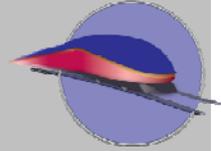


Compliance With The National Environmental Policy Act In Implementing The High-Speed Intercity Passenger Rail Program



AUGUST 13, 2009

Introduction

In issuing the High-Speed Intercity Passenger Rail (HSIPR) Program Guidance, the Federal Railroad Administration (FRA) highlighted the central importance the environmental review process, required by the National Environmental Policy Act (NEPA) and related laws and regulations, (including Section 106 of the National Historic Preservation Act and 49 U.S.C. 303, which protects public parks, recreation areas, wildlife and waterfowl refuges, and historic sites) (collectively NEPA), plays in the implementation of the program. FRA identified its approach for melding the NEPA process with the HSIPR program in the June 17, 2009 Guidance (74 Fed. Reg. 29900 (June 23, 2009)). In many ways the choice of the appropriate funding track for a project depends on the stage of NEPA review that the specific proposal has reached. Extensive planning and environmental review is needed to support the development and implementation of a large scale intercity and high-speed rail program.

Statutory Requirements

FRA's compliance with NEPA is outlined in the agency's Procedures for Considering Environmental Impacts (64 Fed. Reg. 28545 (May 26, 1999)) and the Council on Environmental Quality's (CEQ) NEPA implementing regulation (40 C.F.R. §§ 1500-08). NEPA requires that appropriate environmental documentation be available to public officials and citizens before decisions are made and actions are taken. The available information should be relevant to the decision to be made at any particular stage of project development. CEQ further encourages agencies to use program environmental impact statements for planning decisions and the use of tiered statements from broader scope (Tier 1) to those of narrower scope (Tier 2 for specific actions). FRA has structured the HSIPR guidance with these considerations in mind.

The HSIPR program is funded initially out of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which places a priority on expedited expenditures that support economic recovery, and through the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), which

established the three principal funding programs, the high-speed rail corridor development program (§501), the intercity passenger rail service corridor capital assistance program (§301), and the congestion program (§302).

The HSIPR Program

The HSIPR program is intended to make major capital investments to support intercity passenger and high-speed rail services. The United States has not had a significant capital investment program for intercity passenger rail outside of Amtrak's annual capital program or for high speed rail outside of the Northeast Corridor improvement programs of earlier years. As the HSIPR Program develops, FRA and applicants will have to complete planning and NEPA documents in accordance with existing requirements so that officials and the public have the appropriate information available to make decisions at each stage of project development and implementation.

Service NEPA for Corridor Programs

In many, if not most, of the corridors around the country where substantial improvements are needed to implement significantly expanded conventional or high-speed rail services, what FRA has defined in the guidance as "Service NEPA" is an essential first step. Service NEPA (which CEQ refers to as programmatic) typically addresses the broader questions relating to the type of service(s) being proposed, including cities and stations served, route alternatives, service levels, types of operations (speed, electric, or diesel powered, etc.), ridership projections, and major infrastructure components. For a major rail corridor improvement program, this type of environmental review must be completed before any substantial investments in the corridor can be made.

Several different approaches are available to accomplish Service NEPA, including Tiered NEPA (Tier 1 environmental impact statement (EIS) or environmental assessment (EA) followed by Tier 2 EISs, EAs or categorical exclusion determinations (CE)) or non-Tiered NEPA (one EIS or EA covering both service issues and individual project components). A large expansive project would typically be addressed in a Tier 1 EIS process involving several rounds of environmental review, such as the EISs that FRA has prepared with the California High Speed Rail Authority for the state's proposed high-speed rail project.

A corridor program of smaller scope with a narrower range of reasonable alternatives could be addressed through a Tier 2 type EIS, or possibly an

EA, if appropriate. FRA's EIS addressing the Desert Express project from Las Vegas, Nevada, to Victorville, California, is an example of this type of review. An EA would be appropriate only for a more limited corridor development program where no significant environmental impacts are anticipated. Regardless of whether a Tier 1 or Tier 2 EIS or an EA is used, to advance a rail corridor development program the document must address the broad service-level issues. The decision on the appropriate level of documentation for a particular proposed action would be made by the FRA in consultation with the applicant.

