activities qualify under Tier 1 or Tier 2 Programmatic Allowances, including meeting any applicable conditions. The Environmental Impact Analyst and members of the project team must provide the PQI with detailed, up-to-date project information and supporting documentation so the PQI can make a well-informed determination as to whether the project qualifies for streamlined review. The Environmental Impact Analyst and project team members must also ensure that the PQI has timely notice of any project changes.

If the project qualifies for streamlined review, the PQI will review the Streamlined Review form for accuracy, ensure the form is complete, and sign. The PQI must include sufficient supporting information on the Streamlined Review form and its associated file attachments to document the decision.

FHWA and the SHPO may review project files to determine if the appropriate review and processing procedures were applied in the Section 106 process, and that project review and compliance documentation is complete in accordance with the Section 106 PA.

10.4.2. Streamlined Review Form

Streamlined Review forms are designated as Appendix C of the Section 106 PA. Both Tier 1 and Tier 2 projects are documented using a Streamlined Review form which is included in the project file. Note that there are two different forms: one for new projects and another for project updates. Project updates will be explained later in this chapter (Section 10.8). The current version of the forms can be found at the Statewide Environmental Office Historic Properties website, under the Programmatic Agreements Section 106 FHWA dropdown, or directly at Appendix C.1 – Screening Form, New Projects or Appendix C.1 – Screening Form, Project Updates.

10.4.3. Standard Section 106 Consultation (PA Appendix D)

Applicability and Standard Section 106 Consultation Process

If the PQI determines that any element of the project does not meet the requirements for either the Tier 1 or the Tier 2 list, DOT&PF follows the standard Section 106 process for the project, pursuant to Appendix D: Delegated Section 106 Process. Under the NEPA Assignment Program, DOT&PF is considered the federal agency responsible for conducting Section 106 consultation for the projects it has assumed. As part of the standard process, DOT&PF carries out or approves:

- Initiation of the Section 106 process
- Identification and evaluation of historic properties
- Finding of effect
- Resolution of adverse effect, when applicable

DOT&PF carries out Section 106 consultation through the Section 106 PA for all assigned FAHP projects.

While DOT&PF is authorized to consult with tribes under the standard Section 106 process, FHWA retains responsibility for direct government-to-government consultation with tribes in accordance with 36 CFR 800.2(c)(2)(ii)(C) and (D), and Part 3.1.3 of the NEPA Assignment Memorandum of Understanding.

The Environmental Impact Analysts must coordinate with the PQI early in the planning process for FAHP projects. There are regulatory timeframes for consultation under Section 106, and therefore the PQI will need to begin consultation as soon as practical to complete the Section 106 process in a timely manner. It is recommended that Environmental Impact Analysts review Appendix D of the Section 106 PA for more detailed information on the standard Section 106 process.

10.4.4. Roles under Standard Section 106 Consultation Process

The PQI conducts the standard Section 106 process. The Environmental Impact Analyst and project team members provide the PQI with detailed, up-to-date project information and supporting documentation to conduct Section 106 consultation and ensure that the PQI has timely notification of project changes.

Unlike the streamlined process, the standard Section 106 process involves many participants, including the SHPO; tribes; Native corporations; local governments; other consulting parties, which can vary from project to project (e.g., landowners, Native organizations, historical societies, and public interest groups); the public; and the ACHP. See Appendix D of the Section 106 PA for further information. The PQI reviews and signs Section 106 correspondence.

10.4.5. Resolution of Adverse Effect(s)

The Section 106 PA's Appendix D (Section E.3) outlines roles and steps for a finding of Adverse Effect.

When a project is determined to have an adverse effect on historic properties, the PQI continues consultation with the Section 106 consulting parties. Resolution of adverse effects is documented in a memorandum of agreement (MOA) or another appropriate agreement document, which records the terms and conditions agreed upon to resolve the adverse effect of the undertaking. Prior to filing the signed MOA with the ACHP, the agreement document is signed by DOT&PF, the SHPO, and any invited signatories or concurring parties, as appropriate.

The SEO PQI has an additional role in adverse effect projects. First, an SEO PQI must participate in reviews of findings of adverse effects prior to signature of the findings letter. Once consultation moves to resolution of adverse effects, an SEO PQI also has the option of participating in consultations with the SHPO and other consulting parties to develop the agreement document. During preparation of the MOA or other agreement document, an SEO PQI must review the initial draft agreement prior to submittal to consulting parties. Finally, an SEO PQI must approve the final text of the agreement document prior to signature. An acknowledgment of this approval will be sent by the SEO PQI via email and will become part of the project record.

The Section 106 process for Adverse Effect projects is not complete until the PQI has filed the signed MOA with the ACHP.

If consulting parties cannot reach agreement on the resolution of adverse effects, consult Appendix D, Section E.3 of the Section 106 PA.

10.4.6. Consultation Letter Templates

As part of the standard Section 106 process, the PQI prepares or oversees and approves Section 106 initiation and finding of effect letters. DOT&PF has developed Section 106 letter templates; their use is required for initiation and finding of effect but they may be adapted to accommodate other circumstances, such as projects requiring multiple consultations or updates. DOT&PF-approved consultation letter templates can be found at the Statewide Environmental Office Historic Properties website under the Section 106 Letter Templates dropdown for Federal Aid Highway. Template-specific process instructions are included on the first page of each template document. Environmental Impact Analysts must coordinate with the regional PQI prior to completing letter templates.

