

Report From Agency
STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

PROPOSED ORDER AMENDING PERMANENT RULE

The Wisconsin Department of Transportation proposes an order to:

Create ss. Trans 400.03 (note), 400.04 (3) (note), (22m), 400.10 (4) (a) 1g., 400.11 (7) (b), (8), 400.12 (4) (b), 400.13 (1) (am), (3), 400.14 (3); amend ss. Trans 400.04 (3), (4), (5), (10), (24), 400.05, 400.06 (5), (6), 400.07 (2) (intro), (2) (b) 1., (2) (c) (intro), 400.08 (1) (a) (intro), (1) (a) 1. c., (1) (a) 2. a., (1) (a) 2. b., (1) (a) 3. (note), (1) (b) (intro), (1) (b) 3., (1) (b) 5. (intro), (2) (a), (2) (f), 400.09 (4) (e), 400.10 (4) (a) 5., (5) (intro), 400.11 (2), (4), (5) (a), (5) (c), 400.12 (3) (a), (4) (title), 400.13 (1) (b) (intro), (2) (a), 400.14 (1) (a), (2) (a); repeal ss. Trans 400.04 (15), 400.05 (note), 400.08 (1) (a) (note), 400.11 (1) (b) 1. to 4., (3) (b) 1. to 4., (5) (b) 1. to 5., 400.13 (1) (a); repeal and recreate ss. Trans 400.08 (1) (b) 1., (1) (b) 2., (1) (c) 1., (1) (c) 2., (1) (d) 1., (1) (d) 2., 400.10 (3) (c); renumber and amend ss. Trans 400.08 (1) (c) (intro), (1) (c) 3., (1) (d) 5. (intro), (1) (d) (intro), (1) (d) 3., 400.10 (4) (a) 1., 400.11 (b) (intro), (3) (b) (intro), (5) (b) (intro), (7), 400.12 (4), and to renumber ss. Trans 400.08 (1) (c) 4., (1) (c) 5., (1) (d) 4.

The Statement of Scope for this Permanent Rule, SS 060-16, was approved by the Governor on July 11, 2016, published in Register No. 727A3 on July 18, 2016, and approved by Secretary of the State of Wisconsin Department of Transportation (“Department”) Mark Gottlieb, P.E., as required by s. 227.135 (2), Stats, on August 1, 2016. The analysis below was prepared by the Department.

ANALYSIS

Statutes Interpreted: Section 1.11, Stats.

Statutory Authority: Sections 1.11, 85.16 (1), and 227.11 (2), Stats.

Explanation of Agency Authority: Section 1.11, Stats., directs the Department to prepare a detailed statement to be included in every recommendation or report on proposals for major Department actions that significantly affect the quality of the human environment. Section 85.16 (1) authorizes the secretary to “make reasonable and uniform orders and rules deemed necessary

to the discharge of the powers, duties and functions vested in the department.” Similarly, and subject to certain conditions and limitations, s. 227.11 (2), Stats., authorizes agencies to promulgate rules to interpret the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute.

Related Statute or Rule: No additional statutes or rules than those identified.

Plain Language Analysis: Chapter Trans 400 implements the Wisconsin Environmental Policy Act (WEPA), s. 1.11, Stats., by establishing the policy and procedures by which the Department will evaluate and consider the environmental effects of its major actions. Local units of government must also follow ch. Trans 400 when undertaking local projects with state or federal funding under s. 86.31, Stats.

To maximize availability of federal funds, ch. Trans 400 was written to parallel the National Environmental Policy Act (NEPA) regulations promulgated by various federal agencies. Recent updates to federal law, rules and guidance, including updates to the federal transportation funding bill MAP-21 and the Federal Highway Administration’s and Federal Transit Administration’s NEPA regulations and guidance, have incorporated provisions that are intended to streamline and allow innovation in the environmental review process. As a result, ch. Trans 400 potentially imposes more restrictive procedural requirements on the Department than state statute or federal laws. The proposed updates would incorporate recent federal streamlining provisions to re-establish consistency between federal and state rules for environmental documents related to transportation.

The proposed updates also consolidate references to federal rules and policies to improve readability and reduce future rulemaking efforts to keep specific citations current. In addition, this

rulemaking addresses non-substantive errors and provisions that may be perceived as internally inconsistent in the current rule.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations: WEPA, as implemented through ch. Trans 400, applies to all major Department actions. To ensure the availability of federal funds and other federal approvals, Department actions must also follow NEPA. 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 President's Council on Environmental Quality (CEQ) also promulgates general NEPA regulations, found at 40 CFR Parts 1500 to 1508. The CEQ's regulations apply to all federal agency actions, such as approving the use of federal funds on state-administered transportation projects.

The most substantive regulations that impact Department highway 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.

