119th Congress—Federal Priorities: Environmental Issues in Transportation

TxDOT Government Affairs Division

SUMMARY

The Texas Department of Transportation (TxDOT) appreciates the opportunity to provide input on transportation policies for consideration by the 119th United States Congress. As a recognized leader among state departments of transportation, TxDOT looks forward to addressing the shared goal of, among others, improving and streamlining environmental processes that present unique challenges to the transportation sector to achieve our mission: *Connecting you with Texas*. Below are key items and policy priorities related to environmental statutes and regulations for consideration as Congress develops a surface transportation reauthorization bill and other transportation-related legislation.

As discussed below, several of these issues can be resolved administratively by USDOT as these issues are regulatory requirements that are inconsistent with federal statutory allowances, or they are 'guidance' that are also inconsistent with statute and regulation. In future reauthorizations, Congress should include statutory language that would prohibit USDOT from adding guidance or regulatory provisions that exceed the requirements provided by Congress.

Key Environmental Issues

- Create an exception from Section 6(f) for federally funded transportation projects.
- Clarify and streamline environmental review requirements.
  - Expand the National Environmental Policy Act (NEPA) assignment authority to include project level air quality conformity determinations, currently excluded from assignment agreements.
  - Clarify that a NEPA-assigned state has autonomy over its public involvement procedures, provided the states comply with federal statutes and regulations.
  - Clarify that planning consistency is not required for NEPA approval.
  - Eliminate the 30-day waiting period prior to a Finding of No Significant Impact (FONSI).
  - Allow air conformity determinations to be made after the NEPA decision, but prior to construction.
  - Harmonize NEPA processes across USDOT agencies to reduce duplicative work and time burdens on state Departments of Transportation (state DOTs).
- Allow federal reimbursement for right of way acquired prior to environmental clearance.

Create an exception from Section 6(f) for federally funded transportation projects

Neither Section 6(f) of the Land and Water Conservation Fund (LWCF) Act nor the implementing regulations and guidance appear to have been written to account for federally funded transportation projects. Rather, they appear to be written for a scenario in which a local government uses LWCF money to develop a park and then later decides to use the land for another purpose. For example, the National Park Service has explained that Section 6(f) "strongly discourages casual discards and conversions of state and local park and recreation facilities to other uses" and that the requirement to secure a replacement property "serves as a simple and effective deterrent."

However, when it concerns federally funded transportation projects that require a conversion of a LWCF-assisted property, there is no change in purpose or "casual discard or conversion," and there should not be any "deterrent" to such an action. The federal government should not penalize or hamstring itself because it previously provided a grant to a local government for a particular property when it was unlikely that the property would eventually be needed for a federally funded transportation project.

Additionally, there is already a federal law governing a federally funded transportation project's impacts on a significant public park or recreation area: Section 4(f) of the Department of Transportation Act of 1966 (23 USC 138) is specific to federally funded transportation projects and applies regardless of whether the park or recreation area was developed with LWCF money.

A narrow exception to the applicability of Section 6(f) would allow important infrastructure projects to proceed while maintaining the protections it provides for most LWCF-assisted areas. TxDOT proposes the following legislative exemption: "Section 6(f) of the Land and Water Conservation Fund Act (54 USC

200305(f)(3)) shall not apply to any conversion of property to non-public outdoor recreation use that is determined by the Secretary of Transportation to be necessary for a federally funded transportation project."

Clarify and Streamline Environmental Review Requirements

Expand NEPA assignment authority to include project-level air quality conformity determinations, currently excluded from assignment agreements.
TxDOT recommends the Federal Highway Administration (FHWA) grant NEPA-assigned states full authority, rather than piecemeal. Under federal law, states may assume responsibilities of the FHWA under NEPA and related federal laws for surface transportation projects. However, the authority to make a project level air quality conformity determination was retained by FHWA (23 USC 327(a)(2)(B)(iv)(II)). Assignment of this authority to states is needed to fully achieve the project delivery streamlining benefits of NEPA assignment.

Clarify that a NEPA-assigned state has autonomy over its public involvement procedures.
TxDOT requests that Congress clarify its intent for 23 USC 327, specifically whether FHWA holds sole responsibility for the public involvement process for NEPA-assigned states. FHWA's rules, at 23 CFR 771.111(h)(1), require that each state must have procedures approved by FHWA to carry out a public involvement/public hearing program, which must contain certain components required by rule. This rule was promulgated prior to the enactment of the NEPA assignment statute (23 USC 327), which provides that a NEPA-assigned state is "solely responsible and solely liable" for carrying out the assumed responsibilities. Despite this, FHWA interprets its rule as continuing to require FHWA review and approval of public involvement procedures even in a NEPA-assigned state. This means that every time a NEPA-assigned state makes a substantive change to its public involvement procedures, it must first obtain FHWA's review and approval, which can take an extensive period. TxDOT asks that Congress direct FHWA to establish that a NEPA-assigned state has autonomy over its own public involvement procedures, provided the state is compliant with relevant federal statutes and regulations.

