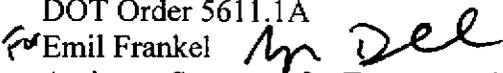




U.S. Department of
Transportation

Office of the Secretary
of Transportation

Memorandum

Subject: DOT Order 5611.1A
From:  Emil Frankel
Assistant Secretary for Transportation Policy
To: Relevant DOT Offices and Administrations

Date: October 20, 2003
Reply to: Angie Drumm
x65459

I am pleased to transmit DOT Order 5611.1A entitled, U.S. Department of Transportation National Procedures for Elevating Highway and Transit Environmental Disputes. This Order implements Section 1309 (c) of TEA-21 by establishing internal procedures for elevating disputes involving environmental reviews of highway and transit projects to the Secretary of Transportation.

These procedures will supply another avenue that the Federal Highway Administration, the Federal Transit Administration, other Federal agencies, Governors, and project sponsors can use to resolve disputes related to agreed upon timelines in the environmental review process.

After Departmental coordination in May, DOT Order 5611.1A was revised to incorporate comments. These comments did not result in changes to the substance of the Order.

Should you have any questions, please contact Camille Mittelholtz at (202) 366-4861 or Angie Drumm at (202) 366-5459.

Thank you.



U.S. Department of
Transportation

Office of the Secretary
of Transportation

ORDER

DOT 5611.1A

October 10, 2003

**Subject: U.S. DEPARTMENT OF TRANSPORTATION NATIONAL
PROCEDURES FOR ELEVATING HIGHWAY AND TRANSIT
ENVIRONMENTAL DISPUTES**

1. **PURPOSE.** This order establishes procedures for elevating disputes involving environmental reviews of highway and mass transit projects to the Secretary of Transportation (Secretary). These procedures are the steps that the U.S. Department of Transportation (Department) and other Federal agencies will take to address disputes arising from the project development process that are not otherwise resolved. The procedures are designed to address significant interagency disputes that have caused or threaten to cause project delays.
2. **AUTHORITY.** This order provides the procedures for implementing section 1309(c) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, as amended by the TEA-21 Restoration Act, Public Law 105-206. Section 1309 of TEA-21 requires the Department to ensure that Federal agencies cooperatively develop and meet agreed-upon time periods for environmental reviews, analyses or opinions, or issuance of environmental permits, licenses or approvals. If timely compliance is not achieved, the Secretary, pursuant to section 1309(c), may, after notice and consultation with the other agency, close the record on the matter before the Secretary. For environmental issues within the jurisdiction of another agency, section 1309(c) directs the Secretary and other agency heads to resolve the issue within 30 days.
3. **BACKGROUND.**
 - a. Section 1309 ("Environmental Streamlining") of TEA-21 directs Federal agencies to develop and implement coordinated environmental, including historic and archeological, reviews of highway and mass transit projects. The Department and key Federal environmental resource and regulatory agencies have agreed in the spirit of partnership and cooperation to work toward the goal of expediting the development of these projects while at the same time protecting and, to the extent feasible, enhancing environmental outcomes. To this end, the Department has entered into a National Memorandum of Understanding (MOU) with the U.S. Department of the Interior, the U.S. Department of Agriculture, the U.S. Department of Commerce, the U.S. Environmental Protection Agency (EPA), the

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- b. U.S. Army Corps of Engineers (Corps), and the Advisory Council on Historic Preservation. The National MOU is an agreement to collaboratively plan and develop transportation projects, and to conduct concurrent project reviews under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and in connection with issuing environmental permits, licenses and approvals. Agreement on review timeframes for individual projects is a key aspect of concurrent project reviews. The National MOU calls for field offices of the signatory agencies to develop streamlining opportunities, including MOUs with cooperatively determined timeframes.
- c. In addition, the Administrative Dispute Resolution Act authorizes agencies to use dispute resolution proceedings for the resolution of an issue in controversy that relates to an administrative program. 5 U.S.C. § 571. The Department strives to meet national transportation goals by preventing, managing, and resolving disputes in mutually acceptable and cost-effective manners. To further this commitment, the Department issued a Statement of Policy on Alternative Dispute Resolution. 67 Fed.Reg. 40367 (June 12, 2002). The policy recognizes the benefits of collaborative, consensual dispute resolution approaches and encourages Departmental employees and persons who interact with the Department to identify opportunities for their use.
- d. The Department has developed a comprehensive conflict management and dispute resolution system. The Department recognizes that conflict can be constructive if it forces agencies to acknowledge differing views and be creative in accommodating diverse interests. However, conflict can also be highly destructive when it damages agency and/or personal relationships and causes undue project delay. The Department's conflict management and dispute resolution system has four components:
 - (1) Guidance for agencies in resolving disputes as they arise in the project development process using both unassisted and assisted problem solving;
 - (2) Training workshops to help agency staff understand the dispute resolution guidance and to develop more effective problem-solving and collaboration skills;
 - (3) Access to qualified third-party neutrals who can provide professional assistance in resolving disputes; and
 - (4) Procedures for elevating disputes to the Secretary under section 1309(c) of TEA-21.

