

Session #5

Reforming NEPA:
What Recent
Legislative,
Executive, and
Judicial Changes
Mean for
Environmental
Review of Rail
Projects



## Reforming NEPA: What Recent Legislative, Executive, and Judicial Changes Mean for Environmental Review of Rail Projects









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Moderator: **Casey Morris,** Associate, Kaplan Kirsch LLP Panelists:

Nate Hunt, Partner, Kaplan Kirsch LLP

Lana Lau, Supervisory Environmental Protection

Specialist, FRA

Catherine van Heuven, Partner, Kaplan Kirsch LLP

The past several years have seen changes from Congress, the current and previous Administrations, and the courts affecting the environmental review of processes under the National Environmental Policy Act ("NEPA"). This session will track some of these changes and their implications for undertaking new projects requiring NEPA review.



PASSENGER RAIL LAW WORKSHOP WEBINAR 5 OF 6 Thursday, December 4, 2025 | 3:00 p.m. EST



## NEPA: Foundations and Context



Signed on January 1, 1970. Requires federal agencies to incorporate environmental considerations in their planning and decision-making processes.

For all "major Federal actions significantly affecting the quality of the human environment", federal agencies must prepare a "detailed statement."

NEPA is procedural.

Council on Environmental Quality ("CEQ") provides guidance on the implementation of NEPA for federal agencies.

#### **Statutory Citations:**

NEPA: 42 U.S.C. §§ 4321 et seq.

Section 139 (USDOT-Specific): 23 U.S.C. § 139

# NEPA: Foundations and Context, cont.



#### **Main NEPA documents:**

- 1. Categorical Exclusion ("CE or "CATEX") determination
- 2. Environmental Assessment ("EA")
  - a. Finding of no Significant Impact ("FONSI")
- 3. Environmental Impact Statement ("EIS")
  - a. Inc. Purpose and Need statement, Environmental Effects, and Alternatives Analysis
  - b. Record of Decision ("ROD")

# NEPA: Foundations and Context, cont.



#### No major amendments to NEPA from 1970 until 2023...

#### Recent major developments in NEPA space include:

- Fiscal Responsibility Act of 2023
- Case Law
  - CEQ Authority and Regulations: Marin Audubon Society v. FAA (D.C. Cir. 2024) and lowa v. CEQ (D.N.D. 2025)
  - Scope of NEPA Reviews: Seven County Infrastructure Coalition v. Eagle County (2025)
- Removal of CEQ NEPA Regulations (Apr. 2025)
- One Big Beautiful Bill Act (July 2025)
- FRA and FTA NEPA Regulation Updates: 23 CFR Part 771 (July 2025)

Potential Future Changes?: SPEED Act

## A Very Big Year in NEPA Litigation

Overview of Legal Decisions Significantly Affecting the Scope of the National Environmental Policy Act

Nate Hunt Partner, Kaplan Kirsch LLP



## A long history of NEPA case law.



NEPA litigation has been focused on implementing 1978 regulations is sued by Council for Environmental Quality (CEQ).

A majority of NEPA requirements were based in regulation and not the statute (e.g. consideration of "indirect" and "cumulative" effects).

CEQ's regulations were considered "applicable to and binding on all Federal agencies."

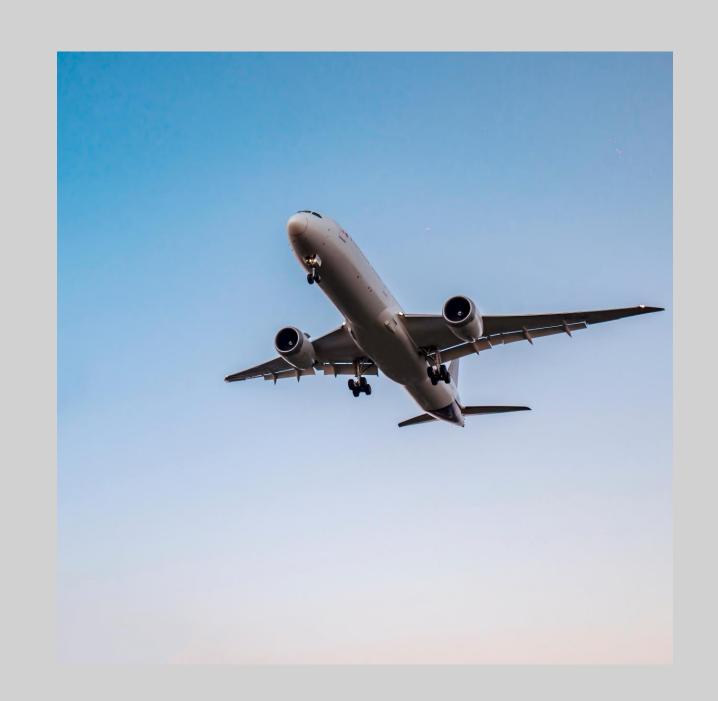
Substantial body of case law over the decades interpreting the CEQ regulations, which has largely defined the nature and scope of environmental review under NEPA.