Project NEPA

In the Guidance, FRA has drawn a distinction between Service NEPA and Project NEPA. Project NEPA consists of a Tier 2, site-specific environmental review that is appropriate to make a decision on implementing a particular project. FRA's recent EIS addressing replacement of the Portal Bridge in New Jersey is an example of Project NEPA review. The type of Tier 2 document (EIS, EA, categorical exclusion (CE) documentation) appropriate in a given situation depends on the scope and magnitude of the proposal being considered and the likely environmental impacts.

In instances where it is fairly evident that there are likely to be significant environmental impacts, proceeding directly to prepare an EIS would be the appropriate course of action.

In situations where an applicant is unsure about whether or not there are likely to be significant environmental impacts, preparing an EA would be the appropriate course of action, which would lead to either a Finding of No Significant Impact or an EIS.

In instances where there is likely to be no significant environmental impacts and FRA has an established CE, completion of a FRA CE Worksheet would be the appropriate course of action. See 64 Fed. Reg. 28547. FRA and applicants need to be careful not to segment projects or programs to avoid the scope of environmental review required by NEPA. FRA is responsible for determining the appropriate type and scope of NEPA documentation, and FRA environmental staff is available to advise applicants with respect to individual projects. FRA cannot approve or fund a project that does not have a sufficient NEPA document.

Categorical Exclusions

According to the CEQ, categorical exclusion (CE) means 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 implementing the CEQ NEPA regulations, thus neither an environmental impact statement nor an environmental assessment is required for such actions. 40 C.F.R. § 1508.4. FRA's Procedures for Considering Environmental Impacts contain twenty actions that FRA has identified as categorically excluded. 64 Fed. Reg. 28,547. FRA adopted these CEs over time as the agency implemented various programs and developed experience in evaluating the potential environmental impacts associated with those programs. On the basis of this experience, FRA has determined that these categories of action typically can be implemented without significant environmental impacts. FRA's CEs are based upon the agency's experience in implementing programs and since FRA has not had large scale discretionary funding programs to implement, the agency has not had the opportunity or necessity to develop as broad a set of CEs as other Department of Transportation operating administrations.

The Federal Highway Administration and the Federal Transit Administration both have CEs included in their environmental regulations that cover actions similar to those which FRA will be considering under the HSIPR Program. However, FRA is not authorized to use other operating administration CEs. FRA is initiating a process to work with CEQ to amend and expand our CEs, but that process will take time and will not be a factor in this first round of HSIPR applications.

FRA has several existing CEs that are particularly relevant to the HSIPR program:

(11) Maintenance of: existing railroad equipment; track and bridge structures; electrification, communications, signaling, or security facilities; stations; maintenance-of-way and equipment bases; and other existing railroad-related facilities. For purposes of this exemption "maintenance" means work, normally provided on a periodic basis, which does not change the existing character of the facility, and may include work characterized by other terms under specific FRA programs.

(16) Minor rail line additions including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines and new track 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 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 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.

(--) Environmental remediation through improvements to existing and former railroad track, infrastructure, stations and facilities, for the purpose of preventing or correcting environmental pollution of soil, air or water.

(--) Replacement, reconstruction, or rehabilitation of an existing railroad bridge, including replacement with a culvert, that does not require the acquisition of a significant amount of right-of-way.

For projects that potentially fit within one of FRA's CEs, FRA provides a CE Worksheet that an applicant may complete and submit to the agency. A particular project or proposal must fit within the description for the relevant CE, and which is often very fact specific. FRA has published guidance on its website on completing the CE Worksheet that provides assistance in completing the form. See <http://www.fra.dot.gov/us/content/1608>.

With respect to particular CEs, FRA has over the years funded a number of activities under the maintenance CE, including activities within a right-of-way that address deferred maintenance such as the replacement of rail or ties. The CE for minor rail line additions covers a number of smaller activities to improve rail lines. FRA does not have a CE for all work within an existing right-of-way though the fact that work will occur

within the railroad right-of-way is a relevant factor that FRA will consider with respect evaluating a potential project within its existing CEs.

