
Office of Inspector General

Audit Report

NATIONAL ENVIRONMENTAL POLICY ACT: FRA COORDINATES AS REQUIRED BUT OPPORTUNITIES EXIST TO MODERNIZE PROCEDURES AND IMPROVE PROJECT DELIVERY

Federal Railroad Administration

Report Number: CR-2014-010

Date Issued: December 5, 2013





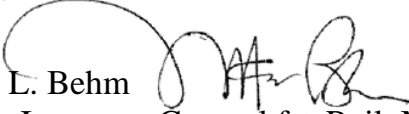
Memorandum

U.S. Department of
Transportation

Office of the Secretary
of Transportation
Office of Inspector General

Subject: **ACTION**: National Environmental Policy Act:
FRA Coordinates As Required But Opportunities
Exist to Modernize Procedures and Improve
Project Delivery
Federal Railroad Administration
Report Number: CR-2014-010

Date: December 5, 2013

From: Mitchell L. Behm 
Assistant Inspector General for Rail, Maritime,
Hazmat Transport and Economic Analysis

Reply to
Attn. of: JA-50

To: Federal Railroad Administrator

As part of its \$10.1 billion High Speed Intercity Passenger Rail Program (HSIPR), the Federal Railroad Administration (FRA) collaborates with project grantees, the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA) on both construction and compliance with the National Environmental Policy Act's (NEPA) requirements. The President's Council on Environmental Quality (CEQ) is responsible for implementing NEPA and Federal agencies are required to follow CEQ regulations and develop procedures as necessary to ensure proper consideration of environmental concerns in agency decision-making. Until HSIPR's inception, FRA had undertaken comparatively few NEPA reviews, because it historically focused on rail safety. With recent legislation aimed at improving project delivery of surface transportation projects, primarily through reforming environmental issues,¹ and as construction begins on many HSIPR projects, there is growing interest among grantees and other stakeholders regarding the variation among modal agencies in handling NEPA reviews. There is also growing interest in the degree to which FRA coordinates with FHWA and FTA.

¹ Moving Ahead for Progress in the 21st Century (MAP-21) became law on July 6, 2012, and authorizes Federal-aid highway programs for 2 years while maintaining current spending levels. MAP-21 also focuses highway programs on key outcomes to ensure that taxpayers are receiving the most for their money.

We initiated this audit to address questions surrounding the adequacy of FRA's procedures for navigating the NEPA process and review concerns raised by stakeholders. For example, some grantees told us that they have had to rely on guidance from other DOT modes to navigate the process and some State officials have suggested that DOT's modes need to consider a "one U.S. DOT" approach to the NEPA process, in which they all use the same implementing procedures. After we began our review, the Chairman of the House Committee on Transportation and Infrastructure requested that we conduct additional work as part of our audit. Specifically, the Chairman asked that we evaluate the impact that differing authorities mandated to FHWA and FTA by Titles 23 and 49 of the U. S. Code have on FRA's ability to coordinate with those operating administrations (OA) to expeditiously complete NEPA reviews. We completed this evaluation while executing our audit objectives which were to (1) assess FRA's procedures for coordination with FHWA and FTA to ensure compliance with NEPA requirements, and (2) determine whether the procedures incorporate relevant statutory requirements and CEQ guidance.

To conduct our audit, we assessed existing policies, procedures and guidance against CEQ's regulations. Specifically, our legal staff identified applicable laws and regulations the Agency must follow, and assessed FRA's NEPA implementing procedures for compliance with these requirements, including coordination with modal counterparts on NEPA and the impact of Titles 23 and 49 of the U.S. Code on such coordination. We also met with officials at FRA, FHWA, FTA, and the Office of the Secretary of Transportation (OST) to gain an understanding of coordination on NEPA's requirements among the OAs and the impact of differing statutory authorities our legal analysis addressed. Furthermore, we administered a questionnaire to program participants from HSIPR, the Rail Line Relocation and Improvement Capital Grant Program² (RLR), and the Railroad Rehabilitation and Improvement Financing Program³ (RRIF) regarding their experiences with FRA's NEPA process and guidance.⁴ We performed our work from September 2012 through September 2013 in accordance with generally accepted Government auditing standards.

² RLR is a grant program implemented by FRA to assist State and local governments in mitigating the adverse effects created by the presence of rail infrastructure.

³ RRIF is program implemented by FRA that provides direct federal loans and loan guarantees to finance the development of railroad infrastructure.

⁴ We sent our survey to nine HSIPR and nine RRIF participants on the basis of total funding amounts. Nine RLR participants were randomly selected. Rates of response to the survey varied. Eight HSIPR grantees, four RRIF participants, and four RLR participants responded.

RESULTS IN BRIEF

FRA coordinates with FHWA and FTA in compliance with NEPA, and is working with OST to further enhance coordination on the Department's multimodal projects. Based on our legal analysis, we found that FRA's implementing procedures comply with CEQ's requirements for coordination, and the differing authorities in Titles 23 and 49 of the U.S. Code do not appear to impact its ability to coordinate with FHWA and FTA. Additionally, environmental law and policy experts at FHWA and FTA referred to CEQ regulations and DOT's NEPA order, stating that the regulatory content is thorough and sufficient, and reminds OAs to coordinate with other OAs; local, state, and Federal agencies; interested stakeholders; and the public, when appropriate. Outside stakeholders have suggested a "one U.S. DOT" approach to improving NEPA coordination within the Department, which would create one set of departmental implementing procedures. However, many DOT officials shared concerns that this approach might not adequately reflect inherent differences among the various transportation modes. FRA is also assisting OST in its efforts to improve coordination among the Department's agencies on multi-modal projects, and collaboration on the use of categorical exclusions (CE)⁵ for those projects.