## Marin Audubon Society v. Federal Aviation Administration



D.C. Circuit vacates air tour flight plan over national parks issued by the FAA and National Park Service for failure to comply with NEPA.

Plaintiffs claimed that FAA and the NPS improperly considered baseline conditions in relying on a categorical exclusion.



## NEPA regulations are invalid.



Majority of panel raised the issue that Congress never granted CEQ rulemaking authority. Rulemaking authority is given to an agency by statute, and not by an executive order.

This issue was not briefed by the parties, and no party challenged the CEQ's authority to issue binding NEPA regulations

The D.C. Circuit did not vacate the CEQ regulations as ultra vires.

## A few months later: lowa v. CEQ



Federal district court in North Dakota vacated the Biden Administration's Phase 2 NEPA regulations on the same grounds—holding that CEQ did not have authority to promulgate NEPA regulations in 1978.

CEQ only has authority to make recommendations to the President. The court relied on statutory interpretation and NEPA legal decisions before President Carter's executive order in 1977.

Around the same time, President Trump rescinds President Carter's executive order.

## Seven County Infrastructure Coalition v. Eagle County



Surface Transportation Board's authorization of an 88-mile rail line to export crude oil from Utah's Uinta Basin.

D.C. Circuit holds that Board violated NEPA by failing to consider downline environmental impacts and by failing to consider upstream (drilling) and downstream (refining) environmental impacts. Vacated decision.

Petitioner for cert was granted.



## Issue before the Supreme Court



#### **Question Presented:**

Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.



# D.C. Circuit erred in two primary ways...



Failing to afford the Board sufficient deference regarding scope of the environmental review.

Improperly requiring the Board to assess indirect effects of third-party oil and gas development and refining that were separate from the railway project.



# A "course correction" under NEPA



Supreme Court sought to bring "judicial review under NEPA back in line with the statutory text and common sense."

**Substantial Deference.** Agencies are in the best position to draw a "manageable line" in determining the scope of environmental review.

Restriction of Indirect Effects. Courts must focus on a "proposed action," and NEPA does not require an agency evaluate effects of *separate* projects.

## What's next...



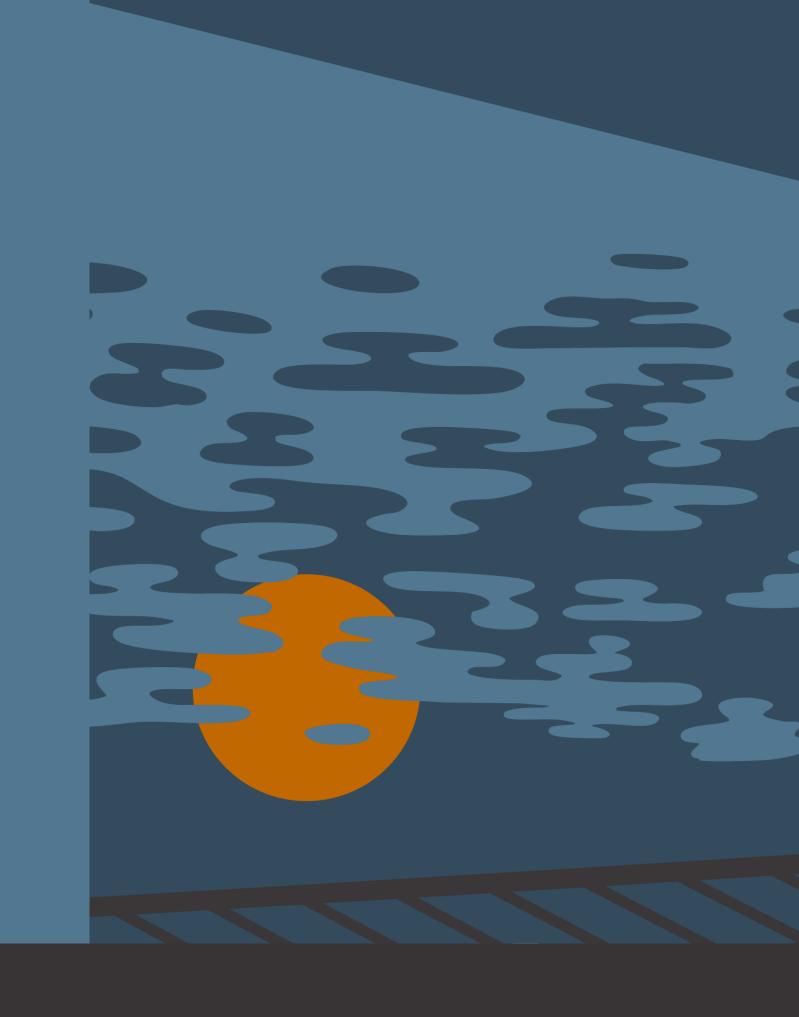
Heightened focus on agency-specific NEPA regulations.

Redefining the scope of indirect effects under NEPA.

Further reliance on APA principles in evaluating agency deference under NEPA.

