Technical Memorandum #11 – Environmental Compliance Considerations

Introduction

Once a decision is made to move forward with implementation of a statewide plan for a high-speed rail plan, the High-Speed Railway Commission (HSRC), as the project proponent, would be expected to identify a specific route option following sufficient planning, initiate preliminary engineering design to define the high speed rail project, and coordinate with federal and state agencies, as appropriate, on environmental review requirements. The project may require various approvals and permits from regulatory agencies, with approvals likely coming from funding sources, such as Federal Railroad Administration grant programs or Illinois Department of Transportation state or federal funds, and others being necessary due to a specific resource impact (e.g., take of a federally or state listed species, discharges into waters of the U.S.). The type and level of environmental reviews will depend on the anticipated resource impacts and need to comply with various environmental laws and regulations.

This memo outlines the potential federal and state compliance needs, which should be evaluated further during the next planning phase as more information on environmental resource issues and funding sources becomes known. Local laws are not specifically discussed, as they will need to be reviewed as the project is better defined and more information on specific activities in the various local jurisdictions is known.

Federal Regulations and Permitting

Compliance with the following federal environmental laws and regulations may be required, depending on the level of involvement from federal agencies and anticipated impacts on federally protected resources.

National Environmental Policy Act (NEPA)

An action by a federal agency will trigger compliance with this law. It could come from funding, issuance of a permit or authorization, or another specific approval. The level of review will depend on the specific federal agency conducting the review, as well as the nature of the project, anticipated resource concerns, public controversy or concerns, and property acquisition needs (as examples). Review considerations (known as classes of action) include Categorical Exclusion (no potential for significant impacts), Environmental Assessment (unknown resource impacts), or Environmental Impact Statement (potential for significant impacts, project is considered a major project). Each federal agency with an approval for the project will be required to demonstrate compliance with its NEPA Implementing Regulations. If multiple agencies are involved, a joint review process is preferred to streamline the reviews, with one agency typically serving as the lead agency and each agency making its own decision under NEPA or agreeing to a joint decision document. A review under NEPA will consider reviews under other federal laws, with the NEPA decision not being made until compliance with other laws has been demonstrated.

Endangered Species Act (ESA)

If the project could result in effects on federally listed species, a review under the ESA will be required, regardless of if a federal agency action was triggered separately. The provisions of ESA require either a federal consultation (Section 7) or incidental take permit (Section 10(a)) to address the effects. Under Section 7, the lead federal agency will consult with the U.S. Fish and Wildlife Service (responsible for terrestrial and freshwater aquatic species), and the process could involve a simple review using existing programmatic documentation (e.g., Programmatic Biological Opinion/Conference Opinion for Transportation Projects in the Range of the Indiana Bat, Northern Long-Eared Bat, and Tricolored Bat), a brief species analysis (informal), or a more complex (formal) review that requires a biological assessment. Which species or critical habitat would be affected and the nature of those effects will dictate the level of review, and conservation measures should be expected to avoid or minimize any effects, with more measures being necessary for potential adverse effects. Under Section 10(a), the project proponent will coordinate with the Service to evaluate and mitigate take of the species, which includes preparation of a habitat conservation plan that describes the species, assesses the effects, and presents a mitigation strategy to offset effects to individual species or groups of species and their habitat. This process is only used when a federal agency is not otherwise involved in approving the project (e.g., if no federal funding or other early approvals, the U.S. Army Corps of Engineers may be able to review the project under Section 7 as part of its permitting process, if applicable).

National Historic Preservation Act (NHPA)

Similar to NEPA, if a federal agency has an action on the project, compliance with the NHPA will be triggered (if no federal agency involvement, this law is not triggered). Similar to the ESA approach, though, the level of review under the NHPA will depend on the presence of historic properties (cultural sites, objects, districts, or other resources that are eligible for listing on the National Register of Historic Places) and nature of effects to those properties. The lead federal agency will lead the review and determine the appropriate level of consultation with the Illinois State Historic Preservation Office and Native American tribes under Section 106. If some activities would take place in an existing railroad right-of-way, they may be exempt from review under Section 106 per the Rail Right-of-Way Program Comment. For activities that do require consultation, the typical process entails defining the area of potential effects, conducting research and evaluating eligibility of cultural resources, evaluating effects on eligible resources (historic properties), and consulting with others. If any historic properties would be adversely affected, mitigation will be necessary to offset or reduce those effects through a memorandum of agreement or similar agreement document.

Farmland Protection Policy Act (FPPA)

As part of the overall environmental review process or NEPA review, the federal agency is responsible for reviewing if its action would result in a conversion of farmland. Farmland includes prime farmland, unique farmland, land of statewide or local importance, and land that could be used for farmland even if it is not active farmland, but it does not include urban or built up land and land already established for transportation uses (e.g., within an established right-of-way). The project proponent will coordinate with the federal agency and Natural Resources Conservation Service in Illinois on the proposed conversion, evaluation of alternatives if needed, and identification of ways to offset the loss of farmland if a large amount would be converted. The documentation uses a farmland conversion form established

by the U.S. Department of Agriculture (Form AD-1006).