FRA's implementing procedures that are intended to guide grantees through the NEPA process are outdated and limited. Because the Agency has not updated most of its implementing procedures since 1999, requirements from subsequent statutes and recommended CEQ guidance have not been included. The procedures also contain outdated terminology. For example, the procedures refer to the Office of Policy and Program Development which no longer exists. Additionally, grantees informed us that they needed more guidance from FRA on its NEPA process, and that they have been forced to use other OAs' guidance in an attempt to navigate FRA's process. FRA is still developing standard operating procedures (SOP) for its staff to use in NEPA process administration and to help ensure consistency in the environmental documentation that grantees submit. FRA officials acknowledged that SOPs are needed to assist grants staff in their administration of NEPA and other requirements. Finally, FRA has added new CEs, but has not implemented CEQ's recommended process for keeping CEs current by evaluating its existing CEs.

We are making recommendations to improve FRA's compliance with the NEPA process.

⁵ A category of actions for projects that do not have a significant environmental impact, and therefore may be "excluded" from further environmental review.

BACKGROUND

NEPA, enacted in 1969, requires that Federal agencies develop procedures to assess the potential environmental impact of all proposed actions of federally funded projects. It also created CEQ (the Council) which oversees agencies' development of environmental policies and procedures, issues guidance to assist agencies' compliance with NEPA, and reviews and approves agencies' procedures. The Council establishes Government-wide NEPA regulations forming the essential framework, while departments are responsible for establishing supplemental procedures addressing areas of general concern, and individual agencies publish procedures addressing issues particular to its programs. DOT issued its supplemental procedures in DOT Order 5610.1C, while FRA published implementing instructions in the Federal Register, which were last updated in 1999. Table 1 summarizes the NEPA laws, regulations and procedures that are most relevant to FRA and this audit.

Table 1. NEPA Laws, Regulations and Procedures Relevant to FRA⁶

Document	Summary
<p>NEPA 42 U.S.C. § 4321-4347, as amended, Jan. 1, 1970.</p>	<ul style="list-style-type: none"> • Requires Federal agencies to develop and implement procedures to incorporate environmental factors into their decision-making. • Established the Council for Environmental Quality (CEQ) to oversee NEPA implementation.
<p>Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act 40 CFR § 1500-1508, November 28, 1978</p>	<ul style="list-style-type: none"> • Define what Federal agencies must do to comply with and achieve the goals of NEPA, including coordination. • Gives agencies broad discretionary authority to interpret and implement NEPA and CEQ regulations.
<p>Procedures for Considering Environmental Impacts (DOT) DOT Order 5610.1C, as amended, July 30, 1985</p>	<ul style="list-style-type: none"> • Implement the mandate of NEPA, as defined and elaborated upon by CEQ regulations, within the programs of the Department of Transportation. • Supplement the CEQ regulations by applying them to DOT programs.
<p>Procedures for Considering Environmental Impact (FRA) 64 FR 28545, May 26, 1999</p>	<ul style="list-style-type: none"> • Provides FRA's procedures for compliance with NEPA.

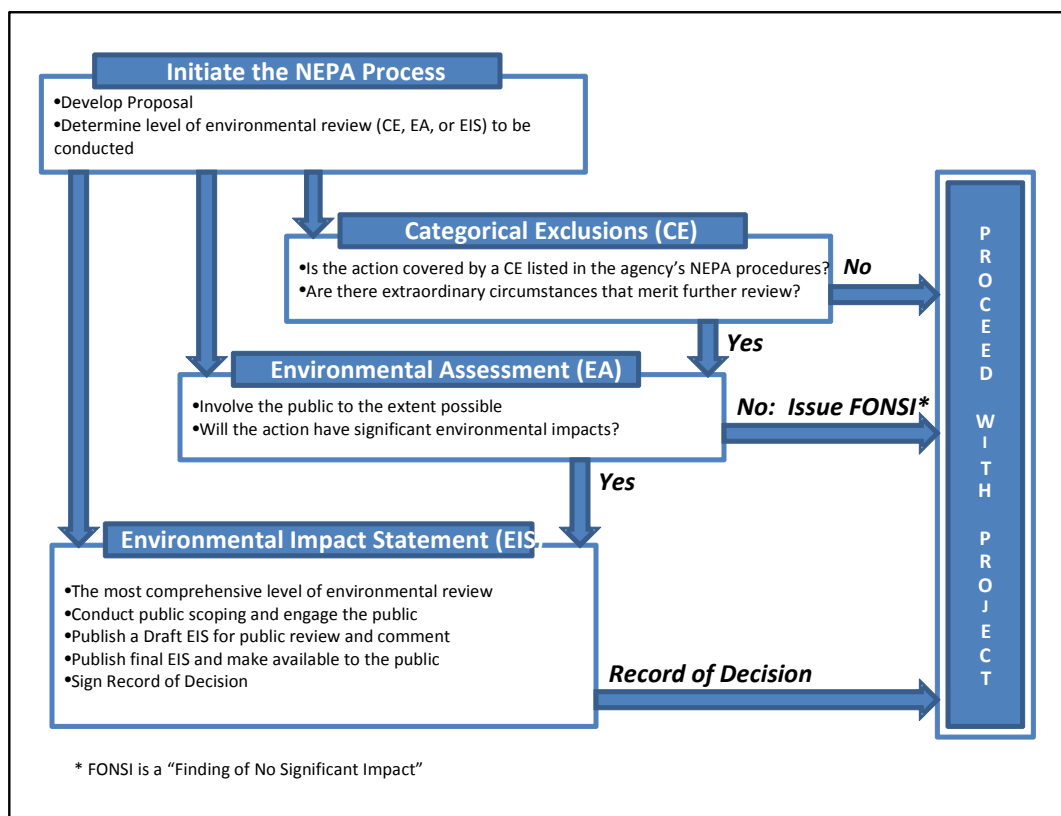
Source: OIG Analysis

⁶ We discuss Titles 23 and 49 of the U.S. Code later in the report. Because they were not applicable to FRA's NEPA process, we did not include them in this table.