Potentially fewer vacaturs of agency decisions and the likely expansion of the "harmless error" rule in NEPA litigation.

## Thank You!





## NEPA's Changing Landscape

Katie Van Heuven Partner, Kaplan Kirsch LLP



# Recent Legislative, Executive, and Judicial Changes...



## The Three Branches

Legislative Branch



**Executive Branch** 



Judicial Branch



## Statutory Changes



### Infrastructure Investment and Jobs Act (Nov. 15, 2021)

- Amended 23 USC § 139 (Efficient environmental reviews)
  - Codifies One Federal Decision
  - Adds new definitions
  - Timelines
  - Page limits

## Statutory Changes, cont.



## Fiscal Responsibility Act (June 3, 2023)

- Amended 42 USC § § 4321 et seq. (NEPA)
  - Codifies the three levels of NEPA review
  - Establishes definitions, including of "major Federal action"
  - Page and time limits for EAs and EISs
  - Establishes thresholds for when environmental document is required
  - Allows the interagency adoption of CATEXs
  - Provides direction for lead and cooperating agencies

## Statutory Changes, cont.



## One Big Beautiful Bill Act (July 4, 2025)

- Amended 42 USC § § 4321 et seq. (NEPA)
- Sponsor "opt in" fees
- Sponsor may pay a fee for an expedited EIS or EA
  - One year for an EIS
  - 180 days for an EA
- Funding goes to Treasury, not specific agency

## But wait! There's more...



## Standardizing Permitting and Expediting Economic Development (SPEED) Act – H.R. 4776

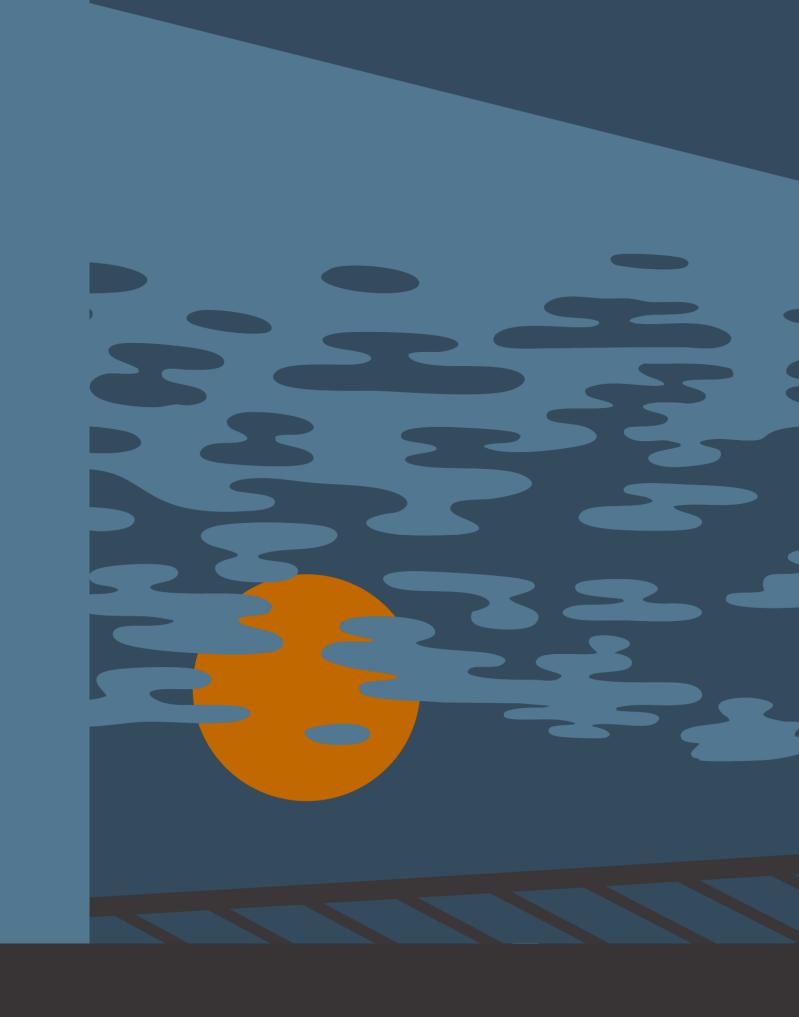
- Pending in current Congress (119<sup>th</sup> Congress, 2025-2026)
- Imports holdings from Seven Counties Supreme Court decision
- Expands exemptions from definition of "major federal action"
- Limits judicial review
  - Restricts judicial remedies to remanding actions to agency
  - New 150-day statute of limitations for filing NEPA claims
  - Plaintiffs must have filed substantive comments in order to sue.

## Regulatory Change - Background



- Trump 1 Revisions to NEPA regulations (July 2020)
- Biden "Phase 1" Rulemaking (April 2022)
- Biden "Phase 2" Rulemaking (May 2024)
- Marin Audubon v. FAA (Nov. 2024) (D.C. Cir rules that CEQ regulations are "ultra vires")
- Executive Order 14154 (Jan. 2025) (proposing rescission of CEQ regulations)
- CEQ Rulemaking rescinding NEPA regulations (published Feb. 2025, effective April 2025)
- Updated 771 Regulations....