The templates accommodate a requirement in the NEPA Assignment Program Memorandum of Understanding (Part 3.1.2) to include the following language in consultation letters in a way that is conspicuous to the reader:

> *The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 U.S.C.*
>
> *327 and a Memorandum of Understanding dated November 3, 2017, and executed by FHWA and DOT&PF.*

This language must also be included on the cover page of any historic properties or cultural resources report prepared under the NEPA Assignment Program.

10.5. Additional Situations Covered under the Section 106 PA: Emergency Projects, Discoveries, and Encountering Human Remains

The Section 106 PA also provides programmatic procedures for emergency situations and inadvertent discoveries of cultural resources, along with stipulations for discovery of human remains. In accordance with Stipulation VI of the Section 106 PA, emergency projects are those that require emergency highway system and/or facility repairs that are necessary to protect the life, safety, or health of the public; minimize the extent of damage to the highway system/facilities; protect remaining highway facilities; or restore essential traffic. Stipulation VI provides guidance on what steps to take if an emergency project is necessary. In addition, if initial emergency repair plans change after notifications have been made under Stipulation VI, Environmental Impact Analysts and REMs must keep the PQI apprised of such changes, so that the PQI can update coordination with SHPO and consulting parties as needed.

If a cultural resources discovery is made during construction or other project activities, including but not limited to geotechnical investigation, the Section 106 PA Stipulation VII and Appendix F: Archaeological Monitoring and Discovery Plan provides information on what to do, regardless of whether a monitor is present at the time of discovery. Individual projects may also have case-specific Inadvertent Discovery Plans that were developed during the course of Section 106 consultation.

The Section 106 PA Stipulation VIII describes procedures for discovery of human remains. If this occurs, work will stop immediately, the remains will be treated with respect, and unless another agreement document is in place, parties will follow procedures delineated in Appendix H: DOT&PF Procedures and State and Federal Laws Pertaining to the Discovery of Human Remains.

10.6. Confidentiality and Project Documentation

10.6.1. Confidentiality

State and federal laws protect the confidentiality of historic properties and their locations (e.g., Section 304 of the NHPA, Section 9 of ARPA, and AHPA [AS 41.35.070 Preservation of Historic, Prehistoric and Archaeological Resources Threatened by Public Construction]). These laws restrict the availability of confidential site location information and other sensitive information that could result in damage to historic properties. DOT&PF has developed guidelines to ensure confidentiality and protection of those cultural resources while meeting the requirements of Section 106, AHPA, NEPA, and Section 4(f) of the U.S. Department of Transportation Act of 1966. DOT&PF's Cultural Resources Confidentiality Guidelines should be consulted at the initiation of project scoping activities and should be followed at all times.

10.6.2. Project Documentation

Project documentation of the Section 106 process must include sufficient information for any reviewing party to understand the basis of the decisions made

throughout the Section 106 process (36 CFR 800.11(a)). The regulations at 36 CFR 800.11(d) through (g) describe documentation standards for various steps in the Section 106 process.

Guidelines for the development and maintenance of Section 106 information in environmental documents and the project file are provided in the DOT&PF Cultural Resources Confidentiality Guidelines.

Information about cultural resources considered in relation to the project is part of the project environmental documentation and project file. As described in Section 10.6.1, some of this material may be sensitive and confidential, depending on its contents. Environmental Impact Analysts should consult with the PQI on confidentiality of cultural resources documents for the project.

10.7. Coordinating with NEPA

The Environmental Impact Analyst integrates the information from Section 106 compliance into the project's NEPA documentation as part of public involvement and agency coordination activities. Under NEPA, impacts of the project on cultural resources are considered as part of the analysis of impacts to the human environment. As described in Section 10.6.1, be mindful that confidentiality requirements limit the information that may be included in the NEPA document that is available to the public. Coordinate with the PQI to ensure that Section 106 compliance is appropriately integrated into the NEPA document. The Section 106 process is completed before the NEPA decision document is issued (23 CFR 771.113(a)).

10.8. Project Updates and Re-evaluations

After NEPA approval, a project may require re-evaluation as a result of project changes, the achievement of a major project milestone, or the passage of time. See Chapter 6 of this manual (Re-evaluation), for more information on the requirements and process for project re-evaluations.

When the project changes, or goes through the re-evaluation process, the Environmental Impact Analysts and project team members need to coordinate with the designated PQI to ensure that cultural resources are addressed appropriately.

Section 106 updates are separate from the NEPA document re-evaluation process; updates may occur during a re-evaluation or at any other time as needed.

Circumstances that warrant Section 106 updates include, but are not limited to, a change in project activities or APE after the previous Section 106 process was completed. Additionally, if five or more years have passed since the last historic property identification was conducted for the project, the PQI will review the Section 106 documentation to determine whether an update is necessary; in these cases the region PQI may consult with the SEO PQI for confirmation.

