

# The Federal Flyer

## Congress Holds Oversight Hearings on Proposed Planning/NEPA Rules USDOT Criticized for Going Too Far; Warned of Possible Congressional Intervention

### Inside this issue:

Congress Holds Oversight Hearings on Proposed Planning/NEPA Rules

1

Transportation Appropriations Headed for Conference

4

On both sides of the aisle and in both chambers of Congress, members last week expressed serious concerns over the U.S. Department of Transportation's (USDOT) proposed revisions to rules governing the transportation planning and National Environmental Policy Act (NEPA) review processes. Two House and Senate transportation authorizing committees scheduled oversight hearings on the rules last week at the request of state and local transportation officials.

**Senate Panel Grills FHWA and CEQ Leaders.** The Senate Environment and Public Works Committee held its oversight hearing on September 12, 2000. The first panel of witnesses consisted of **Federal Highway Administrator Kenneth R. Wykle, Council on Environmental Quality Chairman George T. Frampton, Jr., and Lois J. Schiffer**, with the Environment and Natural Resources Division of the Department of Justice.

According to **Chairman Robert C. Smith (R-N.H.)**, what Congress intended by the environmental streamlining provision of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA 21) was to have all stakeholders come together early in the project development process to consider all environmental issues with no hidden agendas. Congress envisioned a concurrent review process with a cooperative spirit among participating agencies and the elimination of duplications. Smith said that the proposed rules seem to go beyond the intent of Congress and of TEA 21 when they seek such goals as "to maximize attainment of an environmental ethic" and to make transportation decisions through an expanded cooperative partnership. In Smith's view, apparently shared by the members of his committee from both parties, the proposed rules "miss the mark."

Some of the harshest criticism came from the committee's ranking Democratic member **Senator Max Baucus (D-Mont.)**, who described the proposed rules as "an exercise in chaos theory." Although reaffirming that Congress does not want to "give short shrift to the environment," Baucus suggested that the proposed regulations go backwards, making the planning and environmental review processes even more burdensome. Both Baucus and **Senator George Voinovich (R-Ohio)**, who chairs the Transportation and Infrastructure Subcommittee, noted that the proposed rules would extend to any investment the requirement for an "alternatives analysis" now applied only to major projects through the Major Investment Study (MIS).

Baucus also challenged the proposed rules for requiring state departments of transportation to "cooperate" with local non-metropolitan officials, local transportation officials, tribal organizations, interest groups and individuals, rather than merely to consult with them. To Wykle's response that TEA 21 intended to increase the involvement of such groups, Baucus responded that increasing the required relationship from "consultation" to "cooperation" suggests joint decisionmaking, which constitutes shifting decisionmaking authority away from state and local officials without legislative authorization. Wykle said that there was no intention to use the proposed rules to give additional decisionmaking authority to anyone. Because the regulations do not define the power of the groups and individuals brought into the discussion, however, Baucus said they would increase litigation and increase the power of interest groups and individuals to slow down the process.

**Senator Bob Graham (D-Fla.)** said that TEA 21 intended to empower FHWA to bring state transportation departments and environmental agencies to the table early in the project development process. That way, based on grounds that are or should be known at that time, they could make "go/no go" decisions that would be binding later in the NEPA process.

He asked to what extent the proposed rules accomplish that. Administrator Wykle testified that the intent of the proposed rules is to allow the products of the planning process to be used in the NEPA process, thus speeding up NEPA review. However, to mandate such binding agreements would be outside the jurisdiction of USDOT, Wykle said. Graham then asked, "What does Congress have to do to give you that authority?" Wykle responded that making the necessary statutory changes would be difficult because more than 40 different federal statutes are involved.

**State Transportation Officials Call for Rewrite of Regulations.** **Thomas R. Warne**, executive director of the Utah Department of Transportation and president of the American Association of State Highway and Transportation Officials (AASHTO), led a second panel representing state DOTs. Joining Warne were **Jim Currie**, deputy director of the Montana DOT, **Carol Murray**, assistant commissioner and chief engineer of the New Hampshire DOT, and **Gordon D. Proctor**, director of the Ohio Department of Transportation.

In his testimony, Warne said of the proposed regulations, "This is the kind of help we don't need." AASHTO called for a comprehensive review and revision of the regulations. Warne asked the members of the committee to "return the agencies to the original course you had set in TEA 21."

Proctor testified that any streamlining efforts made by the proposed regulations were more than offset by new requirements. He characterized the proposed regulations as expanding the role of non-elected, unaccountable advocates, eroding the decisionmaking authority of transportation officials. The regulations also "commingle" the objectives of Title VI of the Civil Rights Act with the requirements of an executive order concerning environmental justice, creating new, undefined protective classes.