4. **DEFINITIONS.**

- a. **Affected Agency.** The Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) and any other participating Federal agency directly involved in a dispute that is elevated to the Secretary under these procedures.
- b. **Head of a Federal Agency.** The top administrative official for the agency involved in the dispute. Negotiations among the affected agencies will involve staff with the full authority of the Secretary and the head of the agency on the issue in dispute. If the authority is delegated below the agency head level, then such delegation must be to a person vested with the full authority of the Secretary or agency head on the issues in dispute.
- c. **Participating Agency.** Any Federal agency that is a cooperating agency under NEPA or is otherwise involved in providing reviews of or granting a permit, license or approval for a transportation project.
- d. **Project Applicant.** The transportation sponsor, typically a state department of transportation or a transit agency.
- e. **Project Review Timeline.** A timeline mutually developed and agreed to by (1) the field offices of the lead and cooperating NEPA agencies, as defined in 40 C.F.R. § 1501.5- 1501.6, for completing environmental reviews under the Department's NEPA process for a specific transportation project, or (2) the field offices of the lead NEPA agency under the Department's NEPA process and all Federal agencies involved in providing reviews, opinions, analyses or approvals in connection with issuing an environmental permit or license for a specific transportation project. Failure to comply with a project review timeline ("failure to comply"), or the anticipation thereof, is the basis for initiating the elevation process.

5. **APPLICABILITY.** The procedures set forth herein apply to Federal agencies and to State agencies with Federally delegated authority, including the project applicant, during environmental reviews of highway and transit projects that are funded wholly or in part by the Department. Specifically, the procedures apply to disputes between two or more affected agencies involving the NEPA process; the issuance of permits by the Corps under section 404 of the Clean Water Act, 33 U.S.C. §§ 1251-1376, and by the U.S. Coast Guard under various laws; the consultation by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the Endangered Species Act, 16 U.S.C. § 1531 et seq.; approvals by the EPA; and consultation or approvals required by various Federal agencies under other applicable laws such as the National Historic Preservation Act, 16 U.S.C. § 470 et seq. The procedures (1) take into account the respective statutory mandates and commitments of these Federal agencies, and (2) are not intended to circumvent or serve as a substitute for other statutory or regulatory processes available to Federal agencies for dispute resolution.

6. CONTENT.

- a. These procedures are designed to expedite decision-making on transportation projects developed through a coordinated process in accordance with section 1309 of TEA-21. Specifically, all participating Federal agencies must cooperatively develop and agree upon a project review timeline for individual projects as required by section 1309(b)(2). If a participating agency fails to render its review, opinion or analysis, or fails to make a decision on issuing a permit within the agreed-upon time period, such failure may be elevated to the Secretary pursuant to section 1309(c). Failure to comply with the agreed-upon timeline includes failure to reach decisions at major decision events such as concurrence points in the NEPA process.
- b. The lead agency in the Department's NEPA process, either the FHWA or the FTA, or the Governor of the state may initiate the elevation process. The elevation process may also be initiated prior to a failure to comply with the agreed upon timeline if the FHWA Division Administrator, the Regional FTA Administrator or the Governor of the state believes a disagreement is so serious or fundamental or involves questions about agency mandates or policy that it will likely cause a failure to comply. Likewise, any participating agency can request elevation for a qualifying dispute that it believes is the result of actions by the project applicant, FHWA or FTA.
- c. The elevation process begins with the project applicant or participating agency notifying the FHWA Division Administrator, the FTA Regional Administrator, or the Governor of the state of a failure to comply with the agreed upon timeline or the imminence of such a failure.
- d. The following steps constitute the elevation process:
 - (1) Initial Notification to FHWA or FTA. The transportation project applicant or a participating agency may notify the FHWA Division Administrator, the FTA Regional Administrator or the Governor of the state of a failure to comply (or anticipated failure to comply). The notification will be accompanied by a brief position paper summarizing the issues and the project applicant's or participating agency's position. The Division or Regional Administrator will forward all requests for elevation to the FHWA or FTA Administrator with a recommendation on whether to elevate. In cases when the Governor has been asked to initiate the elevation process, he/she reviews the case and decides whether to forward the request to the FHWA or FTA Administrator. In both cases, the FHWA or FTA Administrator reviews the request and decides whether to elevate the dispute to the Secretary.
 - (2) Notice of Intent to Elevate to the Secretary. If persuaded that elevation to the Secretary is justified, the Administrator of FHWA or FTA will provide written notice to the relevant office(s) and to the head(s) of the other affected Federal