10.8.1. Project Updates via Streamlined Review

When applicable, a Section 106 update may be addressed through streamlined review. Streamlined review may be employed for an update if the PQI determines that all of the new proposed work falls within the Tier 1 and 2 parameters, including all conditions. This process may apply to projects which originally completed the Section 106 process with either standard consultation or streamlined review.

Such updates are documented with PQI signature on the *106 PA Streamlined Project Review Screening Record-for project updates* at Appendix C.1 – Screening Form, Project Updates. The signed form and supporting enclosures are to be included in the project file (unless confidentiality restrictions apply).

10.8.2. Project Updates via Standard Consultation

If the update does not qualify for streamlined review, proceed with standard consultation according to the Section 106 PA Appendix D. The PQI must include appropriate consulting parties when processing updates through consultation letters.

Updated consultation letters must clearly indicate what the current project consists of, and what has changed since the last consultation. Template letters on the Statewide Environmental Office Historic Properties website may be adapted to accommodate project update descriptions and background, in coordination with the PQI. Note that if a project was originally processed as a streamlined review but no longer qualifies as such, the updated consultation letters must include the entire range of project activities, not just the changes. This is to ensure that consulting parties receive a complete description of the project.

Typically, projects which completed Section 106 more than five years ago renew consultation beginning with "Initiation of consultation" letter templates.

Exceptions may be granted by the Statewide cultural resources manager or Statewide cultural resources specialist.

If an update is for a project that completed Section 106 more recently, PQIs have the discretion to commence renewed consultation with either updated "Initiation of consultation" or "Finding of Effect" letters.

Technical Appendix

A list of DOT&PF historic properties guidance documents and resources, including the full suite of PAs, PA amendments, and appendices, can be found at this website: Statewide Environmental Office Historic Properties.

General Section 106 Resources:

The Advisory Council on Historic Places Section 106 summary.

The National Historic Preservation Act of 1966 (as amended through 2006).

The regulations implementing Section 106 can be found at 36 CFR Part 800.

DOT&PF Resources:

Alaska FHWA Section 106 PA: First Amended Programmatic Agreement Regarding Implementation of Section 106 of the National Historic Preservation Act for the Federal Aid Highway Program in Alaska.

DOT&PF's Cultural Resources Confidentiality Guidelines.

Curation Memorandum of Understanding with the University of Alaska's Museum of the North.

The Bridge Inventory Report provides useful information on structural, dimensional, and location data of bridges and culverts that are biennially inspected by the DOT&PF Bridge Section, along with build date.

FHWA and Other Federal Resources:

The FHWA Environmental Review Toolkit for Historic Preservation provides information on methods and analyses regarding Section 106 compliance activities.

Program Comment for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges (ACHP, November 2, 2012) and DOT&PF's accompanying guide, Applying the FHWA Program Comment on Common Post-1945 Concrete and Steel Bridges.

The FHWA has compiled the Bridge Program Comment Excepted Bridges List; which includes some bridges that have some exceptional quality and consequently will continue to be considered individually pursuant to Section 106.

Section 106 Exemption Regarding Effects to the Interstate Highway System (ACHP, March 2005) and the Interstate Highway System Section 106 Exemption Route List within Alaska provides a list of routes exempt from Section 106 in Alaska.

State of Alaska Resources:

The statute for historic properties under state jurisdiction: Alaska Historic Preservation Act.

The SHPO and DOT&PF Liaison are housed at the Alaska Office of History and Archaeology. Their website contains resources for the preservation and protection of cultural resources of Alaska, as well as information on Section 106 and AHPA compliance requirements.

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11. Quality Assurance and Quality Control

11.1. Introduction
11.2. Procedural Requirements
11.3. Early Project Development
11.4. Draft Document Development
11.5. Final Environmental Document Preparation

11.1. Introduction

The Alaska Department of Transportation and Public Facilities (DOT&PF) integrates Quality Assurance (QA) and Quality Control (QC) considerations into its environmental documents and decisions in its compliance with applicable laws, regulations, and standards. DOT&PF ensures both QA and QC processes are built into the environmental analysis and approval process.

This QA/QC chapter is intended to provide guidance on the required incorporation of QA and QC throughout the environmental process. See the following sections for more information on QC reviews specific for each environmental document type: Chapter 3, Section 3.3.2 for Categorical Exclusions (CEs); Chapter 4, Section 4.3 for Environmental Assessments (EAs) and Findings of No Significant Impacts (FONSIs); and Chapter 5, Section 5.4 for Environmental Impact Statements (EISs) and Records of Decision (RODs).

QA is a process that occurs during document development to:

- Implement procedures established in this manual
- Prevent document errors and omissions
- Support the development of accurate National Environmental Policy Act (NEPA) documents and appropriate NEPA decisions

QC is a review process that occurs after the document is complete, and prior to document approval to:

- Ensure procedures were followed, including:
  - Complete environmental analysis
  - Project file documentation
- Identify and correct errors and omissions

In general, QA occurs through collaborative development of the environmental document, and QC occurs through a series of review steps once the document is complete.