At the conclusion of the hearing, Chairman Smith made it clear that, should FHWA implement their regulations as written, Congress would intervene and rewrite new regulations themselves.

**House Subcommittee Adds Fuel to the Fire Under USDOT Proposed Rules.** The day after facing a very critical Senate, Administrator Wykle confronted the House Transportation and Infrastructure Committee's Ground Transportation Subcommittee. This time, **Patrick R. Reilly**, chief counsel for the Federal Transit Administration, joined Wykle on the first witness panel. While its tone was less harsh than the Senate, the House subcommittee was equally critical of USDOT's new streamlining regulations.

Both **Subcommittee Chairman Thomas Petri** (R-Wisc.) and **ranking subcommittee Democrat Nick Joe Rahall** (D-W. Va.) opened the hearing by stating that the proposed rule has not streamlined the environmental process and appears directly to violate both the letter and spirit of TEA 21. The proposed changes will increase costs that, in Wisconsin, would eat up one-third of the increased funding TEA 21 provided the state, Petri said. Petri urged USDOT to "fight harder for transportation people." He said the goal of the environmental streamlining provision of TEA 21 was to maintain federal environmental goals and standards, but also to provide for better coordination, so that, within that framework, the states would be able to meet their safety, mobility, and economic needs. That did not seem to be the spirit of the proposed rules, he said.

Rahall also observed that the proposed regulations seem to propose new, more complex requirements, often against the letter and spirit of TEA 21, and remarked that he was looking to USDOT for something stronger than a general assurance to listen to the concerns being expressed by state DOTs. Wykle again asserted that USDOT had no intent to go beyond Congressional intent in the proposed regulations. Wykle acknowledged, however, that the rule is being perceived as inappropriate. Rahall responded that, if USDOT does not address that perception and take Congressional concerns seriously, "this issue is begging for Congressional intervention in one form or another."

**Congressman William O. Lipinski** (D-Ill.) asked if the proposed regulations would give an individual an opportunity to raise an objection to a project that is within six to twelve months of implementation. Sharing Lipinski's concern that the proposed rules would send all projects developed under the current system back to the planning table, Petri asked why the proposed rules contain no "grandfathering" provision or other phase-in process. If the new rules require agreement among a new group that includes members who did not previously have a right to object, Petri suggested, the planning process would slow down significantly. Wykle responded that USDOT has specifically asked for recommendations concerning an effective date for the rules

"This is the kind of help we don't need."

Thomas Warne,  
President of  
AASHTO

and for comments on the “grandfathering” issue. He said USDOT would again have to evaluate whether the proposed He said USDOT would again have to evaluate whether the proposed rules provide additional opportunities to slow project development, but noted that, under the new rules, the state DOT, MPOs, and transit operators can agree on the level of detail required. Reilly agreed with Wykle that USDOT should reconsider the proposed rules.

**Congressman Bob Ney** (R-Ohio) was perhaps the only member of the committee who struck a positive note about the proposed rules. Ney observed that it is important that both rural and urban officials are included in the project planning process and that he likes the changes to the definition of “consultation” and the enhanced role that gives to rural officials.

The **Honorable Jane Hague**, a council member from King County, Washington, president of the National Association of Counties (NACo), and a later witness before the subcommittee, echoed Ney’s comments. Hague indicated that NACo supports the provisions in the proposed rule assuring that rural county officials are at the table in the transportation planning process and acknowledged Congressmen Ney and Lipinski for championing the interests of rural officials in TEA 21. She also expressed appreciation for the provisions in the proposed rules that require that the process for involving local officials in project planning be documented and for requiring that state and rural officials work together in planning transportation projects.

**Congressman Steve Horn** (R-Ca.) referred to Senator Baucus’s characterization of the rules as “an exercise in chaos theory” and suggested that USDOT may have to “go back to the drawing board” with them. He asked Wykle whether USDOT, in formulating the proposed rules, had done any regulatory analysis or looked at what the states were doing. Wykle said that USDOT had consulted the states and held several focus groups, affording many groups the opportunity to offer suggestions. Wykle noted, however, that federal agencies are legally prohibited from negotiating with interested parties in developing regulations. Horn noted state DOTs had participated in USDOT hearings but they believe their concerns were completely ignored.

**AASHTO, AMPO, and APTA Express Common Ground on Rules.** A second panel for the House hearing included state and regional representatives from AASHTO, AMPO, and APTA. AASHTO President Thomas Warne and AASHTO Standing Committee on Planning Chairwoman **Mary E. Peters**, director of the Arizona DOT, represented state DOTs. **Peter Plumeau**, executive director of the Chittenden County MPO of Burlington, Vermont, appeared on behalf of the Association of Metropolitan Planning Organizations (AMPO). **William W. Millar**, president of the American Public Transit Association (APTA), spoke to multimodal issues. And **Timothy S. Stowe**, vice president for transportation and planning for Anderson and Associates, appeared on behalf of the American Consulting Engineers Council (ACEC).