Clarify that planning consistency is not required for NEPA approval.
TxDOT requests that Congress clarify its intent to establish consistency with NEPA approval. FHWA guidance documents issued in 2008 and 2011 instruct that compliance with federal transportation planning requirements (23 CFR Part 450) must be documented as part of the NEPA environmental review of a highway project. This often results in a project advancing through environmental review only to be held up near the end while plans are updated, reviewed, and approved through the required planning process.

There is no statute or regulation requiring this consistency check at this point in the process. It is simply FHWA's guidance that ties these two separate requirements together. The transportation planning requirements at 40 CFR Part 450, and the requirement to perform an environmental review under 23 CFR 771, are separate requirements, and compliance with either is not dependent on compliance with the other. A project must be determined to comply with planning requirements before FHWA formally authorizes federal assistance on a project. However, that occurs at a specific point in time in project development that is after, not concurrent with NEPA clearance. Mandating compliance with the Part 450 rules prior to NEPA approval adds administrative requirements and limits the ability of state DOTs to be prepared for funding changes and shifting project priorities.

Eliminate the 30-day waiting period prior to a finding of no significant impact.
FHWA's regulations, at 23 CFR 771.119(h), require a 30-day waiting period after a final environmental assessment (EA) is issued before a finding of no significant impact (FONSI) can be issued, if the project is of a type that "normally" requires an environmental impact statement (EIS), such as a new controlled access freeway or a highway project of four or more lanes at a new location. The basis for this rule is a Council on Environmental Quality (CEQ) rule (40 CFR 1501.6(b)(2)(i) that requires this 30-day waiting period on an EA project that normally requires an EIS, to mirror the 30-day waiting period that normally exists between a final EIS and a record of decision (ROD).

However, MAP-21 provided the ability to issue a combined final EIS/ROD for a federally funded highway project under most circumstances, in which case there is no 30-day waiting period. Given the intent of MAP-21, there should not be separate notices of the final EA and FONSI and a 30-day waiting period for EAs, a lower-level environmental classification, for federally funded highway projects. TxDOT requests that Congress direct FHWA to remove the 30-day waiting period prior to a FONSI.

Allow air conformity determinations to be made after a NEPA decision, but prior to construction.

TxDOT asks that Congress clarify conformity requirements in the Clean Air Act and direct FHWA and the Federal Transit Administration (FTA) to amend regulations to meet those requirements. The "project-level transportation conformity rule" applies to certain FHWA and FTA projects in air nonattainment areas (*see* 40 CFR Part 93, implementing 42 USC 7506(c)(1)(B) of the Clean Air Act). Under this rule, and specifically 40 CFR 93.104(d), FHWA/FTA cannot "adopt, accept, approve, or fund" a project until it has been found to conform to an applicable implementation plan, which is essentially a plan for bringing an area into compliance with one or more National Ambient Air Quality Standards.

This rule has been interpreted as prohibiting FHWA/FTA from issuing a NEPA decision for a project until the conformity determination for the project is made, which creates unnecessary delays because the agency can only make a conformity determination once it is ready to issue the NEPA decision. This can happen for various reasons, including situations in which the project design changes because of the NEPA process, which then requires the local MPO to adjust its local transportation plan and program so that the description of the project is consistent, and the conformity determination can be made. There is also no reason to require the conformity determination for the project to be made prior to the NEPA decision, because air emissions from the project cannot occur until the start of construction, which typically occurs long after the NEPA decision.

TxDOT requests that Congress clarify that project-level conformity determinations are required to be made prior to the start of construction, and that such determinations are not required for a NEPA decision on a project. Under this proposal, "hot-spot analyses," which can be an aspect of project-level conformity on some projects, would still be conducted prior to the NEPA decision, but the overall project-level conformity determination could occur after the NEPA decision.

Harmonize NEPA processes across agencies within USDOT.

TxDOT asks USDOT to develop one consistent process for NEPA review and approval that all USDOT agencies follow. Agencies throughout USDOT currently have different processes and procedures for NEPA. This creates confusion for state DOTs and duplicative work for both state DOTs and federal agencies. In the past, this has resulted in an instance where FHWA approved TxDOT's NEPA review on a project, but FRA objected to a section of that review, and TxDOT was required to redo the NEPA review for the portion of the project in question, thereby causing significant project delays. Creating a single NEPA review and approval process across agencies will bring efficiency and eliminate confusion.

Allow federal reimbursement for right of way acquired prior to environmental clearance

TxDOT requests removing the additional requirements found in 23 U.S.C. Section 108(c)(3)(C-G). At the time a parcel of land is incorporated into a project and the purchasing agency shows it has followed the Uniform Relocation and Real Property Acquisition Act of 1970 and Title VI of the Civil Rights Act, the acquired right of way should be eligible for federal reimbursement. This would allow for more advanced acquisitions to take place, allowing state DOTs to preserve right of way for future projects, thereby providing cost savings. This is especially true in a growing state like Texas, where land values and land development continue to increase across the state.