

17 AAC is amended by adding a new article to read:

Article 12. ENVIRONMENTAL PROGRAMS

Section

010. Purpose

020. Implementation of 23 U.S.C. 326 (Categorical Exclusion Assumption)

030. Implementation of 23 U.S.C. 327 (NEPA Pilot Program)

040. Adoption of Federal NEPA Requirements

050. Additional Categorical Exclusion

060. Definitions

17 AAC 12.010. Purpose. These regulations are limited in scope to providing authority and rules necessary for successful implementation of any powers or duties accepted by the department under the terms of one or more memorandums of understanding executed between the Department of Transportation and Public Facilities and the Federal Highway Administration, Alaska Division pursuant to 23 U.S.C. 326 and 23 U.S.C. 327. Further, the powers and duties assigned under in 23 U.S.C. 327 are codified in 23 CFR Part 773 (February 6, 2007) (Eff. ___/___/___, Register ___).

Authority: AS 44.42.300

Editors Note: The memorandums of understanding, which contain the lists of projects for which the department will assume duties under 23 USC §§326 and 327 are available for inspection and copying at the Department of Transportation and Public Facilities Environmental Management Office located at 3132 Channel Drive, Juneau, Alaska 99801.

17 AAC 12.020. Implementation of 23 U.S.C. 326 (Categorical Exclusion

Assumption) (a) The department will assume those duties of the Secretary of Transportation explicitly assigned by written agreement under 17 AAC 12.010 to implement 23 U.S.C. §326(c).

(b) The duties described in (a) include:

(i) assumption of responsibilities for determining the class of action or level of environmental documentation for federal aid highway projects throughout the State of Alaska,

(ii) assumption of all or part of the responsibilities of the Secretary of Transportation for environmental review, consultation, or other related actions required under any Federal law applicable to activities that are classified by the Secretary of Transportation as categorical exclusions, with the exception of government-to-government consultation with Indian tribes,

(iii) to take the role of a Federal agency for the purposes of the Federal law under which the responsibility is exercised, and

(iv) any other matters reasonably necessary for successful assumption of the duties assigned.

(c) If an agreement is entered under paragraph (a), the department assumes responsibility, and agrees to act on behalf of, the United States Department of Transportation in assuring compliance with all applicable Federal environmental laws and other Federal related requirements associated with a categorical exclusion level project. (Eff. ___/___/___, Register ___).

Authority: AS 44.42.300

Editor's Note: Under 23 U.S.C. §§326 and 327, the state is deemed to be a federal agency, if it agrees to assume duties to approve environmental documents, and the state must consent

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to exclusive jurisdiction of federal courts, which the Alaska Attorney General may do under AS 44.23.020(g). Civil challenges premised on alleged violations of duties undertaken by the department under this article are governed solely by applicable federal law and procedure.

17 AAC 12.030. Implementation of 23 U.S.C. 327 (NEPA Pilot Program). (a) The Commissioner will assume those duties of the Secretary of Transportation explicitly assigned by written agreement under 17 AAC 12.010 to implement 23 U.S. 327(c).

(b) The duties identified in (a) above include:

(i) assignment from the Secretary of Transportation of responsibilities with respect to one or more highway projects within the State of Alaska under the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370(c)),

(ii) all or part of the responsibilities of the Secretary of Transportation for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a specific project, and

(iii) any other matters reasonably necessary for successful assumption of the assigned duties.

(c) The Commissioner did not assume responsibility for any conformity determination required under section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility imposed on the Secretary of Transportation by 23 U.S.C. 134 (Metropolitan Planning) and 23 U.S.C. 135 (Statewide Planning). (Eff. ___/___/___, Register ___).

Authority: AS 44.42.300

Editor's Note: Federal laws and Executive Orders the Federal Highway Administration believes are applicable when the state assumes federal responsibilities are listed in Appendix A to 23 CFR Part 773 (February 6, 2007).