Chapter Trans 400 was written to closely parallel FHWA's NEPA regulations to ensure department actions meet both state and federal requirements. Over the years, both FHWA's NEPA regulations and ch. Trans 400 have been updated to incorporate new policies or new directives from Congress. Recently, Congress approved significant changes to U.S. DOT's environmental

review process as part of the most recent 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). These changes are intended to streamline the environmental review process for transportation projects by reducing required processes, accelerating project delivery and encouraging innovative project development approaches.

These changes to the NEPA regulations greatly benefit many projects using federal funds or otherwise requiring federal approval, but are not reflected in Wisconsin's ch. 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.

Comparison with Rules in Adjacent States: Neighboring states either follow federal NEPA regulations when seeking federal approval and/or funding, or have adopted potentially more restrictive environmental regulations as a matter of that state's preferred policy. Illinois, Iowa, and Michigan do not have state-level environmental policy acts like WEPA. Minnesota does have a state-level environmental policy act like WEPA, found at Minn. Stat. ss. 116D.01 to 116D.06. Unlike Wisconsin's ch. Trans 400, Minnesota's implementing rules apply generally to all state agencies. Minnesota's rules are found at Minn. Admin. R. ch. 4410.

The Illinois DOT's project development guidance applicable to environmental documents is available here (accessed Sep. 15, 2016): <http://www.idot.illinois.gov/assets/uploads/files/doing-business/manuals-split/design-and-environment/bde-manual/Chapter%2022%20General%20Environmental%20Procedures.pdf>.

The Iowa DOT's environmental documentation overview is available here (accessed Sep. 15, 2016): <http://www.iowadot.gov/ole>.

The Michigan DOT's EIS guidance is available here (accessed Sep. 15, 2016):

http://www.michigan.gov/mdot/0,4616,7-151-9621_11058_22978_45537-162643--,00.html.

The Minnesota DOT also has policy-level guidance for environmental documentation, available here (accessed Sep. 15, 2016): <http://www.dot.state.mn.us/planning/hpdp/>.

The President's Council on Environmental Quality (CEQ) has compiled a list of other states with NEPA-like state environmental policy acts, available at:

http://energy.gov/sites/prod/files/2013/09/f2/States_NEPA_Like_22June2013.pdf.

Summary of the Factual Data and Analytical Methodologies: By better aligning ch. Trans 400 with newly enacted federal laws, the Department and local transportation authorities will be able to capture the streamlining and efficiencies intended with those federal law changes. The Department expects reduced review time and process, with benefits that will vary by each agency action, depending on the circumstances of that action and the extent to which new streamlined procedures apply.

Analysis Regarding Rule's Effect on Small Businesses: Because this rule does not add any regulatory requirements for small businesses, the proposed rule updates will not have an economic impact on small businesses under s. 227.24 (3m), Stats.

Effect on small business: The Department anticipates no effect on small businesses as a result of this rule. The agency contact person listed below is also the small business regulatory coordinator for this proposed rule. This proposed rule, fiscal estimate, and other related documents may be viewed at <https://docs.legis.wisconsin.gov/code>.

Agency Contact Person:

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Place Where Comments Should Be Submitted and Deadline: Comments may be submitted to the agency contact person listed above or through the Legislature's Administrative Rules website <http://docs.legis.wisconsin.gov/code> until the deadline given in the forthcoming notice of public hearing.

TEXT OF PERMANENT RULE

SECTION 1. Trans 400.03 (note) is created to read:

Trans 400.03 Applicability. (note) The Wisconsin Environmental Policy Act (WEPA), s. 1.11, Stats., requires environmental documentation for major department actions that significantly affect the quality of the human environment. The National Environmental Policy Act (NEPA) and its implementing regulations similarly require environmental documentation for major federal actions, such as a federal agency approving the use of federal funds or issuing a permit for department actions. For department actions that require federal approval, the department prepares the required environmental documentation. Where NEPA applies to a department action, WEPA typically also applies. The intent of this chapter is to implement WEPA regulations that are consistent with NEPA and its implementing regulations for all department actions to which these laws apply.

SECTION 2. Trans 400.04 (3) (note) is created to read:

Trans 400.04 (3) (note) The specific versions of federal regulations and federal agency orders as referenced throughout this chapter are adopted in s. Trans 400.05 and are reproduced at appendix 1 to this chapter.

SECTION 3. Trans 400.04 (3) is amended to read:

Trans 400.04 (3) "Categorical exclusion" means an action which meets the definition of the term ~~in the guidelines published by the United States council on environmental quality as a federal rule in 40 CFR 1508.4, July 1, 1990, and the rule published jointly by the federal highway administration and urban mass transit administration of the United States department of transportation and in 23 CFR 771.116, 23 CFR 771.117, April 1, 1991, or the procedures published by 23 CFR 771.118, or chapter 6 of order 5050.4B of the federal aviation administration of the United States department of transportation as order 5050.4A, chapter 3, paragraph 23, October 8, 1985, or other actions of the department for which neither an EA, EIS nor other environmental documentation is required by this rule.~~

SECTION 4. Trans 400.04 (4) is amended to read:

Trans 400.04 (4) "Cooperating agency" means any Native American tribe, or any local, state, or federal agency, other than the lead or transportation agency, which has jurisdiction by law over the proposed action or which has special expertise with respect to any relevant environmental effect generated by the proposed action or alternative.