## Thank You!





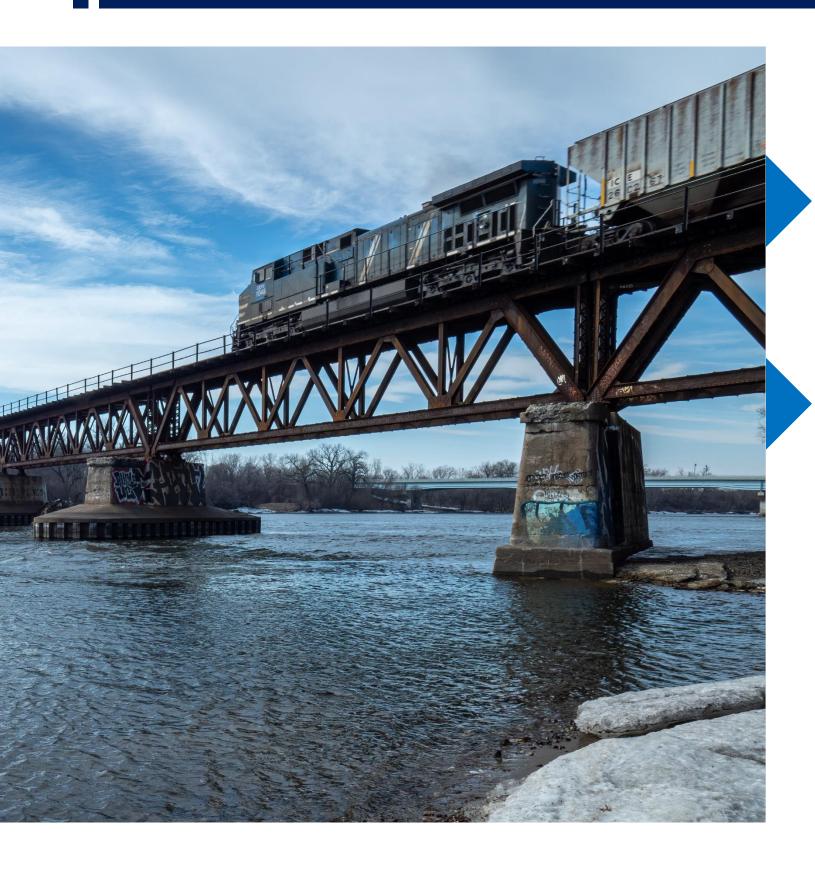


# Reforming NEPA: How FRA Conducts Project Environmental Reviews

Lana Lau, Office of Environmental Program Management



#### Overview

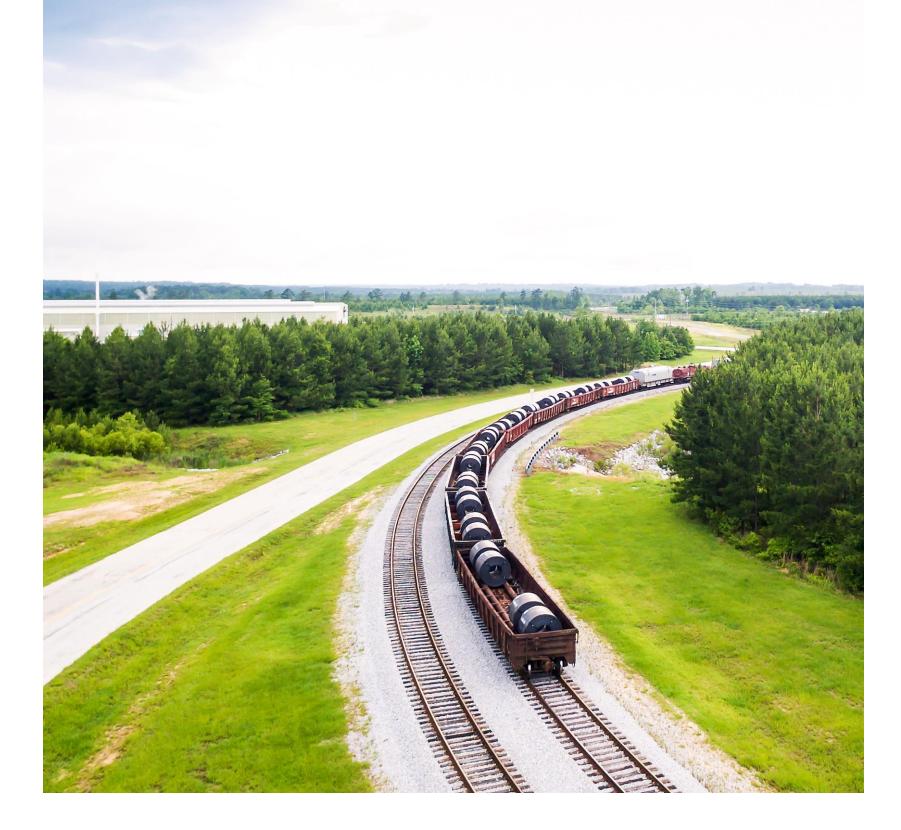


771 Interim Final Rule

FRA Environmental Review Efficiencies

#### 771 Interim Final Rule

- FHWA/FRA/FTA joint Interim Final Rule (IFR) published July 3, 2025.
- IFR <u>effective immediately</u> upon publication.
- Technical revisions to 23 CFR 771
- Preamble to IFR requests public comment