DOT must comply with NEPA for each transportation project when supported by Federal funds. Other Federal agencies must comply with NEPA when issuing permits, such as when a project crosses through Federal lands. FRA, like most awarding Federal agencies, considers the NEPA process a portion of the Federal project lifecycle. Depending on the parameters defined by a particular program, environmental documentation may be required to be completed at the time an agency makes an award. In other instances, some program parameters may allow for environmental documentation to be formally completed after the agency makes the award to the applicant. Where NEPA is required, compliance is documented in one of the following NEPA documents, which might be followed by a determination by the Federal agency (i.e., Finding of No Significant Impact or Record of Decision). (see Figure 1 for an overview of the basic process):

1. For certain projects, an agency may apply what is known as a CE. Agencies must include a list of its CEs in their respective NEPA procedures. When developing the list of CEs, the agency uses its experience with certain types, or categories, of projects to demonstrate that the projects do not have significant environmental impact, and therefore may be “excluded” from further environmental review.
2. Where a project does not meet one of the categories of actions the agency identified as appropriate for a CE, an agency must prepare a more detailed review called an environmental assessment (EA) to analyze the potential environmental impacts of the project. As appropriate, after completing the EA, the agency might issue a Finding of No Significant Impact or begin preparing an Environmental Impact Statement (EIS).
3. When an agency anticipates that an action will have significant environmental impact, NEPA requires the agency to prepare the most detailed form of environmental review, an EIS, which is a comprehensive report on the project’s environmental impact.

Figure 1. Overview of the Basic NEPA Process



Source: Developed from CEQ's NEPA-National Historic Preservation Act Section 106 Handbook

FRA COORDINATES WITH FHWA AND FTA IN COMPLIANCE WITH NEPA, AND IS WORKING WITH OST TO FURTHER ENHANCE THIS COORDINATION

CEQ's regulations require agencies with similar programs to consult with each other on the NEPA process. Both the regulations and the DOT Order provide guidance on the definitions and timing of NEPA coordination with Federal agencies, including OAs. Our legal review found that FRA's implementing procedures follow this guidance, to sufficiently define its coordination roles with other OAs such as FHWA and FTA. In addition, our legal review found that the authorities in Titles 23 and 49 of the U.S. Code do not appear to impact the Agency's ability to coordinate with these OAs. FRA is also assisting OST in its efforts to improve coordination among the Department's agencies on multi-modal projects, and collaboration on the use of CEs for those projects.

FRA's Implementing Procedures for Coordinating with FHWA and FTA Are Sufficient and the Agency Coordinates as Required

Our legal review found that FRA has incorporated coordination language derived from CEQ's regulations and DOT's Order into its implementing procedures. CEQ's regulations require early planning and coordination to reduce delays, and include definitions for agencies' different coordination roles—*lead*, *cooperating* and *joint-lead*.⁷ DOT's Order⁸ also outlines early planning and coordination requirements, and defines the coordination roles for departmental OAs. Based on CEQ and DOT's regulations, FRA has developed the following definitions for the types of NEPA coordination:

- **Lead agency.** When FRA joins other OAs in the preparation of environmental documentation, either an EIS or EA, the agencies should agree to designate a single “lead agency” to supervise the effort. The lead agency should consult with the other cooperating agencies to ensure that the joint effort makes the best use of areas of jurisdiction and of participating agencies' special expertise, that the views of participating agencies are considered in the course of the EA and documentation process, and that the substantive and procedural requirements of all participating agencies are met.
- **Cooperating agency.** FRA is not the lead agency but assists with substantive and procedural compliance with environmental laws, orders, and regulations, and reviews the work of the lead agency to ensure that it satisfies its own requirements.
- **Joint-lead agency effort.** FRA works with one or more agencies either as a co-lead or directly through funding, licenses, or permits, or on a group of actions that are functionally interdependent, in close geographical proximity, or are involved in a single program. FRA's Program Office should join all agencies to perform a joint EA or EIS and prepare the necessary documentation.

In addition to these three primary types of coordination that FRA has defined in its implementing procedures, we reviewed the U.S. Code and identified other types of coordination that FRA may undertake during the NEPA process. For example, one type of coordination involves scoping a project with another OA to ensure that both OAs' needs and responsibilities are considered in the project's development. Exhibit C describes these additional types of coordination.

⁷ 40 CFR §§ 1501.2 - 1501.6

⁸ DOT Order 5610.1C

In survey responses, HSIPR and RLR grantees indicated that FRA coordinates with other agencies when appropriate to facilitate the NEPA process. For example, one HSIPR grantee stated that on its project, FRA requested FHWA's participation as cooperating agency, and that FRA holds bi-monthly conference calls with other agencies to brief them on high speed rail projects, which in each instance facilitated consistent communication and allowed the projects to move forward in a timely manner.

Recognizing the increase in multi-modal projects, FRA coordinated with FTA to develop seven new CEs, designed to better align the Agency's CE list with those of FTA and FHWA. These new CEs were published in January 2013. According to one FRA official, while it collaborated mainly with FTA, the Agency also looked at other agencies' CEs to determine how to align its CEs with those of other agencies such as FHWA. FRA also coordinated with OST to review all of its proposed CEs and supporting documentation prior to sending the proposed CEs to CEQ for final approval.

Differing Statutory Authorities Do Not Impact FRA's Ability to Coordinate with FHWA and FTA

Our legal review of Titles 23 and 49 of the U.S. Code found that these statutes' requirements do not impact FRA's ability to coordinate with FHWA and FTA. Both Titles are broad in nature, providing general administrative structure and guidance to DOT and the OAs. Title 23 contains provisions, including some that are NEPA-specific, for FHWA's administration of Federal aid for the National Highway System, and lays out the role of the Nation's highways in the national transportation system. Title 49 lays out the structure, roles, and responsibilities of DOT and its OAs.