SECTION 5. Trans 400.04 (5) is amended to read:

Trans 400.04 (5) "Department" means the Wisconsin department of transportation or a local agency when acting under the direction of the department.

SECTION 6. Trans 400.04 (10) is amended to read:

Trans 400.04 (10) "ER" or "environmental report" means a brief document used internally by the department to demonstrate a proposed action fits the criteria or conditions for approval as a categorical exclusion ~~in 23 CFR 771.117 (d), April 1, 1991, or has met the review criteria of paragraph 23.a. of chapter 3 of federal aviation administration order 5050.4A of October 8, 1985,~~ under s. Trans 400.08 (1)(d) or has been properly coordinated with other agencies having jurisdiction by law over specific activities.

SECTION 7. Trans 400.04 (15) is repealed.

SECTION 8. Trans 400.04 (22m) is created to read:

Trans 400.04 (22m) "Participating agency" means any Native American tribe or any local, state, or federal agency, other than the lead agency, with an interest in the project. "Participating agency" includes cooperating agencies but does not include nongovernmental organizations or other private entities.

SECTION 9. Trans 400.04 (24) is amended to read:

Trans 400.04 (24) "Reevaluation" means the review of ~~a DEIS or FEIS an approved draft or final environmental document, including DEIS, FEIS, ROD, EA, FONSI, ER, and CE,~~ to assess whether there have been significant changes in the proposed action, the applicable laws, regulations, or policies, the affected human environment, the anticipated environmental impacts, or the proposed mitigation measures.

SECTION 10. Trans 400.05 is amended to read:

Trans 400.05 Federal regulations adopted. ~~Federal regulations, 23 CFR 21771.115, 771.117, 771.119(a) and 771.123(a), April 1, 1998, adopted jointly by the federal highway administration and urban mass transit administration of the United States department of transportation, and its federal aviation administration order 5050.4A, chapter 3, paragraphs 20, 21, 22, and 23, October 8, 1985, pursuant to 40 CFR 1508.4, July 1, 1998, as approved by the United States council on environmental quality, and 40 CFR 1506.8 and 1508.17~~ References throughout this chapter to federal regulations and orders are hereby adopted by the department and are attached hereto in appendix 1: 23 CFR 771.115, 771.116, 771.117, and 771.118, April 1, 2015; 40 CFR 1500.4, 1500.5, 1506.8, and 1508.4, July 1, 2015; 49 CFR 266.19, October 1, 2014; and the United States department of transportation federal aviation administration order 5050.4B, chapters 6, 7, and 9, April 28, 2006.

SECTION 11. Trans 400.05 (note) is repealed.

SECTION 12. Trans 400.06 (5) is amended to read:

Trans 400.06 (5) Measures necessary ~~to avoid, minimize and to mitigate for the mitigation of~~ adverse environmental impacts of proposed actions shall be part of the development and evaluation of alternatives.

SECTION 13. Trans 400.06 (6) is amended to read:

Trans 400.06 (6) The department shall implement procedures to make the WEPA process more useful to decision makers and the public by reducing paperwork and reducing delay utilizing the

means for achieving these goals as specified in the rules of the United States council on environmental quality at 40 CFR 1500.4 and 1500.5, ~~July 1, 1990, that~~ which are attached hereto in appendix 1. Environmental documents shall be concise, clear, and to the point and emphasize real environmental issues and alternatives.

SECTION 14. Trans 400.07 (2) (intro.) is amended to read:

Trans 400.07 (2) (intro.) ~~Except for actions designated CE actions which do not require any environmental documentation, actions~~ Actions and procedures designated EIS, EA or ER shall require the following environmental documentation:

SECTION 15. Trans 400.07 (2) (b) 1. is amended to read:

Trans 400.07 (2) (b) 1. An EA shall be prepared for those project actions for which the significance of the environmental impact is not clearly established. If it is concluded from the analysis in the EA that the action is a major action, an EIS shall be prepared. If it is concluded from the analysis in the EA that the action is not a major action, the EA shall be revised to constitute a FONSI, and the FONSI shall serve as the environmental document. The FONSI shall be prepared only after availability of the EA for public, and cooperating and participating agency, review and comment and the incorporation of any appropriate revisions resulting from the public involvement process. Where a permit will be required or other agency coordination is specifically required by law, the FONSI may serve as the vehicle for such permit or coordinating agency approval.