17 AAC 12.040. Adoption of Federal NEPA Requirements.

(a) The following federal requirements are adopted by reference as applied to the duties assumed by the department under this article (1) 42 U.S.C. 4321-4370(c), National Environmental Policy Act of 1969 and (2) 23 C.F.R. Part 771, Environmental Impact and Related Procedures, revised as of January 1, 2007 as more specifically incorporated by reference except as modified by (b) and (c):

- (1) 23 CFR §771.107 (Definitions for 23 CFR part 771).
- (2) 23 CFR §771.109 (Applicability and responsibilities)
- (3) 23 CFR § 771.111 (Early coordination, public involvement and project development)
- (4) 23 CFR §771.113 (Timing of Administration Activities)
- (5) 23 CFR §771.115 (Classes of actions)
- (6) 23 CFR §771.117 (Categorical exclusions)
- (7) 23 CFR §771.119 (Environmental assessments)
- (8) 23 CFR §771.121 (Finding of no significant impact)
- (9) 23 CFR §771.123 (Draft environmental impact statements)
- (10) 23 CFR §771.125 (Final environmental impact statements)
- (11) 23 CFR §771.127 (Record of decision)
- (12) 23 CFR §771.129 (Supplemental environmental impact statements)
- (13) 23 CFR §771.130 (Supplemental environmental impact statements0

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(14) 23 CFR §771.135 (Section 4(f) [49 USC §303])

(b) As used in the regulations incorporated by reference in (a) of this section, the term “administration” means the Department of Transportation and Public Facilities (DOT&PF) and the term “applicant” is deleted engineer.

(c) The federal regulations in 23 C.F.R. Part 771 that are adopted by reference in (a) of this section are revised as follows:

(1) 23 CFR §771.107(b) is revised to read: (b) Action. A highway project proposed for FHWA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(2) 23 CFR §771.107(d) is deleted.

(3) 23 CFR §771.109(b) is revised to read: “It shall be the responsibility of the Commissioner to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation.”

(4) 23 CFR 77.109(c)(1) is revised to read: “the DOT&PF shall prepare the environmental impact statement (EIS) and other environmental documents in accordance with the environmental procedures approved by the Commissioner,”

(6) 23 CFR §771.109(c)(2),(3), (4), and 23 CFR §771.109(d) are deleted.

(7) 23 CFR §771.111(c) is deleted

(8) 23 CFR §77111(h)(1) is revised to read: “The DOT&PF shall carry out a public involvement/public hearing pursuant to 23 USC §128 and 40 CFR parts 1500 through 1508 and DOT&PF public involvement procedures.

(9) In 23 CFR §771.111(h)(2)(iii) is revised by substituting the term “DOT&PF” for the term “State highway agency”.

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(10) In 23 USC §771.111(h)(2)(vi) is revised by substituting the term “Commissioner” for the term “FHWA”.

(11) 23 CFR 771.111(h)(3) is revised to read “Based on the reevaluation of project environmental documents required by Sec. 771.129, the environmental management office and the regional preconstruction engineer will determine whether changes in the project or new information warrant additional public involvement.”

(12) 23 CFR 771.111(h)(4) and 23 CFR 771.111(i) and (j) are deleted.

(13) 23 CFR 771.113(a) the term rolling stock is deleted from third sentence.

(14) In 23 CFR §771.113(a)(2) the term “FHWA Division Administrator” means the Commissioner of DOT&PF.

(20) 23 CFR §771.119(c) is revised to read: The EA is subject to Commissioner approval before it is made available to the public.

(21) 23 CFR §771.119(g) is deleted.

(22) 23 CFR 771.119(h) is revised to read: When the Commissioner expects to issue a FONSI for an action described in Section 771.115(a), copies of the EA shall be made available for public review (including the affected state, federal and local governmental agencies) for a minimum of 30-days before the Commissioner makes a final decision (See 40 CFR 1501.4(e)(2).) This public availability shall be announced by a notice similar to a public hearing notice.

(23) 23 CFR §771.121(c) is revised to read: (c) If a Federal agency has issued a FONSI on an action which includes an element proposed for federal funding, the environmental management office will evaluate the federal agency's FONSI. If the Commissioner determines that this element of the project and its environmental impacts have been adequately identified and assessed, and concurs in the decision to issue a FONSI, the Commissioner will issue DOT&PF

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FONSI incorporating the federal agency's FONSI. If environmental issues have not been adequately identified and assessed, the Commissioner will require appropriate environmental studies.