11.1.1. MOU Requirements

The DOT&PF Statewide Environmental Office (SEO) is responsible for the management, control, and oversight of the NEPA Assignment Program environmental review and approval process, including as specified in NEPA Assignment Program Memorandum of Understanding (MOU) (Part 8.2.4.) for QA and QC:

In carrying out the responsibilities assumed under this MOU, DOT&PF agrees to carry out regular QA/QC reviews to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, DOT&PF's QA/QC process will include the review and monitoring of its processes and performance relating to project decisions, completion of environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed.

11.2. Procedural Requirements

In addition to the QA/QC requirements delineated in the MOU and this manual, DOT&PF has procedural requirements for Project Management Plan (PMP) and Public Involvement Plan (PIP) development in its Highway Preconstruction Manual (HPCM) and Civil Rights Office requirements for public involvement processes. Note that when requirements from these DOT&PF resources overlap, the more extensive process will apply.

DOT&PF's Federal Highway Administration (FHWA)-approved PMP procedural requirements are included in Chapter 4, Preliminary Engineering through Environmental Document Approval, and PIP and public involvement procedural requirements are included in Chapter 5, Public Involvement and Agency Coordination, of the HPCM.

11.2.1. Civil Rights Office

DOT&PF's Civil Rights Office maintains a Title VI Program Plan and a Section 504/ADA Work Plan containing specific public involvement required language and processes. These plans, and the requirements within, are periodically updated and the

Civil Rights Office should be regularly consulted for compliance with the current program plans.

11.3. Early Project Development

11.3.1. Project Development Team

QA of an environmental document, specifically an EA or EIS, begins with the project development team. The project development team is initially comprised of the following region staff: Engineering Manager, Environmental Impact Analyst, and Regional Environmental Manager (REM). Additional region staff are added to the team based on the needs of the project, and could include planners, engineers, subject matter experts, and consultants. A Statewide Environmental Office (SEO) staff member is assigned to the team when the Class of Action (COA) consultation process is initiated with SEO. The SEO staff member may be the Statewide Environmental Program Manager, or delegated to a NEPA Program Manager, for an EA, and will be the Statewide Environmental Program Manager for an EIS. The collaborative formation of the team for the development of an environmental document is a QA activity that can be documented in the region project file with emails, project meeting summaries, and other similar items demonstrating the coordination effort.

11.3.2. Project Management and Public Involvement Plans and Schedule

After the project development team is formed, the next step is PMP development, including development of the PIP, and project schedule. The project development team builds QA into the PMP, PIP, and schedule development process through collaboration with one another and consultation with support groups and subject matter experts, as appropriate, to identify environmental constraints early in the environmental process and to establish timelines, tasks and responsibilities. Documentation of the collaborative plan and schedule development (e.g., emails, meeting notes/summaries, and phone logs) is included in the region project file.

11.3.3. Plan and Schedule Approvals and Class of Action Recommendation and Concurrence

The Engineering Manager and REM perform a QC review of the PMP, PIP, and schedule prior to approval, and of the *COA Consultation Form* recommendation for their joint concurrence. This QC review includes:

- Review of the project name, state and federal project numbers, project scope, and project description, including project limits, for accuracy and consistency
- Confirmation that the COA recommended is appropriate for the project description, any known environmental issues and probable environmental impacts
- Review the identification of appropriate technical reports, public involvement, agency coordination, and permit approvals
- Review of the project schedule for consistency with the PMP and PIP

The PMP, PIP, schedule approval, and COA recommendation are placed in the region project file as evidence the QC review is completed.

The NEPA Program Manager performs a QC review of the *COA Consultation Form* and recommendation before concurrence. This QC review verifies the COA recommendation is appropriate for the project description, any known environmental issues, and probable environmental impacts. This review is evidenced by documented communication requesting additional information or clarification, and/or concurrence with the recommendation, and is included in the region project file.

11.3.4. Prior Concurrence of Certain Projects

For selected projects, "prior concurrence" pursuant to 23 CFR 771.125(c), will be obtained before proceeding with key approvals under NEPA. The prior concurrence decision will be made by the Chief Engineer, advised by the Alaska Department of Law (LAW), and will ensure that the project and document in question are acceptable from a policy and program perspective. Prior concurrence may apply to DOT&PF approvals of Draft EISs and Final EISs. On rare occasions prior concurrence may apply to Draft EAs and Final EAs. Projects requiring prior concurrence will be identified on a case-by-case basis by the Statewide Environmental Program Manager, based on input and recommendations from the SEO NEPA Program Managers, REMs, and LAW and may include projects meeting one or more of the following criteria:

- impacts of unusual magnitude
- high level of controversy

- major unresolved issues
- emerging or national policy issues
- issues for which a Region or SEO seek policy assistance

In completing the prior concurrence review, the Chief Engineer will personally examine the elements of the environmental document at issue and seek advice and input, as appropriate, from technical subject matter experts. The Chief Engineer will make the prior concurrence decision before the document is approved by the Statewide Environmental Program Manager.

11.4. Draft Document Development

11.4.1. Completion of Technical Reports

During early project development the project development team identifies the necessary technical studies to support development of the environmental document. QA is incorporated into the development of the technical reports through coordination between the team, support groups, and subject matter experts, as appropriate, regarding methodologies and approaches for the technical studies.