SECTION 16. Trans 400.07 (2) (c) (intro.) is amended to read:

Trans 400.07 (2) (c) (intro.) *ER*. An ER is a procedure followed for an action that is likely to fit the criteria for a conditional categorical exclusion in 23 CFR 771.117 (d), ~~April 1, 1998 23 CFR 771.118 (d),~~ or federal aviation administration order ~~5050.4A, chapter 3, paragraph 23.a., October 8, 1985, 5050.4B, chapter 6, paragraph 605,~~ or otherwise requires coordination with or concurrence of another agency. An environmental report, or ER, shall be prepared to demonstrate whether the proposed action does fit the criteria or conditions for approval as a categorical exclusion and has been properly coordinated with other agencies having jurisdiction by law over specific activities. The ER shall serve as the department's record of coordination with other agencies having jurisdiction over specific activities, including the following activities:

SECTION 17. Trans 400.08 (1) (a) (intro.) is amended to read:

Trans 400.08 (1) (a) *EIS—Environmental Impact Statement*. ~~The federal highway administration regulations at 23 CFR 771.115(a) April 1, 1998, federal aviation administration order 5050.4A, chapter 3, paragraph 21, October 8, 1985, identify types of federally funded actions which require the preparation of an environmental impact statement.~~ The following are examples of department major actions that normally require the preparation of an environmental impact statement:

SECTION 18. Trans 400.08 (1) (a) (note) is repealed.

SECTION 19. Trans 400.08 (1) (a) 1. c. is amended to read:

Trans 400.08 (1) (a) 1. c. ~~New construction~~ Construction or extension of a fixed rail transit facilities ~~including facility, such as~~ rapid rail, light rail, commuter rail, ~~and automated guideway transit or bus rapid transit that will not be located within an existing transportation right-of-way.~~

SECTION 20. Trans 400.08 (1) (a) 2. a. is amended to read:

Trans 400.08 (1) (a) 2. a. ~~First time~~ Unconditionally approving or funding the first airport layout plan approval or airport location approval for a new commercial service airport located in a standard-metropolitan statistical area.

SECTION 21. Trans 400.08 (1) (a) 2. b. is amended to read:

Trans 400.08 (1) (a) 2. b. ~~Federal financial participation in, or airport layout plan approval of,~~ unconditionally approving or funding a new runway capable of handling to accommodate air carrier aircraft at a commercial service airport located in a standard-metropolitan statistical area.

SECTION 22. Trans 400.08 (1) (a) 3. (note) is amended to read:

Trans 400.08 (1) (a) 3. (note) The federal highway administration regulations at 23 CFR 771.115 (a) and federal aviation administration order 5050.4B, chapter 9, paragraph 903, identify types of federally funded actions which normally require the preparation of an environmental impact statement. The federal railroad administration regulation at 49 CFR 266.19, October 1, 1997, generally identifies actions that do not require an environmental impact statement.

SECTION 23. Trans 400.08 (1) (b) (intro.) is amended to read:

Trans 400.08 (1) (b) (intro.) ~~EA—Environmental Assessment.~~ EA procedures apply to actions for which the significance of the environmental impacts is not clearly established and require the preparation of an environmental assessment to make that determination. ~~The federal highway administration regulations at 23 CFR 771.115(c) April 1, 1998, and the federal aviation order 5050.4A, chapter 3, paragraph 22, October 8, 1985 identify the types of federal actions that require the preparation of an environmental assessment. Examples of the department's actions that are required to follow the EA procedure are as follows:~~

SECTION 24. Trans 400.08 (1) (b) 1. is repealed and recreated to read:

Trans 400.08 (1) (b) 1. 'Highways and transit.' In addition to actions the department determines to meet the criteria for an EA action under this chapter, the department may apply EA procedures to the highway and transit actions generally identified in 23 CFR 771.115 (c).

SECTION 25. Trans 400.08 (1) (b) 2. is repealed and recreated to read:

Trans 400.08 (1) (b) 2. 'Airports.' In addition to actions the department determines to meet the criteria for an EA action under this chapter, the department may apply EA procedures to actions generally identified in federal aviation administration order 5050.4B.

SECTION 26. Trans 400.08 (1) (b) 3. is amended to read:

Trans 400.08 (1) (b) 3. 'Administrative facilities.' ~~Construction~~ Examples of department actions regarding administrative facilities to which EA procedures normally apply are: construction of a new or replacement administrative building, including an office building, state patrol academy, driver licensing and testing station, state patrol communications building, or other similar facility, at a new location.