According to environmental law and policy experts at FRA, FHWA and FTA, neither Title 23 nor 49 have directly impacted their coordination efforts. These experts conclude that the Council's guidance and DOT's Order are more helpful, stating that the regulatory content in both is thorough and sufficient, and reminds the Agencies to coordinate when appropriate. For each project, DOT's Order also requires each OA to assume primary responsibility for the environmental review process, and to consult with appropriate agencies and interested parties as soon as possible. Furthermore, most Agency officials cautioned against more statutory requirements for agency coordination, noting that such requirements are prescriptive and often do not take into consideration differences in OAs' programs. For example, FRA officials stated that FRA's program and project delivery challenges are different from those of other OAs, specifically FHWA. FHWA and FTA officials echoed these opinions, citing differences in funding

sources, rights-of-way, and environmental impacts that require flexibility in coordination.

FRA Is Taking Steps with the Department To Enhance NEPA Coordination with Its Modal Counterparts

FRA is working with the Department and its modal counterparts to enhance coordination on future multi-modal projects by establishing a process to use one another's CEs. An OST working group, in which FRA is a main participant, is considering a proposal that would allow DOT's OAs to use one another's CEs when working on multimodal projects. Currently, NEPA procedures provide for adoption of EISs, but not EAs or CEs. The working group first considered the proposal several years ago. With the introduction of MAP-21, however, the initiative took on new purpose, as the group was tasked with redefining the meaning of "multimodal project," which is defined prescriptively in the statute to only include projects receiving FHWA or FTA funds. As written, the definition precludes other modal projects that do not have FHWA or FTA funding sources—even if they involve multiple modes—from being considered "multimodal" and therefore, being eligible to apply a CE under the provisions in MAP-21.

OST officials told us that they hope the group will complete its work by the end of 2013, but will need CEQ's approval and all the OAs' agreement. According to officials in OST's Office of General Counsel, the group's results will most likely become part of the Department's update to its NEPA Order, which is in progress. In contrast to the Department's thinking, some State officials have suggested that DOT's OAs need to consider a "one U.S. DOT" approach to the NEPA process, in which they all use the same implementing procedures. These officials indicated that this approach would facilitate better departmental coordination. However, OA and CEQ officials cautioned against this approach, pointing out that in CEQ's regulations, departments' major subunits are encouraged to, with their departments' consent, adopt their own procedures for NEPA compliance. Additionally, a CEQ official stated that one set of implementing procedures for all OAs would lack the detail necessary to assist grantees in navigating the process and could cause more confusion than clarity. Officials at FRA also indicated that this approach would not work particularly well across all modes due to their inherent differences.

FRA HAS OUTDATED AND LIMITED NEPA PROCEDURES FOR GRANTEES, AND THE AGENCY ONLY PARTIALLY COMPLIES WITH SOME GUIDANCE

FRA's implementing procedures to guide grantees through the NEPA process are outdated and limited, and the Agency has only partially complied with CEQ's guidance for updating CEs. The Agency has not updated most of its implementing procedures since 1999. The procedures do not include statutory requirements and recommendations from CEQ's guidance and contain outdated terminology. Furthermore, grantees informed us that they need more guidance from FRA on the NEPA process. FRA is still developing SOPs for its staff to use in NEPA process administration, and has not implemented CEQ's recommended process for keeping CEs current.

FRA's NEPA Implementing Procedures Are Outdated and Limited, and Standard Operating Procedures Are Still Under Development

CEQ requires Federal agencies to continuously review their NEPA policies and procedures, and in consultation with the Council, revise them as necessary to ensure full compliance with NEPA. The Council also encourages agencies to publish explanatory guidance on CEQ's regulations and their own procedures.⁹ In June 2009, FRA published a notice in the Federal Register¹⁰ that established guidance for NEPA compliance for the HSIPR program. However, other than adding new CEs in January 2013, the Agency has not updated its implementing procedures since 1999.

FRA's procedures do not include changes required under an important environmental provision in legislation¹¹ enacted after NEPA or CEQ's recommended changes to agency implementing procedures. For example, FRA is required to comply with provisions of the USDOT Act Section 4(f), which places limits on OAs' authority to approve projects that use land from publicly owned parks, recreation areas, or refuges, and historic sites listed in or eligible for the National Register of Historic Places.¹² Like all Federal agencies, FRA must also comply with provisions of the National Historic Preservation Act¹³ that require agencies to consider effects on historic sites in consultation with State Historic

⁹ 40 CFR § 1507.3

¹⁰ FRA provided guidance on the NEPA process in its original program notice for the HSIPR program, published at 74 FR 29900 on June 23, 2009, and in subsequent documents that the Agency released related to HSIPR, including "Compliance with the National Environmental Policy Act in implementing the High-Speed Intercity Passenger Rail Program," August, 2009.

¹¹ The provision is part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a Legacy for Users of 2005 (P.L.109-59), known as SAFETEA-LU.

¹² The Department of Transportation Act of 1966, P.L. 89-670, 49 U.S.C. 303 (formerly 49 U.S.C. 1651(b)(2) and 49 U.S.C. 1653(f)).