11.4.2. Technical Report Review

Required technical reports undergo a technical report QC review, and can be conducted by:

- A member of the project development team who was not directly involved in the report preparation
- A peer reviewer
- Another subject matter expert, depending on the resource area

Technical report QC review should:

- Confirm adequacy and accuracy of the report
- Ensure appropriate coordination and regulatory requirements are met
- Ensure applicable regulatory requirements and DOT&PF standards are met
- Verify clarity, grammar, and internal consistency of the information
- Document review comments and responses and place in the project file as evidence of the review and to communicate any necessary report changes

11.4.3. Notice of Intent

A Notice of Intent (NOI) is the official notification that a federal agency is beginning the process to prepare an EIS. The initial project development team develops an NOI for publication in the *Federal Register* after it has consulted with any other project sponsor, initiated the 23 USC 139 environmental review process, and reached its decision to prepare an EIS (23 Code of Federal Regulations [CFR] 771.123).

The MOU at Part 10.2.1(B)(i)(a) requires that each NOI receive a legal sufficiency review and determination prior to publication. Following REM and SEO review, the SEO submits the draft NOI to LAW for a legal sufficiency review and determination. The LAW statement documenting completion of the legal sufficiency review and determination is included in the region project file for privileged communications.

Legal sufficiency communications are confidential and remain within DOT&PF, and are not available for public or agency distribution or review, and are maintained in a separate project file for privileged communications.

11.4.4. Public and Agency Involvement and Involvement Summaries and Reports

Prior to public and agency involvement activities, QA review occurs through the collaborative development of public notices, scoping letters/emails, meeting presentation materials and handouts, and through the development of any responses to comments by the project development team. Following the public and agency involvement activity, including scoping efforts, meetings and public hearings, the Environmental Impact Analyst, consultant, or other team member completes a scoping, meeting or hearing summary/report. The team conducts the QC review of the summary/report to ensure the scoping activity, meeting or hearing is accurately recorded, and reviews participant comments and team responses for consistency and accuracy. The QC review also confirms the summary/report includes scoping letters/emails, and meeting or public hearing materials. Once the review is completed, the summary/report and any team comments are included in the region project file to document the QC review.

11.4.5. Preparation of the Draft Environmental Document

QA occurs through collaboration and project meetings during the preparation of the draft environmental

document. Evidence of QA includes emails, phone conversation notes, and meeting notes summarizing collaborative discussions involving project development team members about any aspect of the draft document development (e.g., alternatives, resource areas, methodologies). The Environmental Impact Analyst is responsible for ensuring that evidence of this QA process is included in the region project file, and that the draft environmental document is consistent with any technical reports prepared to support the environmental document.

QC occurs through a series of QC review steps that include region, SEO, and LAW review. The draft document is only made available for publication after QC is complete, the legal review is complete, and SEO receives the region Preconstruction Engineer recommendation for publication.

11.4.6. Draft Environmental Document Review

The draft environmental document review is a QC step performed by the project development team members to determine if the document is ready for legal review and a public availability approval recommendation. The team members review the draft environmental document and will consider the following QC review elements:

- Accuracy
- Adequacy
- Completeness
- Compliance with CEQ and FHWA NEPA regulations (40 CFR 1508 and 23 CFR 771) and DOT&PF standards and procedures
- Conciseness
- Consistency within and between the environmental document, supporting appendices, and technical reports
- Conformance to all NEPA requirements and applicable guidance, policies, and procedures
- Errors and omissions
- Readability

Project development team member review comments and associated responses/resolutions are documented in writing and placed in the region project file to document the QC review.

11.4.7. QC Review Certification

The REM and SEO staff member perform separate QC reviews as described in Section 11.4.6. To document the completed QC review of an environmental document, the REM and SEO staff reviewer each certify the QC review completion certification requirements below in separate emails for the region project file.

This certification email is provided by the REM to the SEO staff member, and then by the SEO staff member to the REM, as evidence that the region and SEO QC reviews of the environmental document are successfully completed and the document is ready for legal review.

QC review completion certification (email):
This project meets all of the following requirements:

A. The document has been determined to be complete.

B. The document meets FHWA NEPA requirements (23 CFR 771) and all other applicable federal and state environmental requirements.

C. Any required public participation has been completed.

D. All consultation and coordination required through this stage of project development have been completed and appropriately documented.

I verify that the DOT&PF QA/QC procedures have been followed, and all necessary QC documentation has been submitted.

The certification emails are placed in the region project file to document QC review completion prior to legal review. The email certifies that QC is complete, the document meets all applicable federal and state environmental requirements, public participation required through this stage is complete, and all required consultation and coordination is complete and appropriately documented.

11.4.8. Legal Review

SEO must request LAW conduct legal review of a Draft EA or Draft EIS. The primary goal of legal review is to assess the document for compliance with legal requirements. The environmental document must undergo legal review prior to approval for public review. More than one legal review may be requested including a review of the revised documents. For controversial or complex projects, LAW may require

that all legal comments be appropriately addressed before concluding the legal review and issuing a memorandum of completion. Communications with LAW and legal advice are confidential and are maintained in a separate file for privileged communications, which is not available for consultant, public, or agency distribution or review. The LAW memorandum documenting completion of legal review is included in a non-confidential folder within the project file.