SECTION 27. Trans 400.08 (1) (b) 5. (intro.) is amended to read:

Trans 400.08 (1) (b) 5. (intro.) Policy, contract, standard, and specification changes. Examples of department actions regarding policy, contract, standard, and specification changes to which EA

procedures normally apply are:

SECTION 28. Trans 400.08 (1) (c) (intro.) is renumbered Trans 400.08 (1) (d) (intro.) and amended to read:

Trans 400.08 (1) (d) (intro.) *ER – Environmental Report.* ~~ER procedures apply to actions identified in 23 CFR 771.117(d), April 1, 1998, and federal aviation administration order 5050.4A, chapter 3, paragraph 23a., October 8, 1985.~~ ER actions require documentation with an environmental report. The environmental report shall demonstrate that the action meets the criteria for a categorical exclusion by demonstrating that specific conditions or criteria for the action have been addressed and that significant environmental effects will not result. ~~Examples of ER actions to which ER procedures apply are as follows:~~

SECTION 29. Trans 400.08 (1) (c) 1. is repealed and recreated to read:

Trans 400.08 (1) (c) 1. ‘Highways, transit, and rail.’ In addition to actions the department determines to meet the criteria for a CE action under this chapter, the department may classify as CE actions those highway, transit, and rail actions identified in 23 CFR 771.116(c), 23 CFR 771.117 (c), and 23 CFR 771.118 (c).

SECTION 30. Trans 400.08 (1) (c) 2. is repealed and recreated to read:

Trans 400.08 (1) (c) 2. ‘Airports.’ In addition to actions the department determines to meet the criteria for a CE action under this chapter, the department may classify as CE actions those airport actions identified in federal aviation administration order 5050.4B.

SECTION 31. Trans 400.08 (1) (c) 3. is renumbered Trans 400.08 (1) (d) 3. and amended to read:

Trans 400.08 (1) (d) 3. ‘Administrative facilities.’ Extensive Examples of department actions regarding administrative facilities to which ER procedures normally apply are: extensive remodeling, expansion or modification of an administrative building, including an office building, state patrol academy, driver licensing and testing station, state patrol communications building, or other similar facility, which either substantially increases the capacity of the facility or substantially changes its use.

SECTION 32. Trans 400.08 (1) (c) 4. is renumbered Trans 400.08 (1) (d) 4.

SECTION 33. Trans 400.08 (1) (c) 5. is renumbered Trans 400.08 (1) (d) 5., and Trans 400.08 (1) (d) 5. (intro.), as renumbered, is amended to read:

Trans 400.08 (1) (d) 5. (intro.) ‘Policy, contract, standard and specification changes.’ Examples of department actions regarding policy, contract, standard, and specification changes to which ER procedures normally apply are:

SECTION 34. Trans 400.08 (1) (d) (intro.) is renumbered Trans 400.08 (1) (c) (intro.) and amended to read:

Trans 400.08 (1) (c) (intro.) *CE – Categorical Exclusions.* CE actions are categorically excluded from the requirement to prepare environmental documentation ~~pursuant to the rule published by the United States department of transportation in 23 CFR 771.117, April 1, 1998, or its federal aviation administration order 5050.4A, chapter 3, paragraph 23, October 8, 1985.~~ CE actions do not

~~require environmental documentation~~ because, based on past experience with similar actions, they do not involve significant environmental impacts. They are actions which do not induce significant impacts to planned growth or land use for the area, do not require the relocation of significant numbers of people, do not have a significant impact on any natural, cultural, recreational, historic or other resource, do not involve significant air, noise, or water quality impacts, do not have significant impacts on travel patterns, and do not otherwise, either individually or cumulatively, have any significant environmental impacts. ~~Examples of CE actions include the following:~~

SECTION 35. Trans 400.08 (1) (d) 1. is repealed and recreated to read:

Trans 400.08 (1) (d) 1. ‘Highways, transit, and rail.’ In addition to actions the department determines to meet the criteria for an ER action under this chapter, the department may apply ER procedures to the highway, transit, and rail actions identified in 23 CFR 771.116 (d), 23 CFR 771.117 (d) and 23 CFR 771.118 (d).

SECTION 36. Trans 400.08 (1) (d) 2. is repealed and recreated to read:

Trans 400.08 (1) (d) 2. ‘Airports.’ In addition to actions the department determines to meet the criteria for an ER action under this chapter, the department may apply ER procedures to actions identified in the federal aviation administration order 5050.4B.

SECTION 37. Trans 400.08 (1) (d) 3. is renumbered Trans 400.08 (1) (c) 3. and amended to read:

Trans 400.08 (1) (c) 3. ‘Administrative facilities.’ ~~Minor~~ Examples of department actions regarding administrative facilities that are classified as CE actions are: minor construction or expansion of an airport facility, such as a runway, taxiway, apron, service or entrance road, or passenger handling or parking facility.

SECTION 38. Trans 400.08 (1) (d) 4. is renumbered to Trans 400.08 (1) (c) 4.

SECTION 39. Trans 400.08 (2) (a) is amended to read:

Trans 400.08 (2) (a) Activities exempt by statute or approved as categorical exclusions by the United States council on environmental quality pursuant to 40 CFR 1508.4, July 1, 1998.