¹³ 16 U.S.C. § 470(f)

Preservation Officers and other consulting parties.¹⁴ FRA's current NEPA procedures comply with these provisions, but not 2005 amendments to the Section 4(f) requirements.¹⁵ In particular, FRA's current procedures do not reflect an alternative method of approving the use of protected resources when the use's impact will be minor, or "de minimis." A de minimis impact determination allows agencies to approve minor use of historical properties without identifying and evaluating alternatives, thus streamlining the approval process. In March 2008, in response to the 2005 amendments, FHWA and FTA issued a final rule that modified the procedures for granting Section 4(f) approvals, which included procedures for making a de minimis impact determination. Because FRA has not incorporated this change in its NEPA implementing procedures, the Agency's grantees do not have similar guidance and procedures in place for requesting a de minimis impact determination.¹⁶

FRA also has not incorporated recent recommendations from CEQ into its implementing procedures. These recommendations are part of the Council's 3-year initiative to modernize and reinvigorate NEPA at the agency level. For example, FRA has not incorporated the Council's recommendations on the appropriate use of mitigation and monitoring. Mitigation commitments are made by an agency to lessen or avoid an action's significant environmental effects that might otherwise require complicated and lengthy environmental analysis, such as an EIS. In its recent guidance, CEQ indicates that when an agency plans to mitigate the environmental impact of a proposed action, the agency should make the commitment public, adhere to the commitment, monitor the mitigation's implementation and effectiveness, and report on the commitment.

FRA staff stated that they have informal business practices in place to ensure that the Agency meets its mitigation commitments, but they have not updated their implementing procedures with these processes or submitted them for public review and comment, which CEQ recommends to ensure transparency and public confidence. Because it has not incorporated these recommendations into its procedures, FRA cannot be sure that staff and program participants meet their mitigation commitments and comply with NEPA. Table 2 summarizes the recent CEQ guidance to Federal agencies to modernize and reinvigorate NEPA that FRA has not incorporated into its implementing procedures.

¹⁴ Compliance with these provisions requires assessments of properties over 50 years old (in some cases younger) to determine eligibility for the National Register. Rail upgrades may impact bridges or stations that require assessments. The grantee must determine whether the project would adversely affect an eligible structure, and make efforts to resolve adverse effects. See William G. Malley and Albert M. Ferlo, "High Speed Rail Grants: The Key Role of NEPA Compliance," Perkins Coie, July 15, 2009.

¹⁵ Section 6009 of SAFETEA-LU.

¹⁶ FHWA and FTA have adopted regulations that establish procedures for making de minimis determinations.

Table 2. CEQ Modernization Guidance Not Incorporated in FRA’s Implementing Procedures

CEQ Memorandum	Summary
<i>Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act</i> , November 23, 2010.	This guidance recommends best practices for the appropriate use of CEs and was developed as part of CEQ’s effort to modernize and reinvigorate Federal agency implementation of NEPA.
<i>Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact</i> , November 23, 2010.	This guidance indicates that when a finding of no significant impact depends on successful mitigation, such mitigation requirements should be made public and be accompanied by monitoring and reporting.
<i>Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act</i> , March 6, 2012.	This guidance was issued to alert Federal agencies to the wide array of tools that are available to meet the goal of high quality, efficient and timely environmental reviews under NEPA.

Source: OIG Analysis

FRA’s implementing procedures also include outdated organizational references that are misleading and irrelevant to users. For example, the procedures contain twenty references to FRA’s Office of Policy and Program Development—an organizational unit that no longer exists. Another DOT office referred to in the procedures—the Assistant Secretary of Transportation for Policy and International Affairs—also no longer exists. These references to organizational units and positions that no longer exist may cause confusion and delays in navigating the process for users of FRA’s implementing procedures.

Furthermore, though the Agency has issued several procedural and guidance documents on NEPA, grantees generally indicated that they need additional information to navigate the NEPA process. Since 1999, FRA has issued only limited guidance to grantees, resulting in a number of gaps in the information available. In addition, the Agency has been more reactive in developing guidance to assist grantees. For example, all eight HSIPR grantees that responded to our survey stated they used information from FHWA or FTA, including guidance to prepare noise and vibration assessments from FTA, because similar information was not available from FRA. Table 3 summarizes the limited NEPA procedures and guidance that FRA has issued since 1999.

Table 3. FRA's Procedures and Guidance for the NEPA Process

Issue Date	Document	Description
5/26/1999	<i>Procedures for Considering Environmental Impacts (Procedures)</i>	Formal regulations that establish procedures for compliance with the National Environmental Policy Act (NEPA).
6/23/2009	<i>High-Speed Intercity Passenger Rail (HSIPR) Program: Notice</i>	Notice of Funding Opportunity for the HSIPR program that also provided guidance on complying with NEPA.
8/13/2009	<i>Compliance with the National Environmental Policy Act in Implementing the High-Speed Intercity Passenger Rail Program</i>	General policy and guidance on NEPA compliance for the HSIPR program.
	<i>Categorical Exclusion Worksheet</i>	Guidance for grantees on how to evaluate whether projects qualify for categorical exclusions.
	<i>Guidance for Completing the Categorical Exclusion Worksheet</i>	Guidance to grantees on how to complete the FRA Categorical Exclusion worksheet.
8/14/2009	<i>HSIPR NEPA Table — Overview of HSIPR NEPA Requirements</i>	Guidance on compliance with NEPA requirements for the HSIPR program.
5/1/2012	<i>Categorical Exclusion Substantiation</i>	FRA policy and justification for an additional set of categorical exclusions.
6/13/2012	<i>National Environmental Policy Act Implementation</i>	Notice for comments on proposed additions to the list of categorical exclusions in FRA's Procedures.
1/14/2013	<i>Update to NEPA Implementing Procedures</i>	Formal regulations that add seven new categorical exclusions to FRA's Procedures.

Source: OIG analysis

FRA also has not completed SOPs to guide its staff in administering the NEPA process and assist them in performing their duties. FRA officials informed us that they were in the process of developing SOPs, but have yet to establish a timeline for their completion. FRA's Environmental Protection Specialists, who had varying degrees of experience with the NEPA process, informed us that they wanted SOPs to help ensure completeness in the documentation they require from grantees. For example, one Specialist stated that because there is no SOP, she does not know what documentation to require from grantees and as a result, requests all documentation, which may be excessive. FRA staff members acknowledged that the lack of SOPs to administer the process hurts the Agency's image with its grantees. Additionally, grantees shared frustrations over a lack of consistency on required documentation, stating that FRA does not seem to know what it wants grantees to submit for most NEPA actions. FRA officials stated they believe this could be because these grantees are not as familiar with FRA's process as they are with those of other OAs, such as FHWA's.