### Why Update 771?

- Technical updates for consistency with 23 U.S.C. 139 amendments (November 15, 2022, IIJA)
- Technical updates for consistency with NEPA amendments (June 3, 2023, Fiscal Responsibility Act)
- Removed provisions and citations derived from the CEQ regulations (withdrawn effective April 11, 2025).





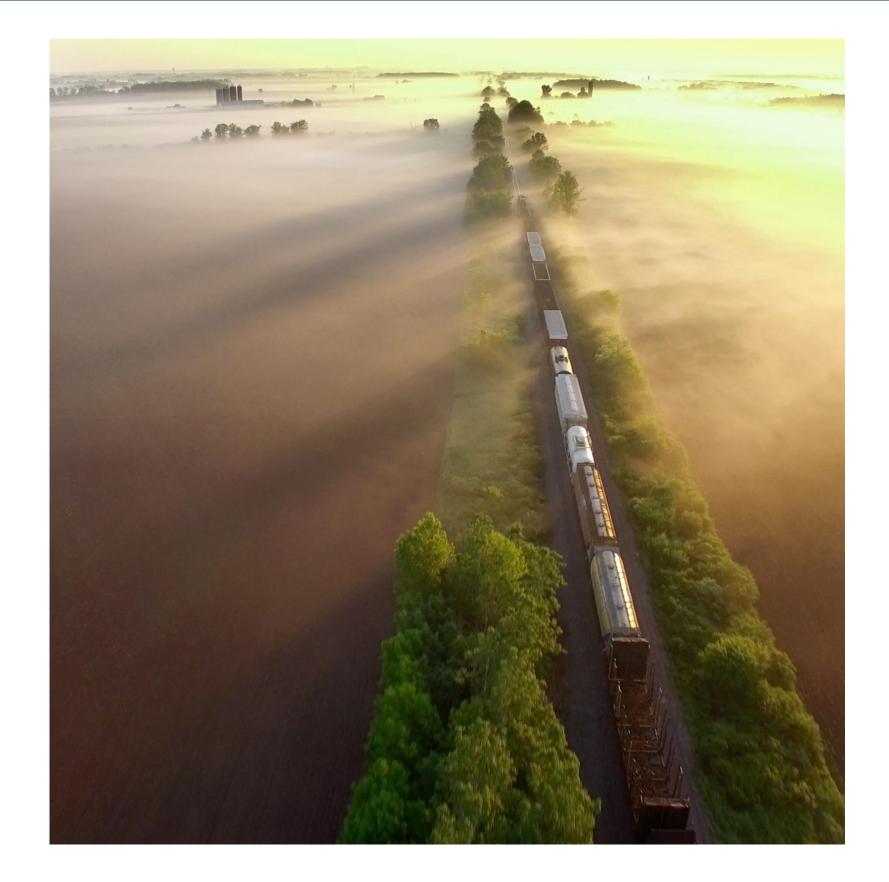
### Summary of Updates

#### § 771.105 Policy:

- Revised to reflect changes in terminology in NEPA and Sec. 139
  - Insertion of terms "reasonably foreseeable" and "single environmental document"

#### § 771.107 Definitions:

- Added statutory definitions for consistency with NEPA and Sec. 139. Added definitions include:
  - Cooperating agency
  - Major federal action
  - Environmental document
  - O FONSI
  - Major federal action
  - Major project
  - Special expertise