Draft EAs

The Draft EA must be provided to LAW for review and comment upon the completion of the REM and SEO staff member QC reviews. Following REM and SEO staff member QC review, the SEO staff member submits the Draft EA and associated documents to LAW for legal review.

Draft EIS

Following REM and Statewide Environmental Program Manager QC review, the Statewide Environmental Program Manager submits the Draft EIS and associated document to LAW for legal review.

11.4.9. Approval for Public Availability

Draft EA

In order for a Draft EA to be approved for public availability, REM, SEO, and LAW reviews must be complete and SEO must receive the region Preconstruction Engineer recommendation for public availability. The Statewide Environmental Program Manager is authorized to sign an approval for public availability of the Draft EA or delegate signature authority to the NEPA Program Manager.

Draft EIS

In order for a Draft EIS to be approved for public availability, REM, SEO, and LAW reviews must be complete and the SEO must receive the region Preconstruction Engineer recommendation for public availability. The Statewide Environmental Program Manager is authorized to sign an approval for public availability of the Draft EIS.

11.5. Final Environmental Document Preparation

QA occurs during preparation of the final environmental document, similar to preparation of the draft environmental document. Evidence of QA includes emails, phone conversation notes, and meeting notes summarizing collaborative discussions involving project team members about any aspect of the final document. The Environmental Impact Analyst is responsible for ensuring evidence of this QA process is included in the project file, and that the final environmental document is consistent with any reports prepared to support the environmental document.

11.5.1. Final Environmental Document Review

The final environmental document review is a QC step performed by the project development team members to determine if the document is ready for approval recommendation. To confirm the document is ready for final approval the team reviews the document for the QC review elements listed above in Section 11.4.6., in addition to the final environmental document QC review elements listed in 11.5.2. Review comments, and associated responses and resolutions, are documented in writing and placed in the region project file.

11.5.2. QC Review Certification

Final EA and FONSI

For an EA, if the environmental decision is likely to be a FONSI, the FONSI may be submitted to the SEO for review along with the Final EA and the region Preconstruction Engineer request for a FONSI. The REM and SEO staff member each perform a QC review of the Final EA and/or FONSI to confirm that it meets NEPA requirements and DOT&PF standards, and is ready for legal sufficiency review and SEO approval.

The REM and SEO staff member each review the Final EA to verify the following:

- All consultation and coordination requirements have been completed and documented
- All public and agency comments have been appropriately addressed
- The EA has been updated and modified as necessary
- Any updated information has been accurately incorporated into the Final EA

The REM and the SEO staff member will review the FONSI for the following environmental decision document QC review elements:

- Clarity in describing the decision

- Accuracy and consistency of project information
- Accuracy in description and documentation of final agreed-upon environmental commitments and mitigation requirements
- Final resolution of any public or agency comments
- Consistency between the Final EA and FONSI

Following QC review, the REM and SEO staff member each complete the certification process as outlined in Section 11.4.7., to document completed QC review of the Final EA and/or FONSI. This certification email is provided by the REM to the SEO staff member, and then by the SEO staff member to the REM, as evidence that region and SEO QC reviews of the Final EA and/or FONSI are successfully completed and the document is ready for legal sufficiency review and final approval. The Statewide Environmental Program Manager is authorized to sign an approved Final EA and FONSI or delegates signature authority to the NEPA Program Manager.

Final EIS and ROD, or Combined Final EIS/ROD

While a Final EIS and ROD may be processed separately, it is recommended they are processed jointly as a combined Final EIS/ROD document. The same QC review requirements apply whether the documents are processed separately or jointly. For a Final EIS and/or ROD, the ROD is submitted to the Statewide Environmental Program Manager for review with the Final EIS and region Preconstruction Engineer request for approval and ROD. Similar to review at the Draft EIS stage, in order for the Final EIS and ROD to be approved, the REM and Statewide Environmental Program Manager each conduct a review of the Final EIS and ROD to confirm that the documents meet NEPA requirements and DOT&PF standards, and are ready for legal sufficiency review and final approval. In addition to the QC review elements identified above in Section 11.4.6., QC review of the combined Final EIS/ROD confirms that the document is ready for legal sufficiency review and final SEO approval.

The REM and Statewide Environmental Program Manager each review the Final EIS to verify the following:

- All required consultation and coordination have been completed and documented
- All public and agency comments have been appropriately addressed
- The Final EIS has been updated and modified as necessary
- Any updated information has been accurately incorporated into the Final EIS

The REM and the Statewide Environmental Program Manager review the ROD for the following:

- Clarity in describing the decision
- Accuracy and consistency of project information
- Accuracy in description and documentation of final agreed-upon environmental commitments and mitigation requirements
- Final resolution of any public or agency comments
- Consistency between the Final EIS and ROD

Following QC review, the REM and Statewide Environmental Program Manager each complete the certification process as outlined in Section 11.4.7. , to document completed QC review of the Final EIS and/or ROD. This certification email is provided by the REM to the Statewide Environmental Program Manager, and then by the Statewide Environmental Program Manager to the REM, as evidence that region and SEO QC reviews of the Final EIS and/or ROD are successfully completed and the environmental document is ready for legal sufficiency review and final approval. The Statewide Environmental Program Manager is authorized to sign an approved Final EIS and/or ROD.