FRA Has Not Implemented CEQ's Recommendations for Periodic Reviews and Updates to CEs

While it has added CEs to those it published with its 1999 implementing procedures, FRA has not implemented the Council's recommended process published in 2010 for periodic review and update of categorical exclusions. CEQ recommends that agencies implement processes to periodically review and update their CEs that include:

- The review of CEs on a timeline; CEQ recommends review every 7 years;
- The publication of the process on the agency's Website; if the reviews are to occur less frequently than every 7 years, the agency should articulate its reasons;
- The development and maintenance of resources for regular CE reviews; and
- The development of procedures for recording, retrieving and preserving documentation on the agency's experience with each CE.

CEQ has cited several reasons why it is important for agencies to conduct periodic reviews. For example, such a review may reveal that grantees are not using an existing CE because its category of actions is too narrowly defined. A review may also reveal that a CE in place for a period of time needs revision because it includes actions that now significantly impact the environment. The Council has also indicated that agencies can use periodic reviews to determine whether they are applying CEs correctly.

CEQ also informed us that, as part of its oversight role and responsibilities under NEPA, it plans to contact agencies to ascertain the status of their CE reviews. FRA's lack of a documented process for reviewing and updating makes it difficult for the Agency to be certain that it is maximizing its limited staff resources.

FRA officials indicated to us that they did not use the Council's recommended process for periodic review and update of its categorical exclusions because they considered it an optional best practice. They also indicated they focused their resources on the development and implementation of project delivery initiatives and technical assistance rather than creating policies and procedures for their programs.

FRA published its new CEs too late for HSIPR participants to use since funds were obligated by the end of fiscal year 2012 and HSIPR grantees were already committed to NEPA processes for their projects. As of May 2013, FRA officials

were unable to specify any FRA projects for which the new CEs were being used. Six of the eight grantees indicated in their survey responses that new CEs would have applied to their projects had they been available and allowed them to avoid the more rigorous EA process. FRA officials also acknowledged that had these CEs been in place, some projects would not have had to complete EAs. The lack of a process for periodic review and update of its CEs prevented FRA from quickly developing relevant categorical exclusions for grantees to use.

CONCLUSION

FRA's \$10.1 billion HSIPR program significantly expanded the Agency's responsibilities, including the volume of NEPA reviews it must process. Although FRA was not specifically subject to recent legislative changes aimed at reforming environmental issues related to project delivery, it is important that the Agency's NEPA process is reflective of the current regulatory environment. As a result, current implementing procedures and standard operating procedures are necessary to ensure that grantees and staff comply with legal and regulatory requirements. Use of FRA's outdated procedures and the Agency's lack of a process for updating CEs may subject grantees and staff to unnecessary paperwork burdens. In addition, the Agency will have difficulty ensuring NEPA compliance among program participants.

RECOMMENDATIONS

We recommend that the Federal Railroad Administrator:

1. Update NEPA implementing procedures to reflect applicable environmental law and requirements and CEQ guidance, including the development of processes and timelines for updating categorical exclusions according to CEQ recommendations.
2. Complete a comprehensive set of standard operating procedures for internal staff administering the Agency's NEPA process.

AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

We provided a draft of our report to FRA on September 18, 2013. We received FRA's full response on November 15, 2013, which can be found in its entirety in the appendix of this report. In its response, FRA fully concurred with both of our recommendations and provided appropriate planned actions and timeframes. We consider the two recommendations resolved but open pending completion of the planned actions.

ACTIONS REQUIRED

FRA's planned actions and timeframes for both recommendations are responsive, and we consider the recommendations resolved but open pending completion of the planned actions.

We appreciate the courtesies and cooperation of FRA, FHWA, FTA and OST representatives during this audit. If you have any questions concerning this report, please call me at (202) 366-9970, or Toayoa Aldridge, Program Director, at (202) 366-2081.

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cc: DOT Audit Liaison, M-1
FRA Audit Liaison, RAD-43
FHWA Audit Liaison, HAIM-13
FTA Audit Liaison, TBP-30

EXHIBIT A. SCOPE AND METHODOLOGY

We conducted our audit work from August 2012 through September 2013 in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

To assess FRA's compliance with requirements for coordination on NEPA, our legal staff identified applicable laws and regulations the Agency must follow. We conducted legal analysis to assess which components of the laws and regulations—such as CEQ coordination requirements and the DOT Order—FRA incorporated in its implementing procedures and compared them to CEQ coordination requirements. We also interviewed officials at FRA, FHWA, FTA, and OST, a senior official at CEQ, and several grant recipients at State departments of transportation. We also administered a questionnaire via email with an online survey tool to participants in FRA's HSIPR, RLR, and the RRIF programs regarding their experiences with the Agency's NEPA process, guidance, and coordination efforts. To determine the extent to which Titles 23 and 49 of the U.S. code impact FRA's ability to coordinate with its modal counterparts on NEPA, our legal staff analyzed the titles for their impacts on FRA's NEPA processes and procedures in addition to any impacts the titles have on FHWA and FTA.

To determine whether FRA's NEPA procedures included relevant statutory requirements and CEQ guidance, we reviewed FRA's implementing procedures and other guidance they have made available to program participants. Our legal staff performed historical analysis of FRA's NEPA implementing procedures to identify updates the Agency has made since their inception, including assessments of categorical exclusion changes and the incorporation of relevant laws such as SAFETEA-LU and MAP-21, as applicable. We also interviewed officials at FRA, OST, CEQ, and professional transportation associations, the American Short Line Railroad Association and the American Association of State Highway and Transportation Officials. We also administered a survey to FRA's five Environmental Protection Specialists to better understand their perspectives on FRA's internal and external NEPA guidance.