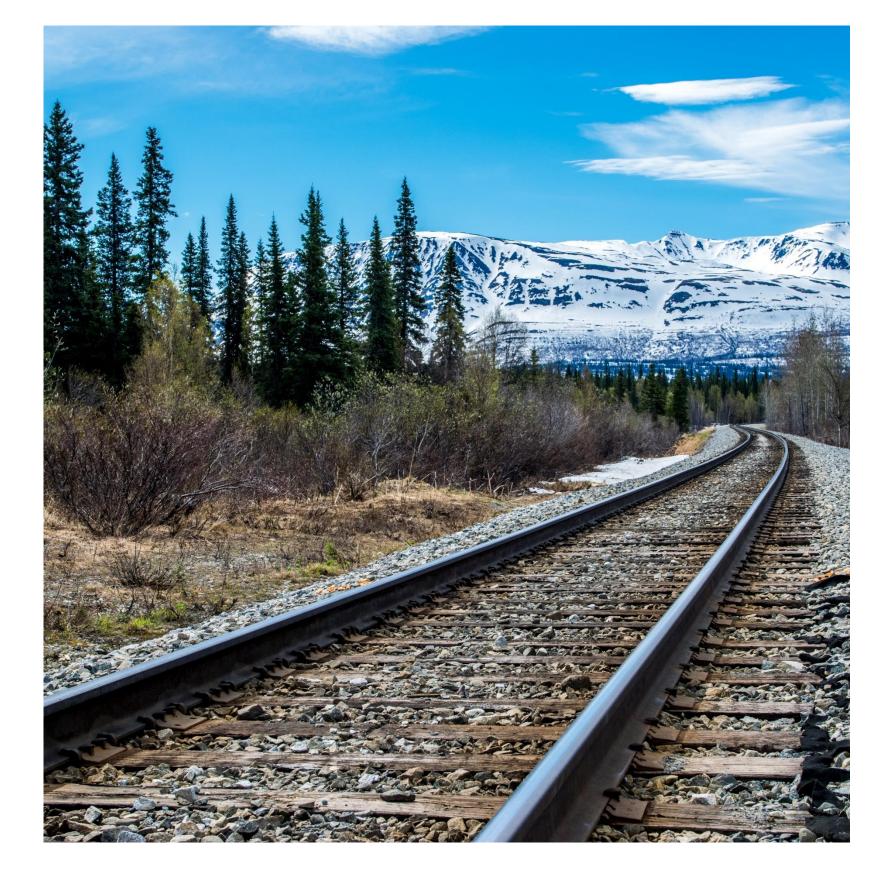
#### Summary of Updates

#### § 771.109 Applicability and Responsibilities

- Clarified that 771 requirements only apply to major federal actions
- Added "extraterritorial activities or decisions" to list of non-major federal actions

## § 771.111 Early coordination, public involvement, and project development

- Added language emphasizing that relevant analyses, studies, planning efforts, etc. may be incorporated into NEPA process
- Added language to differentiate requirements for participating agencies under NEPA and Sec. 139





#### Summary of Updates

#### § 771.115 Classes of actions.

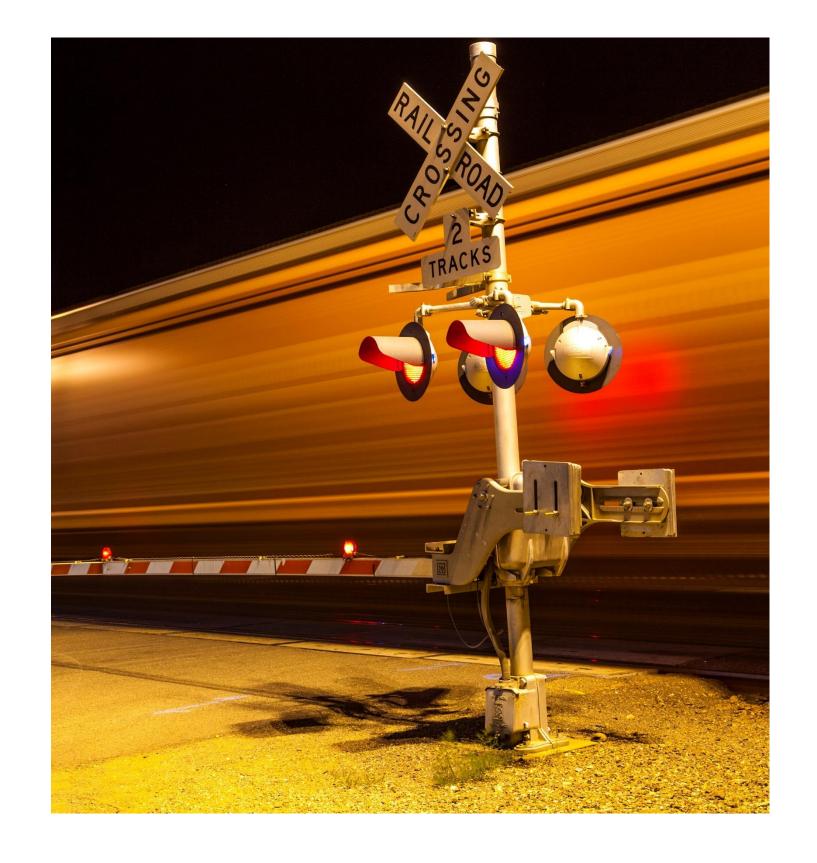
 Emphasized Administration is not required to undertake new scientific or technical research unless essential to selecting an alternative and costs/timeframe are not unreasonable

## § 771.123 Draft environmental impact statements

Clarified that projects following Sec. 139
 process must establish coordination plan,
 including a schedule, within 90 days of NOI

#### § 771.129 Re-evaluations.

Where a second tier of a tiered EA/EIS occurs 5
 or more years after the first tier document, the
 Administration must re-evaluate the analysis