agency(ies) and to the Governor that the Administrator intends to elevate a failure to comply to the Secretary.

- (3) Joint Statements and Interest Papers. As part of the written notice, the FHWA or FTA Administrator will invite the other affected Federal agency(ies) to participate in preparing a joint statement of the issues. In cases where the Governor has initiated the elevation process, the FHWA or FTA Administrator will also invite the Governor's Office to participate. This statement should be a combined effort among all the affected agencies and will clearly define the reason why the review or decision deadline was or is anticipated to be missed, including any substantive issues that need to be resolved. Each agency will also include a brief statement (interest paper) of its perspective on the issues, and will share its interest paper with the other agency(ies). The interest paper should focus on why the party wants a particular outcome and on the party's concerns about the issues. The joint statement and interest papers shall accompany the written request to the Secretary for intervention and will provide focus for deliberations at the Secretarial level. The joint statement and interest papers are to be focused summaries (e.g., two to five pages), and will be prepared within **ten (10) working days** of the notice by the FHWA or FTA Administrator under paragraph (2). If the joint statement and interest papers have not been prepared within **ten (10) working days**, the FHWA or FTA Administrator may proceed to request intervention by the Secretary using the requesting agency's interest paper only. In this event, the agency requesting intervention must certify in writing that it has made a good faith effort to prepare a joint statement with the other affected agency(ies).
- (4) Elevation to the Secretary. The FHWA or FTA Administrator will submit a written request for elevation along with the joint statement and interest papers to the Secretary.
- (5) Determination of Failure to Comply with a Project Review Timeline. Within **ten (10) working days** of the submission of the FHWA or FTA Administrator's written request for elevation, the Secretary will determine whether or not a failure to comply with a project review timeline has occurred (or is imminent) and, if so, will provide written notice of intent for consultation with the heads of the other affected agencies. The notice will include as attachments the joint statement and agency interest papers. At the Secretary's discretion, the notice may also be sent to the heads of other Federal agencies that are participating agencies for the subject project. If the Secretary determines that a failure to comply with a project review timeline has not occurred, the Secretary will notify the FHWA or FTA Administrator of that determination who will then notify the other parties.

(6) Consultation. The Secretary will review the joint statement and agency interest papers and consult with the other Federal agency(ies). Consultation in the context of section 1309(c) is an informal process consisting of phone and/or in-person discussions, and may involve the use of a third-party neutral. Although such consultation has no prescribed time limit, it should be undertaken expeditiously in the spirit of section 1309(c).

(7) Action by the Secretary. Following consultation, the Secretary will choose one of three courses of action:

(a) Extend the Time for Review. The Secretary may extend the time for review. If so, the elevating agency will be directed to continue its deliberations with the other affected agency(ies). An extension of time would be the appropriate course of action if the Secretary determines that an impasse has not been reached and more discussion may lead to resolution. However, most disputes that reach the Secretary are likely to involve serious disagreements that have resisted lower level resolution or that involve issues of statutory mandates or agency policy. In those rare situations where time extensions are warranted, the conditions for the extension and procedures to follow at the end of the extension period shall be cooperatively determined among the affected agencies. Failure to reach agreement by the end of the extension period would re-qualify the dispute for elevation to the Secretary.