SECTION 40. Trans 400.08 (2) (f) is amended to read:

Trans 400.08 (2) (f) The budget request of the department as a whole submitted to the department of administration and legislature pursuant to ss.-s. 6.42 and 19.45-(12), Stats.

SECTION 41. Trans 400.09 (4) (e) is amended to read:

Trans 400.09 (4) (e) Ensure the required involvement of any cooperating and participating agencies.

SECTION 42. Trans 400.10 (3) (c) is repealed and recreated to read:

Trans 400.10 (3) (c) In addition to the contents required under par. (a), the FEIS shall also include the following:

1. Identification of the preferred alternative if one was not included in the DEIS.
2. A discussion of substantive comments received on the DEIS and responses thereto, including the identification of efforts to resolve the issue.

3. A summary of public involvement.
4. A description of mitigation measures that are to be incorporated into the proposed action.

SECTION 43. Trans 400.10 (4) (a) 1. is renumbered Trans 400.10 (4) (a) 1r. and amended to read:

Trans 400.10 (4) (a) 1r. Stimulation of ~~secondary~~indirect environmental effects.

SECTION 44. Trans 400.10 (4) (a) 1g. is created to read:

Trans 400.10 (4) (a) 1g. The content requirements for an ER under sub. (5).

SECTION 45. Trans 400.10 (4) (a) 5. is amended to read:

Trans 400.10 (4) (a) 5. The degree of controversy on environmental grounds associated with the proposed action.

SECTION 46. Trans 400.10 (5) (intro.) is amended to read:

Trans 400.10 (5) (intro.) ER AND CE CONTENT. The ER and CE may be completed on screening sheets developed by the department. The ER and CE shall reflect compliance with the applicable laws and regulations of other agencies, and shall include all of the following:

SECTION 47. Trans 400.11 (1) (b) (intro.) is renumbered Trans 400.11 (1) (b) and amended to read:

Trans 400.11 (1) (b) *Notice of availability of a SEE.* A notice of availability of a system plan and its SEE shall be published ~~in the official state newspaper and other newspapers, as deemed appropriate. The notice may be combined with a notice of opportunity for a public hearing on the system plan. The notice shall:~~ as provided in sub. (8).

SECTION 48. Trans 400.11 (1) (b) 1. to 4. are repealed.

SECTION 49. Trans 400.11 (2) is amended to read:

Trans 400.11 (2) LEIS. In the case of a departmental report or recommendation on a department-initiated proposal for legislation that contains major and significant new proposals that are not within the scope of any categorical exclusion, the department shall prepare a LEIS substantially following the guidelines of the United States council on environmental quality in 40 CFR 1506.8, ~~July 1, 1998.~~ This includes transmission of the LEIS to the legislature concurrent with or within 30 days after the legislative proposal is submitted to the legislature, provided that the LEIS must be available in time for legislative hearings and deliberations, and 5 days in advance. There is no scoping requirement and the statement shall be prepared in the same manner as a DEIS, but shall be considered the detailed statement required by s. 1.11 (2) (c), Stats. Any comments on the LEIS shall be given to the department which shall forward them along with its own responses to the legislative committees with jurisdiction.

SECTION 50. Trans 400.11 (3) (b) (intro.) is renumbered Trans 400.11 (3) (b) and amended to read:

Trans 400.11 (3) (b) *Notice of availability of DEIS.* A notice of availability of the DEIS shall be published ~~in the appropriate official local newspaper or in a newspaper with general circulation within the area affected by the proposed action. If the proposed action is of statewide interest, such~~

~~notice shall also be published in the official state newspaper. Such notice shall include: as provided in sub. (8).~~

SECTION 51. Trans 400.11 (3) (b) 1. to 4. are repealed.

SECTION 52. Trans 400.11 (4) is amended to read:

Trans 400.11 (4) COMBINED FEIS/ROD. The combined FEIS/ROD shall be printed and distributed, and a notice of availability of the combined FEIS/ROD shall be published, in the same manner as provided for a DEIS under sub. (3), ~~except that. If separate FEIS and ROD documents are necessary under s. Trans 400.13 (1) (am),~~ the decision to proceed with the proposed action and to sign the ROD shall not be made sooner than 30 days after the date of publication of the notice of availability of the FEIS or 90 days after the date of publication of the notice of availability of the DEIS.

SECTION 53. Trans 400.11 (5) (a) is amended to read:

Trans 400.11 (5) (a) *Public availability of EA*. The EA shall be made available for public inspection at the department's central office, the appropriate department region office, public libraries as identified under sub. (3) (a) 6., and the office of the local unit of government having requested the proposed action. A charge may be assessed to cover reproduction and handling costs for requested copies of the EA or portions thereof.