Department of Transportation Act (DOT Act)

As part of the overall environmental review process when a U.S. Department of Transportation agency has an action on the project, the agency is responsible for complying with Section 4(f) of the act if use of protected properties may be proposed. These properties include recreation areas, parks, refuges, and historic sites. Conversion or use of the land, typically through property acquisition, right-of-way modifications, or temporary construction work areas, requires coordination with the official with jurisdiction over the land and may require analysis of alternatives and consideration of measures to minimize or offset the loss of land or recreation activities due to the use. For historic sites, this review is typically coordinated with the Section 106 consultation process.

Clean Air Act (CAA)

Also as part of the NEPA review, federal agencies review their actions under the Clean Air Act to evaluate conformity with air quality standards and state or other applicable implementation plans. Railroad projects follow the general conformity regulations and require emission inventories for construction and operation activities that could increase emissions in areas with an existing non-attainment or maintenance status for criteria pollutants based on the U.S. Environmental Protection Agency's Green Book. Highway and mass transit projects follow the transportation conformity regulations and are evaluated for consistency with the state implementation plan.

Other Federal Regulations

Various other federal regulations may need to be considered based on the resource impacts and federal agencies involved in the review. The project proponent will coordinate compliance with these during the NEPA review process. For example, FRA has noise regulations that apply to railroad projects, and a noise and vibration assessment should be anticipated based on the proposed establishment of new high speed rail service. If any aspect of the project is in or near the coastal zone (near Lake Michigan), a review under the Coastal Zone Management Act may be required and could fall under the federal consistency review process (if a federal agency is involved) or the state process to ensure consistency with the State of Illinois Coastal Management Program. Similar to Section 4(f), the conversion of land associated with a property that was purchased or developed using Land and Water Conservation Act funds would require a review under Section 6(f) of that act, regardless of federal agency involvement. Federal laws and executive orders also cover hazardous materials, floodplains, migratory birds, invasive species, energy resources, and other topics, which are considered during the NEPA review and may still apply with no federal action.

Clean Water Act (CWA; Section 404)

Permitting under Section 404 of this law will be required through the U.S. Army Corps of Engineers if discharges into waters of the U.S. are expected. The level of permitting will be based on the nature and extent of those discharges, with nationwide permits covering the smallest impacts and individual permits covering the largest. Some nationwide permits are self-authorizing and do not require further review by the Corps. If the permit triggers a review and permit authorization or issuance through the Corps, the Corps will consider other federal laws and determine if they have already been complied with

and cover the permitting action (typically limited to the activities specifically requiring the permit, not the entire project). Compensatory mitigation may be required, depending on the extent of impacts to wetlands and other waters (streams, ponds, lakes). The project proponent will be responsible for coordinating on the permit requirements, which is typically initiated during the final design phase once sufficient design is available to accurately calculate impacts. Early coordination can be conducted to understand anticipated permit requirements and establish an approach for the permit process.

CWA (Section 401)

The Section 404 permit through the Corps will also trigger a water quality certification under Section 401, which is issued through the State (Illinois Environmental Protection Agency). The certification is attached to the federally issued permit and typically contains specific measures and requirements for activities that could affect water quality to ensure compliance with state laws and water quality standards. The State has already certified the current nationwide permits (typically re-certified every 5 years as the nationwide permits are renewed) with various conditions but would need to review applications for other types of discharge permits. The project proponent will coordinate the certification request in conjunction with the Corps permit process, and the water quality certification will have to be issued before the Corps permit.

CWA (Section 402)

Although the Clean Water Act is a federal law, the Illinois Environmental Protection Agency was delegated permit authority under the National Pollutant Discharge Elimination System and issues discharge permits for certain activities, such as construction activities that cause stormwater discharges. The project proponent or its construction contractor will be responsible for obtaining authorization under the currently active Illinois General NPDES Permit for Construction Site Activities before initiating construction activities. This typically requires preparation of a stormwater pollution prevention plan to identify the types of discharges associated with the project and measures (best management practices) that will be implemented to minimize or avoid those discharges throughout the construction phase. The permit coverage should be obtained just before construction to cover the final construction plans and contractor approach for minimizing soil erosion, sedimentation, and other water quality impacts.

State Regulations and Permitting

Illinois does not have a comprehensive environmental law equivalent to NEPA, but various state laws help protect the environment and require permits for certain activities. IDOT typically reviews projects it funds or oversees under Federal Highway Administration requirements when federal funding is involved and has a reduced review when state funding is involved without federal funding. The IDOT Bureau of Design and Environment Manual outlines the typical review expectations for project reviews, with some provisions applying regardless of a federal action. IDOT reviews environmental impacts based on the nature of the project and potential for resource impacts, similar to federal agencies under NEPA.

Key state laws that may apply to the high-speed rail project, depending on specific state actions and resource impacts are discussed below.