If the project has a potential for significant environmental impact, a particular action that appears to fit within a CE may nonetheless fail to qualify. Section 4(e) of FRA's Procedures outlines the relevant considerations in making this evaluation. These include: if the action is judged to be environmentally controversial; would have a significant environmental impact on any natural, cultural, recreational, or scenic environment or on the air, or water or ambient noise levels; or would use section 4(f) protected properties or adversely affect properties under section 106 of the National Historic Preservation Act. An action that is dropped from consideration as a CE would need to be addressed through an EA or EIS, as appropriate.

To be eligible for consideration as a CE, it is essential that the applicant thoroughly document the project. The level of supporting documentation will vary depending on the scope and complexity of the project and the potential environmental issues that may be raised. Applicants should be particularly mindful of the historic preservation review process required by Section 106 of the National Historic Preservation Act with respect to railroad assets that may be on or eligible for the National Register of Historic Places. FRA environmental staff is available to assist applicants with clarification on required documentation and guidance-related inquiries.

Public and Resource Agency Involvement

Public and resource agency involvement is an important component of the environmental assessment process and encouraged at each stage of the process (see section 9 of FRA's Environmental Procedures). While public and agency involvement is often more structured in connection with preparing an EIS because of its specific requirements for a scoping process, formal circulation of draft and final documents, and possible public hearing or meeting, it is equally important in connection with preparation of an EA (see section 10(d) of FRA's environmental procedures noting that consultation with appropriate Federal, State and local authorities is especially desirable as part of the EA). Public circulation of the draft EA is often desirable depending on the scope of the project, the environmental issues raised and likely public or agency interest in or any controversy surrounding the proposed project. FRA environmental staff is available to assist applicants with structuring the public and agency involvement process and in reaching decisions on EA public circulation processes.

Limitations on Action While A NEPA Review is Underway

If there is a proposal for significant improvements to a particular corridor and that corridor is being evaluated under NEPA, then there is a limit on the actions that can be carried out on that corridor before the environmental review is complete. CEQ regulations provide that until an agency issues a record of decision (except in instances where a programmatic EIS is underway), no action concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives (40 C.F.R. § 1506.1(a)). There are similar limits in instances involving a programmatic review (40 C.F.R. § 1506.1(c) - a lesser included action may be taken only if: it has independent utility; it has its own completed NEPA compliance document; and it does not prejudice the ultimate decision on the larger program.

Specific HSIPR Guidance Tracks

The Guidance identifies four separate funding tracks that will be available for implementing the HSIPR program with different objectives, requirements and prerequisites applicable to each track.

Track 1a addresses construction of ready to go projects for which preliminary engineering (PE) and site-specific Project NEPA documentation (Tier 2 final EIS, final EA or CE documentation) have already been completed at the time of application or can be completed immediately thereafter (i.e., submission of a substantially final document with the application and final documentation submitted within a very short time frame thereafter and no more than two to three weeks). FRA cannot approve for funding any project for which the agency does not have a completed NEPA document. Given the priority on quick action to review, approve and begin construction of Track 1 projects, FRA cannot wait more than a brief period for a complete NEPA document and projects that fail to promptly achieve a completed NEPA document may be dropped from consideration during this first round.

Track 1a is designed to address the backlog of needed rail passenger improvements that support existing rail passenger services, have completed the FRA environmental review process, can be initiated quickly, and be completed within two years. When evaluating whether to fund a particular project in Track 1a that is part of a corridor development program, FRA will evaluate whether the project is primarily for the benefit of existing rail passenger services, the independent utility of the project as discussed in the Guidance, the potential environmental impacts associated with the specific improvement (as documented in the appropriate NEPA document), and whether the project would limit the

choice of reasonable alternatives or prejudice the ultimate outcome of any larger program.

A project that is submitted as a CE under Track 1a but which fails to qualify as such will not be advanced for further consideration in this round since the project would not have PE/NEPA complete, which is a prerequisite for funding consideration under Track 1a. The same would be true for a project supported by an EA if a Finding of No Significant Impact could not be issued.