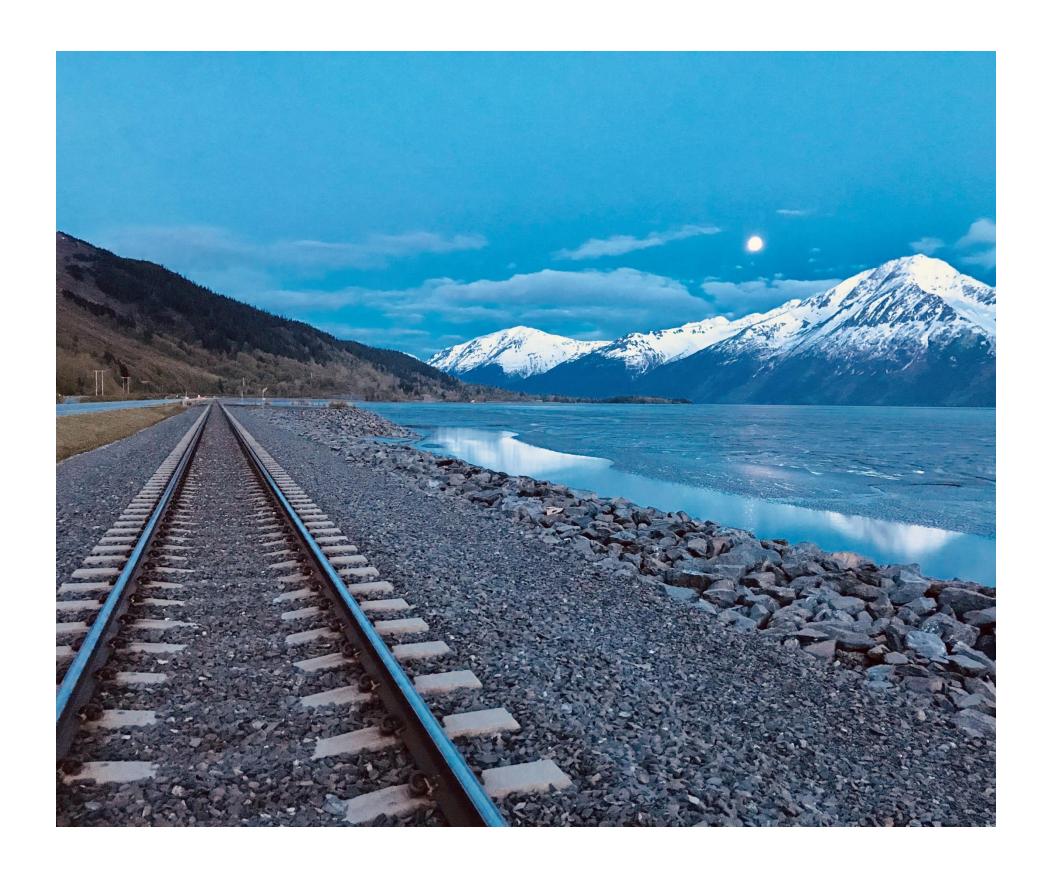
### § 771.138 Timelines, Page Limits, and Certifications. (Added)

- EIS Timeline: 2 years from notice of intent (NOI) to ROD, or FEIS/ROD
- EA Timeline: 1 year from class of action (COA) (or EA NOI) to signature date of EA
- Major Projects (EA/EIS) subject to 23 U.S.C. 139 requirements: Agency average of 2 years from COA/NOI to FONSI/ROD
- Lead agency may extend the deadline for EAs and EISs to provide only so much additional time as necessary for completion
- EIS Page Limits
  - Following Sec. 139 process: 200 pages\*
  - Not following Sec. 139 process: 150 pages. 300 pages for extraordinary complexity.\*
- EA Page Limit
  - o 75 pages\*
- Lead agency certifies that an EA, DEIS, FEIS, or combined FEIS/ROD complies with the requirements of part 771 and applicable statutes.
- Added for clarity and to harmonize requirements in NEPA and 23 U.S.C. 139