Although AMPO has not completed developing its position on the proposed rules, Pomeau said, the organization has been working with both AASHTO and APTA and finds much common ground with those organizations. AMPO wants a clearer definition of the role of MPOs in deployment of intelligent transportation systems and supports the intent behind USDOT’s planning and environmental rules. However, AMPO suggested that portions of the proposed rules appear unclear and excessively flexible, leading to confusion that undermines the intent of Congress. AMPO recommended that those provisions be rewritten. Pomeau specifically mentioned the provisions dealing with environmental justice and the effort to merge the MIS and NEPA requirements as unclear and noted that the rules do not require all necessary parties to participate in the process.

There may be diversity of opinion on how to do it, APTA’s Millar said, but there is agreement on the need to complete major capital projects quickly. Early involvement of necessary parties and early completion of environmental review are positive steps, he stated. APTA also believes that the rules adhere to six important principles: (1) support for intermodalism; (2) support decisionmaking at all levels; (3) promote balance among various objectives; (4) maintain mode neutrality; (5) ensure early and rigorous cooperation and collaboration; and (6) ensure early and continuing participation by stakeholders. With regard to the elimination of the MIS, APTA suggested that USDOT might have been “overzealous.” However, multimodal alternatives analysis must remain in the project planning process, he said. Making the components of the analysis optional (as recommended by AASHTO) shifts alternatives analysis out of project planning and into project development. The proposed rules do not make substantial

“This issue is begging for Congressional intervention in one form or another.”

Congressman  
Nick Rahall

improvements to the environmental review process, Millar suggested, and APTA would like to see more environmental streamlining where possible. More work is needed to ensure cooperation among federal agencies. APTA strongly supported the provisions of the proposed rules requiring consideration of environmental justice and equity in transportation decisionmaking. However, the proposed rule imposes a requirement for gathering considerable demographic data to little apparent benefit, and APTA is concerned about the cost and delay that is likely to result from lack of clarity in the proposed regulations.

The public comment period on the USDOT proposed planning and NEPA regulations ends on September 23, 2000. During the two hearings, USDOT officials indicated that they had originally expected to have the final rules published by the end of this year. However, they said, if significant negative comments are received, the USDOT will take additional time to review those comments and respond to them, which would delay final publication until next year.

**Texas Commissioner of Transportation John W. Johnson** wrote to the two committees thanking them for holding these hearings and expressing the Texas Department of Transportation's (TxDOT) concerns about the proposed rules. TxDOT will submit official comments to the rules docket.

## Transportation Appropriations Headed for Conference Bill Linked to VA/HUD; Earmarks Expected

The Senate Committee on Appropriations last week used an unusual maneuver to provide an additional \$3.9 billion in funding for the bill for programs at the departments of Veterans Affairs and House and Urban Development. The committee agreed to reduce the allocation it earlier had provided for the transportation appropriations bill by \$4 billion in order to shift those funds to cover the VA/HUD appropriations bill. This reallocation of funds was said to be essential if the VA-HUD bill is to have any chance of being passed by the Senate this year. However, **Committee Chairman Ted Stevens** (R - Alaska) promised to more than make up the cut later on, when they get together with House members in the final round of negotiations on the various spending measures. "We literally borrowed from the transportation bill and it will have to be replaced as we go forward," Stevens said. Stevens expressed confidence that, despite continued bargaining with the Clinton Administration on overall spending levels, lawmakers will have more money to allocate to transportation and other bills.

In the meantime, rumors are floating around Capitol Hill that the conference committee on the transportation appropriations bill will meet soon to discuss possible earmarks of discretionary program funds, with particular attention going to the National Corridor Planning and Development and Coordinated Border Infrastructure programs. These rumors also indicate that the conference, while currently stalled over disagreements regarding the Senate's proposed 0.08 BAC penalty provision, may wrap up its work this week. In addition, it is anticipated that the bill will be released to the House and Senate before the end of the month.



The *Federal Flyer* is a publication of the TxDOT Legislative Affairs Office. It is intended to provide up-to-date information on major legislative activities in the 106th Congress for the management of the Texas Department of Transportation, state leaders, and others interested in Texas transportation issues. This report will also feature key activities in the national transportation community. Sources include news services and staff reports.

Coby Chase, Director of Legislative Affairs, serves as publisher and can be reached at (512) 463-6086. The department's federal legislative analysts are Joe Guzzo (202-638-3927), Tonia Norman Ramirez (512-463-9957), and David Soileau (512-463-6081). Please contact any of the staff for information on federal transportation and legislative issues.

This publication will be filed with the State Publications Clearinghouse in the State Library in accordance with the Texas State Depository Law.