SECTION 54. Trans 400.11 (5) (b) (intro.) is renumbered Trans 400.11 (5) (b) and amended to read:

Trans 400.11 (5) (b) *Notice of availability of EA*. A notice of availability of the EA shall be published ~~in the appropriate official local newspaper or in a newspaper of general circulation within the area affected by the proposed action. If the proposed action is of statewide interest, the notice shall also be published in the official state newspaper. The notice may be combined with the notice of opportunity for public hearing provided for under par. (c). The notice shall: as provided in sub. (8).~~

SECTION 55. Trans 400.11 (5) (b) 1. to 5. are repealed.

SECTION 56. Trans 400.11 (5) (c) is amended to read:

Trans 400.11 (5) (c) *Notice of opportunity ~~for to request a public hearing on EA.~~ ~~A~~ If the department affords the opportunity for a public hearing on an EA under s. Trans 400.12 (4) (a), a notice of opportunity ~~for to request a public hearing~~ shall be published when the EA is completed and made available for inspection as provided for under par. (a). Publication of the notice shall be in the appropriate official local newspaper or in a newspaper of general circulation within the area affected by the proposed action. Publication shall also be in the official state newspaper if the proposed action is of statewide interest. The notice shall invite submission of requests for a public hearing on the EA within 30 days after the date of publication of the notice. The notice shall include a description of the procedure for requesting a public hearing.*

SECTION 57. Trans 400.11 (7) is renumbered Trans 400.11 (7) (a) and amended to read:

Trans 400.11 (7) (a) The ER shall upon request be made available for inspection at the department's central office, the appropriate department region office, and the office of the local unit of

government having requested the proposed action. ~~A-Subject to par. (b),~~ a notice of availability shall not be required for an ER. A charge may be assessed to cover reproduction and handling costs for requested copies of the ER.

SECTION 58. Trans 400.11 (7) (b) is created to read:

Trans 400.11 (7) (b) If the department determines to hold, or afford the opportunity for, a public hearing on an ER action under s. Trans 400.12 (4) (b), the department shall make the ER publicly available and provide notice of public availability under sub. (5) as if the ER were an EA.

SECTION 59. Trans 400.11 (8) is created to read:

Trans 400.11 (8) NOTICE OF AVAILABILITY. (a) When an environmental document listed under par. (c) is made available to the public by the department, a notice of availability shall be published in the appropriate official local newspaper or in a newspaper of general circulation within the area affected by the proposed action. If the proposed action is of statewide interest, the notice shall also be published in the official state newspaper. The notice shall include all of the following:

1. Briefly describe the proposed action.
2. Announce the completion and availability of the environmental document.
3. List the locations where the environmental document may be inspected.
4. Except in the case of a ROD or a combined FEIS/ROD document, invite the public to furnish written comments on the proposed action; indicate where comments are to be sent; and indicate the date that such comments must be submitted to the department as determined under par. (b).

(b) The comment period for specific environmental documents shall be as follows:

1. For a DEIS, the comment period may not be less, nor without cause longer than, 45 days after the date of the publication of the notice of availability.
2. If the department determines a separate FEIS and ROD are necessary under s. Trans 400.13 (1) (am), the comment period for the FEIS may not be less, nor without cause longer than, 30 days after the date of publication of the notice of availability.
3. For an EA, and for an ER if the department determines it will hold or afford the opportunity for a public hearing under s. Trans 400.12 (4) (b), the comment period may not be less, nor without cause longer than, 30 days after the date of publication of the notice of availability.

(c) A notice of availability shall be published for the following environmental documents:

1. SEE.
2. DEIS.
3. FEIS and ROD, or a combined FEIS/ROD.
4. EA.
5. ER, if the department determines that it will hold or afford the opportunity for a public hearing under s. Trans 400.12 (4) (b).

(d) The notice of availability of the environmental document may be combined with other public notices required under this chapter.

SECTION 60. Trans 400.12 (3) (a) is amended to read:

Trans 400.12 (3) (a) Whenever a proposed action requires an EIS, the department shall hold a

public hearing on the DEIS no sooner than 15 days after its notice of availability is published. The hearing shall be held prior to the ~~determination of the recommended selection of the final~~ course of action for the proposal, or the department may present a preferred alternative.

SECTION 61. Trans 400.12 (4) (title) is amended to read:

Trans 400.12 (4) (title) PUBLIC HEARING, OR OPPORTUNITY FOR PUBLIC HEARING, ON EA OR ER.

SECTION 62. Trans 400.12 (4) is renumbered Trans 400.12 (4) (a) and amended to read:

Trans 400.12 (4) (a) Unless EA procedures indicate the action is an EIS action, the department shall hold, or afford the opportunity for, a public hearing on an EA action prior to the issuance of a FONSI. A public hearing on an EA may be held by the department at the department's discretion and shall be held if a request for such a hearing is received by the department within the time specified in the notice of opportunity ~~for to request a public hearing provided for under s. Trans 400.11 (5) (c).~~ Whenever the department holds a public hearing or approves a timely request for a public hearing under this subsection, the department shall proceed in the same manner as provided for a public hearing on a DEIS under sub. (3), except that the public hearing shall be held no sooner than 15 days after publication of the public hearing notice and the identity of the EA or ER shall be referenced in the public hearing notice.