### § 771.141 Reliance and Adoption Efficiencies. (Added)

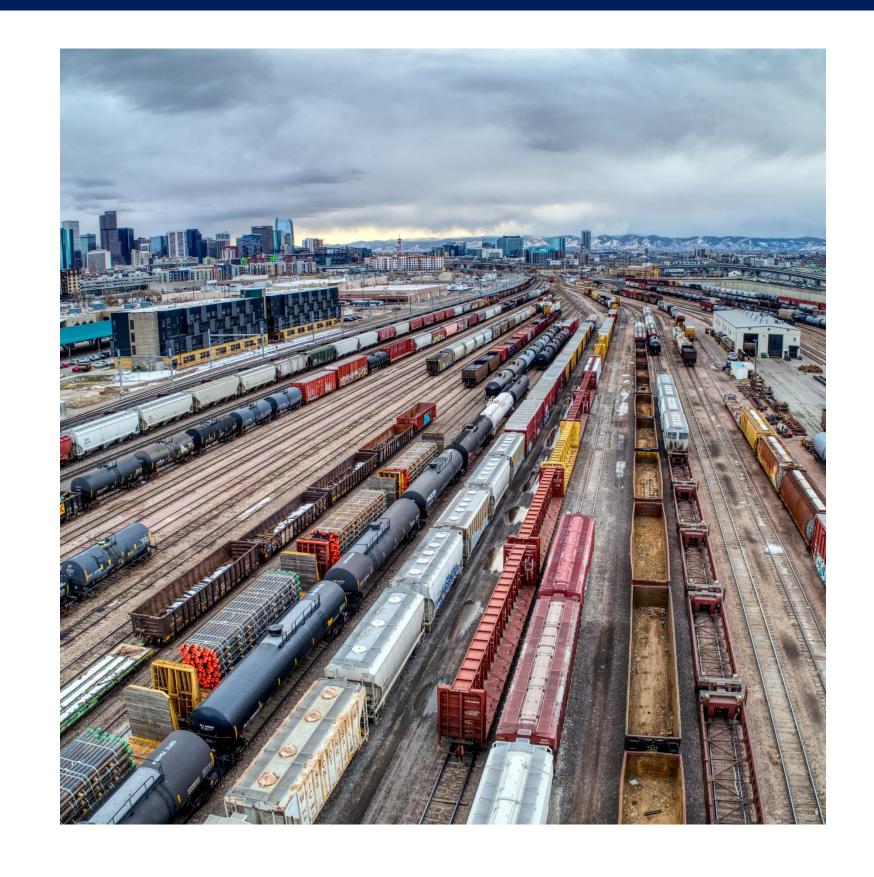
- Agency may rely upon an existing environmental document to document NEPA
- Provides a process for the Administration to adopt categorical exclusions established by other federal agencies
- Added for consistency with NEPA and 23 U.S.C. 139.





#### Tools We Can Use on FRA Projects

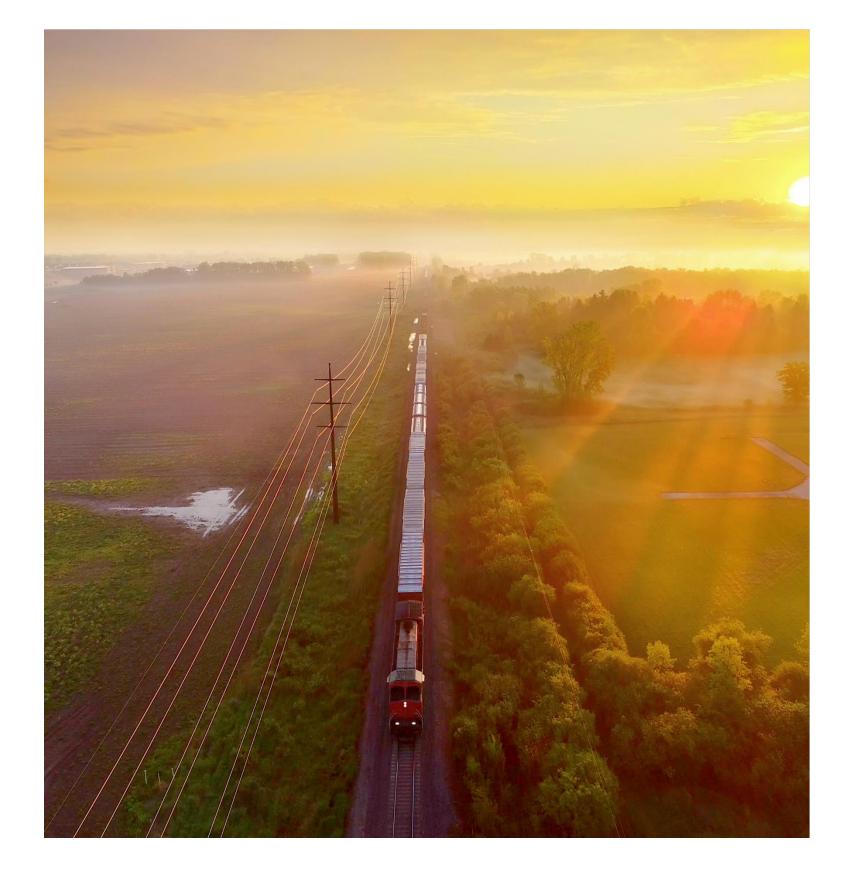
- Use FHWA or FTA categorical exclusions (23 CFR 771.116(d))
- Use USDOT categorical exclusions
   (Appendix A) and other OA CEs (DOT Order 5610.1D, Section 9.f.)
- Programmatic tools
- Section 139 process (process charts)
- Templates for streamlined review





#### Resources

- Federal Railroad Administration
  - **Environment webpage**
- 23 U.S.C. 139
- 23 U.S.C. 139 Interim Final Guidance
  - EA Process Chart
  - o EIS Process Chart
- 23 CFR 771 Interim Final Rule
  - o 90 FR 29426
  - 23 CFR 771 (FRA, FHWA, FTA joint NEPA procedures)
- USDOT NEPA procedures
   (DOT Order 5610.1D)





## Contact Us

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## Questions?