11.5.3. Legal Sufficiency Review

Legal sufficiency review is required for any Final EIS, ROD, or combined Final EIS/ROD, and any Individual Section 4(f) evaluation. All Final EAs or FONSIs relying on a Statute of Limitations (SOL) Notice prepared per 23 U.S. Code (USC) 139(*l*) likewise are required to receive a legal sufficiency review and determination. Communications with LAW and legal advice are confidential and are maintained in a separate file for privileged communications, which is not available for consultant, public, or agency distribution or review. When all legal comments have been appropriately addressed, LAW provides a memorandum documenting that the legal sufficiency review has been completed. The

LAW memorandum documenting completion of the legal sufficiency review is included in a non-confidential folder within the project file. The Statewide Environmental Program Manager cannot approve a Final EIS, ROD, combined Final EIS/ROD, or SOL Notice for a Final EA and FONSI until the document has been determined to be legally sufficient.

11.5.4. Final Environmental Document Approval

Final EA and FONSI

The FONSI may be submitted to the SEO for approval along with the Final EA. If the documents are submitted separately to the SEO, the preparer of the Final EA will prepare a FONSI for SEO review and approval after the SEO staff member determines that no significant impact will result from the proposed action. The REM and SEO staff member each perform a QC review of the Final EA and FONSI to confirm that it meets NEPA requirements and DOT&PF standards, and is ready for final approval. The Statewide Environmental Program Manager is authorized to sign an approved Final EA and FONSI or delegate signature authority to the NEPA Program Manager.

Final EIS and ROD

The Final EIS and ROD require legal sufficiency review (23 CFR 771.125(b)). The Final EIS cannot be approved until it has been determined to be legally sufficient. Following the legal sufficiency review (see Section 11.5.3), the REM and Statewide Environmental Program Manager each complete the QC review completion certification process as outlined in Section 11.5.2. to document that the Final EIS and ROD have completed QC review. The Statewide Environmental Program Manager is authorized to sign an approved Final EIS and ROD. This authority may not be delegated.

11.5.5. Environmental Decision Notice of Availability

After the FONSI or ROD is approved, or concurrent with the SEO review, the region will prepare a notice of availability of the decision document for SEO approval. After SEO approval, the region will issue DOT&PF's notice of availability of the FONSI or ROD to the public and appropriate federal, state, and local agencies (23 CFR 771.121(b)) by the following methods as appropriate:

- In local newspapers, if any
- In the Alaska Online Public Notices
- By mail or email
- By other methods, as appropriate

The decision document will also be made available to the public as follows:

- By request
- Online
- At local libraries, if any
- At DOT&PF region and SEO offices
- At other locations, as appropriate

11.5.6. Publishing Federal Register Notices

Project environmental notices of intent, availability, and statute of limitations are published in the *Federal Register* through FHWA or EPA because only federal agencies may publish notices in the *Federal Register*. The draft notice will be prepared by the region project development team for REM review and transmittal to SEO. SEO will review the draft notice prior to requesting the required legal sufficiency review and determination from LAW. At the completion of the legal sufficiency review, LAW provides a written statement that the legal sufficiency review has been completed and all legal comments have been appropriately addressed. The LAW statement documenting completion of the legal sufficiency review and determination is included in the project file for privileged communications. After region, SEO, and LAW reviews are complete, SEO forwards the draft notice to FHWA for publishing in the *Federal Register.*

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12. Emergency Procedures

12.1 Introduction
12.2 Emergency NEPA Process Overview
12.3 Requirements for FHWA Emergency Relief
12.4 When NEPA Applies
12.5 Class of Action Determination
12.6 Emergency NEPA Document Preparation

12.1. Introduction

The Federal Highway Administration (FHWA) Emergency Relief (ER) Program Title 23, Code of Federal Regulations (CFR) Section 668 was established to provide policy and guidance to repair or reconstruct federal-aid routes that have serious damage as a direct result of a declared event.

This Chapter describes the National Environmental Policy Act (NEPA) document process for emergency repairs and relief actions that will be eligible for FHWA ER aid. Section 106 and emergencies are addressed in Chapter 10, Section 10.5.

12.2. Emergency NEPA Process Overview

When an emergency event has occurred, the State is empowered to undertake immediate emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities.

The NEPA process should start concurrent with emergency repairs or as soon as possible following the decision to take emergency action. The emergency repairs may proceed prior to NEPA document approval.

The NEPA process for emergency repairs is substantively similar to non-emergency actions. As with other Federal Actions, obtain a Class of Action (COA) from Statewide Environmental Office (SEO) (see Chapter 2). The Categorical Exclusion (CE) process applies for all emergency repairs that are CE actions (see Chapter). In the rare instance that a CE is not appropriate and an Environmental Assessment (EA) is required, coordinate with SEO (see Chapter 4), and follow the Council on Environmental Quality (CEQ) Memorandum on Emergencies and NEPA for a concise, focused EA.