Illinois Endangered Species Protection Act

This state law requires take authorization through the Illinois Department of Natural Resources (for

listed animals) or property landowner (for listed plants) for the take of endangered and threatened species and applies to any activity in the state. State-listed species include federally listed species as well as others at risk of becoming threatened or endangered in Illinois. State and local agencies are also required to consult with the Department to assess the potential for effects on state-listed species. Information from the ESA process may be used to support the take authorization process, which requires preparation of a conservation plan, analysis of impacts to listed species, and identification of mitigation measures.

Illinois State Agency Historic Resources Preservation Act

This state act is similar to the NHPA but is only triggered when no federal action is involved on a state agency action. State agencies follow a similar review process when they issue funds, permits, or licenses for projects and must evaluate the effects of their actions on historic properties and consult with the Illinois State Historic Preservation Office.

Illinois Interagency Wetland Policy Act

State agencies are required to compensate for wetland impacts when funding projects, which involves an assessment of wetland impacts and preparation of a plan to offset the impacts. The state definition of wetlands is similar to the federal definition but includes other features that essentially function as a wetland. The state agency will coordinate with the Illinois Department of Natural Resources on approval of a wetland mitigation plan.

Illinois Rivers, Lakes, and Streams Act

Any project that involves construction in the floodway of a river or stream or could affect a public water requires a permit under this act. The Illinois Department of Natural Resources is responsible for issuing the permits and reviewing the effects on waters in the state. Some activities may fit under general permits, while others require individual permits. The project proponent is responsible for verifying coverage under an existing general permit or submitting an application for an individual permit.

Illinois Natural Areas Preservation Act

This state act protects designated natural areas and prevents modifications to them that could adversely affect ecological functions. Projects that may cross through natural areas require review for compliance with the management plan for the area and may require alternative considerations. The project proponent would coordinate with the Illinois Department of Natural Resources and managing entity if a natural area could be affected by the project.

Illinois Open Space Lands Acquisition and Development Act

This state act is similar to the Section 6(f) federal review and requires coordination and review for conversion of lands funded under the act. The project proponent would coordinate with the Illinois Department of Natural Resources and land managing entity, which is typically a local agency, to discuss the potential conversion and identify an agreeable approach to implementing the project.

Illinois Environmental Protection Act

The Illinois Environmental Protection Agency administers this act to protect the quality of the

environment and issue permits for activities that could affect water quality, air quality, land resources, noise, and other aspects of the environment. Most permits apply to stationary sources and point-source discharges that would not apply to a transportation project. Water quality, waste discharge, or hazardous material permits may apply to the high-speed rail project, pending further review. The project proponent would apply for the required permits through the Agency.

Timing of Compliance Reviews

Further planning will help refine the preferred route for a high-speed rail project and identify the expected compliance requirements as more information becomes known about agencies that would be involved or have actions on the project. Specific permitting requirements would be identified during the environmental review phase as more information on environmental resource impacts becomes available. Based on the type of project that would be proposed, the FRA is likely to be the lead federal agency if its grant funding is used, and IDOT would be responsible for state requirements. FRA conducts its environmental review process concurrently with preliminary engineering as part of the project development phase. Permits are typically obtained during the final design and construction phases, depending on the specific permit. The table below outlines an approximate duration for compliance reviews and obtaining permits to use for schedule planning. These durations will vary based on specific resource concerns, agency involvement, and coordination between everyone involved in the process.

Law or Regulation	Agencies Involved	Duration of Review/Permitting*
Project Development Phase		
NEPA	Federal Action Agency(ies)	1 year – 4+ years
ESA	Lead Federal Agency, USFWS	6 months – 1+ year
NHPA	Lead Federal Agency IL SHPO	6 months – 1+ year
FPPA	Lead Federal Agency, NRCS	~3 months
DOT Act (Section 4f)	USDOT Federal Agency	3 months – 1 year
CAA	Federal Action Agency(ies)	3 months – 1 year
Other Federal	Various Federal Agencies	3 months – 1 year
IL ESA	IDOT, IL DNR	6 months – 1 year
IL Historic Resources Act	IDOT, IL SHPO	6 months – 1+ year
IL Natural Areas Act	IDOT, IL DNR	3 months – 6 months
IL Open Space Act	IL DNR, local agency	3 months – 6 months
Final Design/Construction Phases		
CWA	USACE, IL EPA	3 months – 1 year
IL Wetland Policy	IDOT, IL DNR	3 months – 9 months
IL Rivers, Lakes, and Streams Act	IDOT, IL DNR	3 months – 1 year
IL Environmental Protection Act	IDOT, IL EPA	1 month – 1 year

**Duration is an approximate range and includes initial coordination, document preparation, and supporting tasks to facilitate the agency reviews. Initiating a compliance task should not be done until sufficient information on the project is available to properly analyze effects on resources, so some tasks may start later than others. Some compliance activities could ultimately*

take longer than shown due to various factors. Some laws have established timeframes that begin once the regulatory agency initiates its process, such as once an initial class of action determination is made for NEPA or a consultation request is received for ESA and NHPA. The overall timeframe will depend on the level of review or permitting and various factors involved in the review, such as requests for additional information and agency staff review times. Most compliance activities can be conducted concurrently and have overlapping review timeframes.