SECTION 63. Trans 400.12 (4) (b) is created to read:

Trans 400.12 (4) (b) The department may determine to hold a public hearing or afford the opportunity for a public hearing for ER actions. If the department determines to afford the opportunity for a public hearing for an ER action, the department shall follow EA procedures under par. (a).

SECTION 64. Trans 400.13 (1) (a) is repealed.

SECTION 65. Trans 400.13 (1) (am) is created to read:

Trans 400.13 (1) (am) The department shall develop a single document that consists of a combined FEIS/ROD, unless any of the following applies:

1. The FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns.
2. There are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action.

SECTION 66. Trans 400.13 (1) (b) (intro.) is amended to read:

Trans 400.13 (1) (b) (intro.) The record of decision, whether issued in combination with an FEIS or separately, shall contain the following information:

SECTION 67. Trans 400.13 (2) (a) is amended to read:

Trans 400.13 (2) (a) The decision to revise an EA to constitute a FONSI shall not be made until after the end of the ~~30-day comment~~ period specified in the notice of availability of the EA provided for under s. Trans 400.11 ~~(5) (b) (8).~~

SECTION 68. Trans 400.13 (3) is created to read:

Trans 400.13 (3) ER. (a) Unless the department determines to hold, or affords the opportunity for, a public hearing under s. Trans 400.12 (4) (b), an approved ER document constitutes the department's final decision on a proposed action.

(b) When the department holds, or affords the opportunity for, a public hearing on an ER, the decision to revise an ER to constitute a final decision on a proposed action shall not be made until after the end of the comment period specified in the notice of availability of the ER provided for under s. Trans 400.11 (8).

(c) If potentially significant impacts have not been identified during the ER availability period, the department shall revise the ER as appropriate and shall attach a summary of the public hearing, if a hearing was held, and a summary of any comments received and responses thereto. These items, along with a statement of no significant impact, shall constitute the final action determination document and the record of decision.

(d) If, at any point in the ER process, the department determines that the proposed action may have a significant impact on the quality of the human environment, an EIS shall be prepared before proceeding with the proposed action.

SECTION 69. Trans 400.14 (1) (a) is amended to read:

Trans 400.14 (1) (a) A reevaluation of a DEIS shall be prepared if 3 years have elapsed before the date of publication of the notice of availability of the FEIS or combined FEIS/ROD provided for under s. Trans 400.11 (4). A reevaluation of a DEIS shall also be prepared any time prior to the date of publication of the notice of availability of the FEIS or combined FEIS/ROD if, in the judgment of the department, there have been significant changes in the proposed action, the affected human environment, the anticipated environmental impacts or the proposed mitigation measures. If in either case the reevaluation indicates or confirms any such significant changes, a new environmental document or supplemental DEIS shall be prepared prior to proceeding with the proposed action. The supplemental DEIS shall be prepared and processed in the same manner as a DEIS under this chapter. Preparation of the supplemental DEIS shall not require withdrawal of previous approvals for those aspects of the proposed action not directly affected by the changed condition or new information.

SECTION 70. Trans 400.14 (2) (a) is amended to read:

Trans 400.14 (2) (a) A reevaluation of a FEIS shall be prepared any time there have been, in the judgment of the department, significant changes in the proposed action, the affected human environment, the anticipated environmental impacts or the proposed mitigation measures. If the reevaluation confirms any such significant changes, a new environmental document or supplemental FEIS shall be prepared prior to proceeding with the proposed action. The supplemental FEIS shall be prepared and processed in the same manner as a FEIS under this chapter. Preparation of the supplemental FEIS shall not require withdrawal of previous approvals for those aspects of the proposed action not directly affected by the changed condition or new information.

SECTION 71. Trans 400.14 (3) is created to read:

Trans 400.14 (3) REVISION OF FINAL ACTION DOCUMENT. (a) The department may revise a final action document, including a ROD, FONSI, ER, or CE, in order to do any of the following:

1. Select a different alternative, if the new selected alternative is fully evaluated in the FEIS, EA, ER, or CE to the same degree as the originally selected alternative.
2. Make substantial changes to mitigation measures or findings discussed in the final agency action.

(b) If the department revises a final action document under par. (a), those agencies that reviewed the FEIS, EA, ER, or CE shall be given an opportunity to review and comment on the revised final action document. To the extent practicable, the approved revised final action document shall be provided to all persons, organizations, and agencies that received the FEIS, EA, ER, or CE.

SECTION 72. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

(END OF RULE TEXT)

Signed this ____ day of _____ 2019.

Craig Thompson
Secretary
State of Wisconsin Department of Transportation