Track 1b addresses funding for completion of project PE and NEPA to prepare individual projects that support existing services for final design (FD)/construction grants. The goal here again is to satisfy Recovery Act priorities and complete the NEPA process and PE on a fast track to qualify individual projects supporting existing rail passenger operations for possible funding in subsequent solicitation rounds. PE and NEPA under Track 1b must also be completed within two years from obligation. Track 1b is not available for Service NEPA for corridor development programs. Service NEPA for Corridor Programs may be funded through Track 3.

Track 2 is intended to address High-Speed Rail/Intercity Passenger Rail Service Development Programs for corridors that have already been planned through completion of a Service Development Plan and Service NEPA by the time of application or shortly thereafter (i.e., submission of substantially final document with the application and final documentation submitted within a very short time frame thereafter and no more than two to three weeks). As with Track 1a with respect to Project NEPA, Service NEPA must be completed before FRA makes any decision to approve an application. Any needed updates or reevaluations to existing Service NEPA documents necessary to make them current also need to be completed and submitted on or soon after formal submittal of an application. Service NEPA can be satisfied by completing sequential Tier 1 and Tier 2 documents or by combining Tier 1 scope of NEPA review with a Tier 2 document, depending on the extent and magnitude of the proposed improvements for the corridor.

These are corridors for which planning and service level environmental review have already taken place and where applicants and FRA can build on these efforts to begin to implement high-speed rail. As explained in the Guidance, FRA anticipates entering into Letters of Intent (LOI) representing the FRA's support of a Service Development Program and a reservation of Federal funding to support it. FRA cannot and would not make such a commitment without an understanding of the

environmental impacts derived through a completed Service NEPA document.

Track 3 is available to fund Service NEPA or other types of planning efforts such as Service Development Plans or state rail plans or components of these types of planning efforts. FRA recognizes that the amount of Federal funds available in this first solicitation for these uses is limited. However, as noted above, the agency has sought additional funds in the FY 2010 budget request for these purposes.

In addition, applicants that seek to advance PE/NEPA for a corridor program and have their own funds available to do so may want to contact FRA's environmental program staff separate from the HSIPR application process to inquire about how the NEPA process could be initiated and implemented using applicant funds. Through this effort, applicants could better position themselves for future HSIPR solicitations.

Track 4 is available to fund a variety capital investments supporting intercity rail passenger, including high-speed rail service. The NEPA requirements are similar to Track 1a.

Important Considerations for All Tracks

Environmental documentation used to support HSIPR actions needs to be both up-to-date and adequately evaluate the proposed action currently being advanced. CEQ advises that if a proposal has not been implemented, an EIS that is more than 5 years old should be carefully reexamined to determine if preparation of a supplement is necessary (CEQ Forty Most Asked Questions, Number 32). In addition, FRA's NEPA Procedures require a written reevaluation of the adequacy, accuracy and validity of EISs that are three and five years old where major steps toward implementation of a proposed action have not commenced (Section 13(c)(17)). Therefore, even if a project is covered by an EIS, if the document is outdated according to the timelines proscribed by the CEQ regulations and FRA procedures, it should be reevaluated to determine whether a supplemental document should be prepared.

In instances where an environmental document has been prepared but the current proposal is different than the one evaluated in the existing environmental document, an analysis is needed to be sure the existing document adequately addresses the environmental impacts of the current project. The CEQ regulations require preparation of supplements to either draft or final EISs if there are 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 actions or its impacts (40 CFR 1502.9(c)). This would be equally true with respect to EAs. In certain circumstances where the current proposal is substantially different than the one analyzed in the environmental document, preparation of a completely new environmental document may be the appropriate course of action. FRA environmental staff is available to assist applicants with determining the feasibility and reasonability of their environmental clearance approaches.

Conclusion

In conclusion, FRA has carefully structured this first HSIPR solicitation to address a series of statutory and program objectives. FRA staff has been and will continue to be available to assist applicants with respect to particular projects or proposals and the application of NEPA. As noted in Section 1.5 of the Guidance, FRA seeks to work in cooperation with applicants to comply with NEPA, but FRA is ultimately responsible for approving the final product and for the information and conclusions contained therein.

Please contact us with questions at hsipr@dot.gov.

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