Mr. Daniel Hitt  
Director, Environmental Science Bureau  
New York State Department of Transportation  
50 Wolf Road  
Albany, NY 12232  

Dear Mr. Hitt:  

This letter is in response to your inquiry regarding the development of a joint Record of Decision between NY Department of Transportation (NYSDOT) and Federal Highway Administration (FHWA) to satisfy the statutory requirements of both the NY State Environmental Quality Review Act (SERQA) and the National Environmental Policy Act (NEPA).

It is standard practice for NYSDOT to issue its own Record of Decision (ROD) following the completion of a Federal Final Environmental Impact Statement (FEIS) to satisfy the Department’s requirements as noted in the New York Codes, Rules and Regulations Title 17 (17 NYCRR) Part 15, Procedures for implementation of State Environmental Quality Review Act Section 15.9 Record of Decision.

An option that also exists under Section 15.9 allows NYSDOT to jointly prepare a ROD with the Federal Agency to satisfy the requirements of SEQRA. As stated in 17 NYCRR, Part 15, Section 15.9: “in the case where a Federal FEIS has been prepared and the Department has jointly, with the Federal agency responsible for NEPA compliance, prepared a record of decision for the purposes of complying with 40 CFR 1505.2 (effective July 30, 1979), such record of decision, if adopted by the department, may be in lieu of and satisfy the requirements of subdivision (a) of this section.”

In an effort to shorten project delivery and improve the consistency between FHWA and NYSDOT RODs, NYSDOT inquired whether FHWA and NYSDOT could develop and execute a joint ROD to utilize the option noted in the preceding paragraph. In response to NYSDOT’s request, FHWA reviewed several recent NYSDOT RODs to assess the manner and format being used and to compare the substantive contents of NYSDOT’s RODs with FHWA RODs for the same project. In addition, FHWA reviewed established Council on Environmental Quality (CEQ) and FHWA NEPA regulations and guidance as well as New York SEQRA regulations and NYSDOT guidance to determine whether a joint decision document is allowable, encouraged, or explicitly forbidden.

Amongst a small sample of NYSDOT RODs reviewed by FHWA, there is an apparent inconsistency in the manner in which the NEPA document is adopted. Within these cases, information from the NEPA decision was sometimes referenced without formally adopting the NEPA documents, in others the NEPA ROD was formally adopted with the references made to SEQR relevant portions, and finally, some
examples had only a simple cover letter attached to the NEPA ROD which formally stated NYSDOT’s adoption of FHWA’s documents.

To determine whether there is any statutory or regulatory guidance on the subject, FHWA reviewed the following documents:

- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6002, Efficient Environmental Reviews for Project Decisionmaking.
- The Council on Environmental Quality (CEQ) Regulations for implementing the procedural provisions of the National Environmental Policy Act, 40 CFR 1500-1508.
- The Federal Highway Administration Technical Advisory T 6640.8A Guidance for preparing and processing environmental and section 4(f) documents.
- New York Codes, Rules and Regulations Title 17 (17NYCRR) Chapter I. Part 15, Procedures for implementation of State Environmental Quality Review Act Section 15.9 Record of Decision.

The purpose of the review was to determine if the statutory, regulatory and/or guidance documents include language which would allow, encourage, or explicitly forbid the development of a single ROD between FWHA and NYSDOT. Of the documents reviewed none forbade any such joint development. Particularly with respect to the environmental review process, such joint development was encouraged between the lead, joint lead, and participating agencies. The agencies are clearly encouraged to coordinate efforts in a way which reduces duplication and delay of the environmental review process. No language exists which clearly speaks to joint development of a ROD, but this joint development is perceived to be encouraged by language which clearly states that the agencies may combine environmental documents.

In 2005, SAFETEA-LU was signed into law. SAFETEA-LU encourages participation by state and local transportation decision makers in transportation planning and project delivery. One of the ways by which this participation is achieved is by the inclusion of the project sponsor as a joint lead agency. As a joint lead agency, the project sponsor participates as an equal partner to the federal lead agency throughout the project development process.

The Council on Environmental Quality (CEQ) Regulations for implementing the procedural provisions of the National Environmental Policy Act, Section 1506.2(c) states, ‘where state laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, federal agencies shall cooperate in fulfilling these requirements as well as those of federal laws so that one document will comply with all applicable laws.’

CEQ Section 1506.2(b) Elimination of duplication with state and local procedures states ‘Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements, unless the agencies are specifically barred from doing so by other law. Such cooperation shall to the fullest extent possible include:

1. Joint planning process
2. Joint environmental research and studies
3. Joint public hearings (except where otherwise provided by statute.)
4. Joint environmental assessments
CEQ Section 1500.4 (k), (n), (o) Reducing paperwork, and CEQ Section 1500.5 (g), (h), (l) Reducing delay both state that agencies shall reduce excessive paperwork and reduce delay by, Integrating NEPA requirements with other environmental review and consultation requirements, eliminating duplication with state and local procedures, by providing for joint preparation, and with other federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency and by combining environmental documents with other documents.

FHWA and NYSDOT have utilized statutory authorities to strengthen interagency cooperation, to cohesively streamline development and delivery of EIS’s, as well as improve the public review process by providing single, jointly developed and agreed upon EIS’s. Issuance of a ROD following the completion of a FEIS is a required part of the environmental review process for both FHWA and NYSDOT. Merging the current separately issued documents into one would provide the same benefits as those provided by the joint development of an EIS. Based on FHWA’s review of the regulations, it is clear that sufficient flexibility exists which does not require, but could allow the state and federal agencies to develop a single or joint ROD.

It must be noted however, that FHWA and NYSDOT will remain responsible for fulfilling their respective obligations to issue a ROD following the completion of a Final EIS. The agencies’ staff are advised to coordinate development in a way which would make clear that the document serves each of the agencies respective requirements. It is recommended that the ROD follow the format provided for in FHWA’s Technical Advisory T6440.8A but that it also include specific reference to and sufficient discussion to support NYSDOT’s findings as required by 17 NYCRR, Part 15.9.

Please contact Kaylie Cagnina at (518) 431-4125, extension 266, as discussed to coordinate development of formal guidance should your office decide to move forward.

Sincerely,

/s/ Alicia Nolan

Alicia Nolan
Director, Planning, Environment and Right-of-way

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