We sent our program participant survey to 27 entities—9 HSIPR participants, 9 RRIF participants, and 9 RLR participants. HSIPR and RRIF recipients were selected on the basis of funding amounts, with the top nine highest funded entities

from each program receiving the questionnaire. OIG statisticians randomly selected—rather than based on funding amounts—the nine RLR participants.

¹⁷ The nine HSIPR recipients represented over 85 percent of total awarded HSIPR funding, and the nine RRIF questionnaire recipients represented over 85 percent of total RRIF awards. Response rates varied with eight HSIPR grantees responding and four RRIF participants and four RLR participants responding to the survey.

¹⁷ We chose the 9 HSIPR survey recipients from the 35 entities that received HSIPR funding from FRA. We chose the 9 RRIF survey recipients from 33 individual loans recipients of FRA between fiscal years 2002 and 2013. We randomly selected the 9 RLR survey recipients from a list of entities that received \$1 million or more from FRA through the RLR program – which resulted in a universe of 31 entities.

Exhibit A. Scope and Methodology

EXHIBIT B. MAJOR CONTRIBUTORS TO THIS REPORT

Name	Title
Toayoa Aldridge	Program Director
Amanda Seese	Project Manager
Keith Klindworth	Senior Analyst
Michael Day	Analyst
Nick Coates	Associate Counsel
Meg Brown	Honors Attorney
Susan Neill	Writer/Editor
Megha Joshipura	Statistician

EXHIBIT C. TYPES OF FRA NEPA COORDINATION

Coordination Requirement	Description
1. <i>Incorporation of Material</i>	Agencies will incorporate material into an EIS by reference [to other agency decision] when the effect will be to cut down on bulk without impeding agency and public review of the action.
2. <i>Adoption of Environmental Documents</i>	An agency may adopt appropriate environmental documents prepared by another agency.
3. <i>Reduction of Delay Through Interagency Cooperation</i>	CEQ requires agencies to “reduce delay by emphasizing interagency cooperation before the EIS is prepared rather than the submission of adversary comments on a completed document.”
4. <i>Cooperation on Disputes</i>	CEQ requires agencies to reduce delay by “insuring the swift and fair resolution of lead agency disputes.”
5. <i>Coordination on EAs</i>	Coordination is necessary when agencies must work together on EAs.
6. <i>Coordination Between Lead and Cooperating Agencies</i>	Coordination is required when one agency has been assigned lead agency status and other agencies have been assigned as cooperating agencies. The purpose is to emphasize agency cooperation early in the NEPA process.
7. <i>Cooperation on Scoping</i>	An agency may need to cooperate with another Federal agency on scoping of a project.
8. <i>Cooperation on EISs</i>	After preparing a draft EIS and before preparing a final EIS, the agency will obtain the comments of any agency which has jurisdiction by law or special expertise.
9. <i>Cooperation on Monitoring of Mitigation</i>	Agencies may be required to cooperate to ensure that mitigation and other conditions established in an EIS or during its review and committed as part of the decision will be implemented.
10. <i>Consultation on Similar Programs</i>	Agencies with similar programs should consult with each other and the CEQ on their implementing procedures, especially for programs requesting similar information from applicants.
11. <i>Cooperation in the Development of CEs</i>	Agencies are supposed to cooperate on the development of CEs by using the administrative records for CEs developed by other agencies (latest CEQ Guidance on categorical exclusions).

Source: 40 CFR 1500-1508, CEQ Guidance

EXHIBIT D. FRA CATEGORICAL EXCLUSIONS AS OF MAY 2013

Published at 64 FR 28545 on May 26, 1999:

- (1) Administrative procurements (e.g. for general supplies) and contracts for personal services;
- (2) Personnel actions;
- (3) Financial assistance or procurements for planning or design activities which do not commit the FRA or its applicants to a particular course of action affecting the environment;
- (4) Technical or other minor amendments to existing FRA regulations;
- (5) Internal orders and procedures not required to be published in the Federal Register under the Administrative Procedure Act, 5 U.S.C. 552(a)(1);
- (6) Changes in plans for an FRA action for which an environmental document has been prepared, where the changes would not alter the environmental impacts of the action;
- (7) Rulemakings issued under section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916;
- (8) State rail assistance grants under 49 U.S.C. 22101 et seq. for rail service continuation payments and acquisition, as defined in 49 CFR 266;
- (9) Guarantees of certificates for working capital under the Emergency Rail Services Act (45 U.S.C. 661 et seq.);
- (10) Hearings, meetings, or public affairs activities;
- (11) Maintenance of: existing railroad equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; maintenance-of-way and maintenance-of-equipment bases; and other existing railroad-related facilities. For purposes of this exemption “maintenance” means work, normally provided on a periodic basis including the changing of component parts, which does not change the existing character of the facility, and may include work characterized by other terms under specific FRA programs;
- (12) Temporary replacement of an essential rail facility if repairs are commenced immediately after the occurrence of a natural disaster or catastrophic failure;

(13) Operating assistance to a railroad to continue existing service or to increase service to meet demand, where the assistance will not result in a change in the effect on the environment;

(14) State rail assistance grants under 49 U.S.C. § 22101 *et seq.* for relocation costs as that term is defined in 49 CFR Part 266, where the relocation involves transfer of a shipper to a site zoned for the relocated activity. This categorical exclusion shall not apply to the relocation of a shipper involved in the transportation of any material classified as a hazardous material by DOT in 49 CFR Part 172;