(b) Close the Record Regarding the Subject Before the Secretary. The Secretary may decide to close the record. If so, the lead NEPA agency (FHWA or FTA) will be directed to proceed with the next step in the NEPA process. If a final Environmental Impact Statement has been prepared, it would serve as the lead agency's Record of Decision. The Secretary's authority to close the record does not extend to reviews, analyses, opinions or decisions conducted by another agency on any permit, license or approval issued by that agency. Closing the record may be the appropriate action if the Secretary:

- (i) Determines that further deliberation with the head(s) of the other Federal agency(ies) or among the affected agencies at lower levels would not likely lead to a resolution, and
- (ii) Finds that the issue in dispute is not one that another agency has jurisdiction over by operation of Federal law, as described in the following step.

(c) Conduct Negotiations with Other Agency on Issue Within That Agency's Jurisdiction. If the Secretary finds that an issue involved in the dispute is one that another agency has jurisdiction over by

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operation of Federal law, the Secretary and the head of the other agency shall negotiate and resolve the matter within **thirty (30) working days** after the date of the Secretary's finding, unless a time extension is agreed to in writing by all affected agencies.

- (i) The first meeting involving interagency negotiations will include a joint briefing by the staffs of the affected agencies focused on issues previously identified in the joint statement of the issues.
 - (ii) Negotiations should focus on understanding the reasons behind the dispute and attempting to resolve disagreements in creative and concrete ways.
 - (iii) Resolution of the matters at hand may involve either substantive agreement among the agencies or agreement on how to proceed without substantive agreement. In case of the latter, the Secretary and the head of another Federal agency involved in the dispute may agree to disagree, with the respective agencies free to pursue other jurisdictional avenues and statutory responsibilities. For example, the Secretary may decide to close the record with respect to the Department's NEPA process while the head of another affected agency decides to proceed on a separate schedule to render a decision on a permit for the project. Resolution may also be part substantive and part procedural. For example, a regulatory agency may continue to oppose the need for a project in its regulatory process but agree not to veto it in return for additional impact mitigation measures.
 - (iv) The Secretary will prepare a report summarizing the issues in dispute and the resolution reached by the affected agencies. The Secretary and the head of the other affected agency(ies) will sign the report and make it available to the public.
- e. To facilitate consultations or negotiations among the affected agencies, the Secretary or the head of any affected agency may request assistance from the U.S. Institute for Environmental Conflict Resolution, the Council on Environmental Quality (CEQ), the Executive Order 13274 Task Force or any other organization or individual. A request for assistance with consultation can be made any time prior to the Secretary's finding.

7. OTHER DISPUTE RESOLUTION AND DECISION-MAKING PROCESSES.

Nothing in these procedures supersedes other processes available by law or regulation. In particular, any Federal agency engaged in a NEPA process may refer disagreements with the

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lead agency to the CEQ for resolution under 40 C.F.R. Part 1504. Such referrals can be made in the NEPA process up to 25 days after the final Environmental Impact Statement has been issued to the public. 40 C.F.R. § 1504.3(b). Similarly, procedures for elevating "404" decisions by the Corps under section 404(q) of the Clean Water Act and pursuant to a memorandum of agreement among the Corps, the EPA, the USFWS, and the NMFS remain in place and available to all Federal agencies engaged in the "404" review and approval process.

8. **EXECUTIVE ORDER 13274: ENVIRONMENTAL STEWARDSHIP AND TRANSPORTATION INFRASTRUCTURE PROJECT REVIEWS.** Projects selected as high-priority transportation infrastructure projects under EO 13274 are to be monitored and assisted by an Interagency Task Force. In the process of promoting policies to streamline the agencies' environmental reviews, project specific elevation procedures may be developed. If these project specific elevation procedures do not resolve the dispute, the FHWA or FTA Administrator may elevate the matter to the Secretary using the elevation procedures referred to in paragraph 6d(2) (Content) of this Order.
9. **TIME EXTENSION.** While avoiding unjustified delay is a priority, the Secretary may extend any deadlines established in this Order for the dispute elevation process for good cause. This does not extend to the 30-day deadline for resolving disputes referred to in paragraphs 2 (Authority) and 6d(7)(c) (Content) of this Order, which is set by statute.
10. **DELEGATION.** The Assistant Secretary for Transportation Policy is authorized to perform the functions of the Secretary specified in this Order.
11. **EFFECTIVE DATE.** This Order is effective immediately.
12. **JUDICIAL REVIEW.** This Order does not create any right or benefit substantive or procedural, enforceable at law or equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

For the Secretary of Transportation:



A handwritten signature in black ink, appearing to read 'Emil H. Frankel', written over a horizontal line.

Emil H. Frankel
Assistant Secretary for Transportation Policy