Emergency repairs can start prior to NEPA documentation approval if:

- Necessary to protect public safety where there is imminent danger, or necessary to restore essential travel, minimize the extent of damage, or protect the remaining facilities of a damaged transportation system.
- The emergency repairs will not have significant adverse impacts on environmental or cultural resources (see Section 2.2.2).
- There are no unusual circumstances (see Section 2.2.3) and;
- The repair action is within 180 days of the emergency event.

12.3. Requirements for FHWA Emergency Relief

Emergency events that qualify for FHWA ER occur in two ways: if the Governor declares an emergency under Alaska Statutes (AS) 26.23 for the project area and FHWA concurs, or the President of the United States declares an emergency under the Stafford Act Section 5121 of Title 42 of the United States Code (42 U.S.C. 5121) for the project area.

The FHWA may also determine whether an event or multiple events are ER eligible, if the total costs of repairs will exceed $700,000. The ER program provides the funding to repair and restore highway facilities to pre-disaster conditions.

If no qualifying emergency declaration has been made, but the damage was caused by a sudden and unexpected external event, e.g., natural disaster, or manmade disaster, explosion, hazardous spill, etc., and the local government has declared an emergency or is requesting emergency assistance, then proceed with the expectation that a qualifying emergency declaration will be made in the future.

Deterioration or failure caused by delayed maintenance, in the absence of a sudden and unexpected event, is not an emergency.

12.4. When NEPA Applies

For the purposes of NEPA compliance, assume that the emergency repair is or will be eligible for FHWA ER funds if the roads and bridges are damaged as a direct result of a natural disaster or catastrophic failure from an external cause and are Federal-aid highways. Federal-aid highways are public roads that are classified as arterial, urban collectors and major rural collectors.

Highways that are classified as minor rural collectors or local roads are *not* eligible for ER funding even if other Federal-aid funds have been used on those roads. For example, "off system" bridges that were replaced with Federal-aid funds or non-highway projects that were constructed with enhancement funds are not eligible for ER funding. https://www.fhwa.dot.gov/reports/erm/er.pdf

12.5. Class of Action Determination

If the action qualifies for a CE, the most appropriate COA will likely be 23 CFR 771.117(c)(9) Emergency repairs under 23 U.S.C. 125 if the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

NOTE: The (c)(9) COA can be used for both emergency repairs for which prior NEPA approval is *not* required and repairs that stem from the emergency event, but for which NEPA approval *is required* prior to the action. If more than 180 days from the emergency event declaration, NEPA documents should be approved prior to actions taken under 23 CFR 771.117(c)(9).

For emergency repairs under (c)(9) that began within 180 days of the emergency event, work can begin prior to NEPA approval.

In addition to NEPA review, emergency operations will have to comply with other applicable environmental laws, regulations, and Executive Orders, which require additional agency coordination to obtain the appropriate permits and approvals. Many of the common permits and approvals have exemptions or expedited review procedures under emergency situations, and generally are still required prior to repairs. Regional Environmental Managers (REMs) should contact and coordinate with the relevant permitting agencies as soon as possible during/following an emergency event to begin the permitting process or emergency exemptions.

12.6. Emergency NEPA Document Preparation

Steps:

1. A damage assessment report or preliminary assessment report should be completed by DOT&PF as soon as practical following the emergency. The REM should work with the Regional Emergency Response Point of Contact to obtain the damage report.

2. Project control will develop a project name, which usually corresponds with the location of emergency, type of event, and date of event.

    a. The project name should identify the emergency event and emergency relief/repair. For example: *Johnston Bridge Replacement Anchorage Earthquake Emergency Relief*.

3. Project control will also establish a Capital Project with ER funding for 1st Responders to charge to, if necessary.

4. Instead of a State Transportation Improvement Program (STIP) project description for an emergency relief action, the project description should include all the work that was, or will be, completed for the ER project.

5. REMs determine which if any permitting agencies (state and federal) need to be contacted based on the specific emergency repair action. Contact permitting agencies as soon as possible to inform them of the emergency action, coordinate operations and obtain any necessary authorizations.

    Most permitting agencies (state and federal) have emergency authorization procedures. Obtaining authorizations from permitting agencies can proceed prior to the NEPA document process.

6. Complete a COA form and CE form for the action (see Chapter 3).
7. If the action does not qualify for a CE, contact SEO, and determine whether an EA (see Chapter 4) and Finding of No Significant Impact (FONSI) will be required.

Technical Appendix

FHWA Emergency Relief Program provides information on FHWA's special funding for Emergencies.

The Emergency Relief Manual covers procedures applicable to FHWA ER program for Federal-aid highways.

The CEQ regulations (40 CFR 1506.11) and guidance provide for alternative arrangements for NEPA compliance in emergency situations.

The Alaska Disaster Act, when the Alaska Governor declares an emergency is located at AS 26.23.

The Stafford Act is where the President of the United States declares an emergency. More information can be found at 42 USC 5121.