

STATEMENT OF SCOPE

Department of Transportation

Rule No.: Trans 400

Relating to: Wisconsin Environmental Policy Act

Rule Type: Permanent Rule

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Detailed description of the objective of the proposed rule:

Background and Regulatory Framework

The purpose of Wisconsin Administrative Code Chapter Trans 400 is to implement the Wisconsin Environmental Policy Act (WEPA), s.1.11, Stats., by establishing the policy by which the department will consider environmental effects of its major actions on the quality of the human environment, by identifying actions under the jurisdiction of the department that have the potential to affect the quality of the human environment, by determining the appropriate environmental analysis and documentation necessary for each action, by ensuring an opportunity for public participation in the process, and by establishing procedures by which the department will consider the effects of its actions on the quality of the human environment.

WEPA has a broad mandate to consider certain environmental impacts of major state agency actions, but does not prescribe many specific procedures for doing so. Wisconsin Administrative Code Chapter Trans 400 establishes WEPA procedures for the State of Wisconsin Department of Transportation (Department), as well as for local units of government when seeking state reimbursement through the local roads improvement program, s. 86.31, Stats.

Department actions or local units of government must also follow the National Environmental Policy Act (NEPA) and federal implementing regulations when federal funds or a federal permit are involved. Like WEPA, NEPA imposes a broad mandate to consider environmental impacts of major actions, but does not prescribe many procedural specifics. As such, various federal agencies have promulgated rules and guidance that establish federal NEPA procedural requirements. Most relevant for the department, these agencies include the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), the Federal Aviation Administration (FAA), and the Federal Railroad Administration (FRA). The Council on Environmental Quality (CEQ) also promulgates general NEPA regulations, found at 40 CFR pts. 1500 to 1508 that apply to all federal agency actions, such as funding state-administered projects.

The regulations that primarily impact department project development are the regulations found at 23 CFR 771.101 to 771.139 (FHWA's NEPA regulations). Although promulgated under the FHWA heading, these regulations apply to all U.S. DOT highway and public transportation projects. FHWA's NEPA regulations are also intended to incorporate the general CEQ regulations. Wisconsin Administrative Code Chapter Trans 400 was written to closely parallel FHWA's NEPA regulations to ensure department actions meet both state and federal requirements, thereby avoiding any need to create two environmental documents.

Congress approved significant changes to U.S. DOT's environmental review process as part of the federal surface transportation funding bill, the Moving Ahead for Progress in the 21st Century Act (MAP 21), P.L. 112-141, 126 Stat. 405-986 (2012).

The changes, codified by federal transportation agencies through their rule-making processes, resulted in:

- Streamlining of the federal environmental review process for certain federally-funded transportation projects by reducing the level of required environmental documentation
- Accelerating project delivery
- Encouraging innovative project development approaches

These changes to the NEPA regulations greatly benefit many projects using federal funds, but are not reflected in Wisconsin's Trans 400 WEPA regulations. This inconsistency between federal and State regulations results in additional cost and time for many State projects being evaluated under WEPA.

The department proposes to amend Wisconsin Administrative Code Chapter Trans 400 to re-establish Trans 400's consistency with federal NEPA regulations. The department will also update obsolete references and correct minor, non-substantive clerical errors. Without these changes to Wisconsin Administrative Code Chapter Trans 400, environmental documentation for some common project types through State WEPA regulations will remain more restrictive than through federal NEPA regulations.

Issues and Objectives for this Rulemaking

The current version of Wisconsin Administrative Code Chapter Trans 400 does not contain the new streamlining and process reduction opportunities made available through MAP-21, revisions to FHWA's NEPA regulations and guidance. The result is that, for some project types, Wisconsin Administrative Code Chapter Trans 400 is more restrictive, costly and time-consuming because it requires higher levels of documentation and review than applicable federal NEPA regulations. Additionally, the current Trans 400 contains outdated references and may contain minor, non-substantive clerical errors.

The objective of updating Wisconsin Administrative Code Chapter Trans 400 is to re-establish Trans 400's consistency with FHWA and other federal agency NEPA regulations. The department will also update outdated references and will evaluate the rule and correct minor, non-substantive clerical errors.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Alternatives Analysis

This rulemaking proposes updating Wisconsin Administrative Code Chapter Trans 400 to re-establish consistency with FHWA and other federal NEPA regulations. Generally speaking, alternatives to adopting requirements consistent with NEPA included: do nothing, adopt more restrictive procedures than NEPA requirements, or adopt less restrictive procedures than NEPA requires.

The department rejected these alternatives. Wisconsin Administrative Code Chapter Trans 400 currently has more restrictive procedural requirements than MAP-21 and NEPA regulations. As such, the "do nothing" and "adopt more restrictive requirements" alternatives have a similar negative aspect: the department and local units of government would not be able to take advantage of MAP-21 streamlining provisions. Alternatively, the department could adopt less restrictive requirements. However, the department would still have to follow NEPA regulations to secure federal funding. Less restrictive

requirements may also cause confusion over which regulation applies, and might even have the effect of weakening the department's implementation of WEPA.

Existing Policies and Policy Proposals

The following is a summary of the proposed changes to the existing rule:

- **Environmental Impact Statements:** Revise language describing categories of actions normally requiring an environmental impact statement (EIS) to align with language in federal transportation agency rules.
- **Categorization of Department Actions:** Remove specific descriptions of highway, transit and airport action types that require preparation of an environmental assessment (EA), environmental report (ER) or categorical exclusion (CE). Replace these descriptions with references to federal transportation agency rules that identify the environmental document type required for the proposed action.
- **WEPA Process Streamlining:** Require a combined final environmental impact statement (FEIS) and record of decision (ROD) to the maximum extent practicable to be consistent with MAP-21. There is currently no provision for a combined EIS/ROD in Trans 400.
- **Update federal transportation agency rule references** which have been updated or moved since the last Wisconsin Administrative Code Chapter Trans 400 update.
- **Add, delete and revise definitions** to align with federal transportation agency definitions.
- **Include language requiring public availability of and a public hearing on an ER** when determined appropriate by the department.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Wisconsin Administrative Code Chapter Trans 400 is promulgated under the authority of ss. 1.11, 85.16 (1), and 227.11 (2), Stats.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

The estimated time for all state employees' involvement is approximately 500 hours. Other resources, such as consultants, are not anticipated unless state employees cannot allocate the necessary time.

6. List with description of all entities that may be affected by the proposed rule :

- Wisconsin Department of Transportation – when considering the environmental effects of its major actions.
- Local units of government such as counties, cities, villages and towns – when preparing environmental documents for department-funded or reimbursed projects.
- Project stakeholders, such as the general public or environmental groups, who regularly engage with the department during the environmental review process are not anticipated to be significantly impacted. Some public review periods will be shorter or discretionary; for instance, review periods are shortened by combining the FIES and ROD. However, there will still be ample opportunity for public input and the proposed rulemaking will allow discretion to extend timeframes when appropriate.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

The proposed rulemaking will incorporate into Wisconsin Administrative Code Chapter Trans 400 the streamlining provisions of MAP-21 and FHWA's NEPA regulations, 23 CFR pt. 771, and guidance. The proposed changes are intended to be consistent with federal rules regulating the same types of activities, see policy proposals above.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The proposed rule changes are not anticipated to have a significant economic impact to small businesses. The proposed changes have the potential to reduce time and cost on most department and local government unit transportation improvement projects.

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