(15) Financial assistance for the construction of minor loading and unloading facilities, provided that projects included in this category are consistent with local zoning, do not involve the acquisition of a significant amount of land, and do not significantly alter the traffic density characteristics of existing rail or highway facilities;

(16) Minor rail line additions including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities;

(17) Acquisition of track and bridge structures, electrification, communication, signaling or security facilities, stations, maintenance-of-way or maintenance-of-equipment bases, and other existing railroad facilities or the right to use such facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties;

(18) Research, development and/or demonstration of advances in signal, communication and/or train control systems on existing rail lines provided that such research, development and/or demonstrations do not require the acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail line;

(19) Improvements to existing facilities to service, inspect, or maintain rail passenger equipment, including expansion of existing buildings, the construction of new buildings and outdoor facilities, and the reconfiguration of yard tracks;

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation;

Added by 78 Federal Register 2713 on January 14, 2013:

(21) Alterations to existing facilities, locomotives, stations and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms.

(22) Bridge rehabilitation, reconstruction or replacement, the rehabilitation or maintenance of the rail elements of docks or piers for the purposes of intermodal transfers, and the construction of bridges, culverts, or grade separation projects, predominantly within existing right-of-way, that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, construction or reconstruction of approaches and/or embankments to bridges, or construction or replacement of short span bridges.

(23) Acquisition (including purchase or lease), rehabilitation, or maintenance of vehicles or equipment that does not cause a substantial increase in the use of infrastructure within the existing right-of-way or other previously disturbed locations, including locomotives, passenger coaches, freight cars, trainsets, and construction, maintenance or inspection equipment.

(24) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, passenger amenities, benches, signage, sidewalks or trails, equipment enclosures, and fencing, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras.

(25) Environmental restoration, remediation and pollution prevention activities in or proximate to existing and former railroad track, infrastructure, stations and facilities conducted in conformance with applicable laws, regulations and permit requirements, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water oil/water separators, installation of pollution containment systems, slope stabilization, and contaminated soil removal or remediation activities.

(26) Assembly or construction of facilities or stations that are consistent with existing land use and zoning requirements, do not result in a major change in

traffic density on existing rail or highway facilities and result in approximately less than ten acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping.

(27) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, installing, maintaining, or restoring drainage ditches, cleaning ballast, constructing minor curve realignments, improving or replacing interlockings, and the installation or maintenance of ancillary equipment.

APPENDIX. AGENCY COMMENTS



U.S. Department
of Transportation

Federal Railroad Administration

MEMORANDUM

INFORMATION: Management Response to the
Office of the Inspector General (OIG) Draft
Report on Federal Railroad Administration
National Environmental Policy Act (NEPA)
Program

Subject:

Date: November 15, 2013

From: Joseph Szabo
Federal Railroad Administrator

To: Mitchell L. Behm
Assistant Inspector General for Rail, Maritime,
Hazmat Transport and Economic Analysis

Reply to
the Attn of: ROA-03

The Federal Railroad Administration's (FRA) NEPA implementing procedures have successfully guided FRA staff and grantees for decades in completing small projects and multi-billion dollar railroad development programs. Since the 1970s, FRA has effectively implemented NEPA in carrying out programs, such as the Northeast Corridor Improvement Project, Amtrak's Northend Electrification Project, the Next Generation High-Speed Rail Program, and the High-Speed and Intercity Passenger Rail (HSIPR) Program.

For the HSIPR Program in particular, FRA's small environmental team worked hand-in-hand with grantees to complete over 120 environmental reviews since the inception of the program. These reviews have facilitated construction activity for over 38 projects to date, representing \$3.6 billion in federal funding. FRA avoided potential delays and allowed these HSIPR projects to advance more readily by deciding to postpone the planned update of FRA's NEPA implementing procedures. Rather than focusing on revising the implementing procedures or developing new standard operating procedures, FRA's NEPA staff instead worked directly with grantees to expedite preparation of legally sufficient project documentation.

Moreover, FRA prioritized the creation of new categorical exclusions over a revision of the NEPA implementing procedures and started this effort as soon as the need became apparent. Although the process to create categorical exclusions took more effort and time than FRA anticipated, FRA has used these new categorical exclusions during 2013 to speed clearance of independent components of HSIPR corridor investment programs. FRA further accelerated HSIPR projects by accommodating established State processes and systems and supporting grantees' use of alternate guidance. FRA works closely with the States giving them extensive responsibilities in preparing NEPA documentation, reflecting FRA's long-standing partnership with State departments of transportation. When HSIPR grantees asked about using other U.S. Department of Transportation (the Department) agency guidance, FRA often supported use of such existing guidance, which was familiar to grantees and therefore saved time and effort.

Recommendations and Responses

OIG Recommendation 1: Update NEPA implementing procedures to reflect applicable environmental law and requirements and CEQ guidance, including the development of processes and timelines for updating categorical exclusions according to CEQ recommendations.

FRA Response: Concur – FRA agrees with the recommendation and expects to issue revised NEPA implementing procedures in April 2015, following an August 2014 draft for public comment. Related developments will likely influence the timing and final form of FRA's revised procedures. For example, the Department is in the process of revising its NEPA order. In addition, legislation to reauthorize rail and other surface transportation programs is now under development. The outcomes of these two initiatives might lead to changes in FRA NEPA requirements or practices.

OIG Recommendation 2: Complete a comprehensive set of standard operating procedures for internal staff administering the Agency's NEPA process.

FRA Response: Concur – FRA agrees with the recommendation and has begun preparing such internal standard operating procedures. FRA expects to complete this effort by June 2014.

We appreciate this opportunity to offer additional perspective on the OIG draft report. We also appreciate the courtesies of the OIG staff in conducting this review. Please contact Rosalyn G. Millman, Planning and Performance Officer, at 202.384.6193, with any questions or requests for additional assistance.

Appendix. Agency Comments