(24) 23 CFR §771.123(a) is revised to read: (a) An EIS shall be prepared when the Commissioner determines that the action is likely to cause significant impacts on the environment. When the decision has been made to prepare an EIS, the Commissioner will issue a Notice of Intent (40 CFR 1508.22) for publication in the Federal Register. The Commissioner shall announce the intent to prepare an EIS by publication of the Notice of Intent in a newspaper of general circulation.

(24) 23 CFR §771.123(b) is revised to read: (b) After publication of the Notice of Intent, the Commissioner will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. Scoping is normally achieved through public and agency involvement procedures required by Sec. 771.111. If a scoping meeting is to be held, it should be announced in the Federal Register Notice of Intent and the notice in a news paper of general circulation made under subsection (a).

(26) The first sentence of 23 CFR §771.123(c) is deleted.

(27) 23 CFR §771.123(d) is revised to read: The Commissioner may select a consultant to assist in the preparation of an EIS in accordance with AS 36.30, the State Procurement Code.

(28) 23 CFR §771.123(e) is deleted.

(29) The third sentence of 23 CFR 771.123 (f) is revised to read: “However, with the Commissioner’s concurrence, the party requesting the draft EIS may be charged a fee which is

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not more than the actual cost for reproducing the copy or may be directed to the nearest location where the statement may be reviewed.”

(30-) 23 CFR §771.123(h) is revised to read: The public hearing requirements are as described in Sec. 771.111(h). 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. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing is not held, a notice shall be placed in a newspaper of general circulation similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(31) 23 CFR §771. 123(j) is deleted.

(32) The first sentence of 23 CFR §771.125(a)(1)is revised to read: After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the Commissioner.

(33) The first sentence of 23 CFR §771.125(a)(1) is revised to read: After circulation of a draft and consideration of comments received, a final EIS shall be prepared by DOT&PF

(34) 23 CFR 771.125(b) is revised to read: The final EIS will be reviewed for legal sufficiency by the Alaska Attorney General prior to the Commissioner’s approval.

(35) 23 CFR 771.125(c) is deleted. (36) 23 CFR §771.125(g) is revised to read: “The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The Commissioner shall also publish a notice of availability

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in a news paper of general circulation and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the regional preconstruction engineers offices and at the environmental management office. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

(37) 23 CFR §771.127(b) is revised to read: b) If the Commissioner subsequently wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, the Commissioner shall issue a revised ROD. To the extent practicable the revised ROD shall be provided to all persons, organizations, and agencies that received a copy of the final EIS.

(35) 23 CFR §771.130(e) is deleted.

(36) 23 CFR §771.135 replace Administration with “Commissioner”.

(Eff. ___/___/___, Register ___).

Authority: AS 44.42.300

17 AAC 12.050. Additional Categorical Exclusions. Those types of DOT&PF actions determined by the Council on Environmental Quality (CEQ) to qualify as categorical exclusions (CE) under 23CFR Section 771.117(d) shall be considered as categorical exclusions under 23 CFR 771.117 when the department has executed a memorandum under 17 AAC 12.010, which allows the Department’s review and approval authority of these types of projects.

Authority: AS 44.42.300

17 AAC 12.060. Definitions. In this article, unless the context requires otherwise,

(1) “Department” shall mean the Alaska Department of Transportation and Public Facilities 9DOT&PF);

(2) “Environmental management office” shall mean the administrative unit within the DOT&PF which performs the duties performed by the Federal Highway Administration under 23 CFR Part 771;

(3) “Regional preconstruction engineer” shall mean the position in each of DOT&PF’s regional offices with final authority over preparation of and the submission of environmental studies to the environmental management office; and

(4) “Secretary of Transportation” shall mean the Secretary of the United States Department of Transportation. (Eff. ___/___/___, Register ___).

Authority: AS 44.42.300

Editor’s Note: The Department of Transportation and Public Facilities has three regional offices, which may be found at the following locations:

**Southeast Region
6860 Glacier Hwy.
Juneau AK 99801-7909**

**Central Region
4111 Aviation Ave.
Anchorage, Alaska 99502-1058**

**Northern Region
2301 Peger Rd
Fairbanks AK 99709-5316**

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**The Environmental Management Office is located at 3132 Channel Drive, Juneau, Alaska
99801.**