

(H. B. 2729)
(Conference)

(No. 212-2015)

(Approved December 8, 2015)

AN ACT

To amend Section 4 of Act No. 416-2004, as amended, known as the “Environmental Public Policy Act,” and establish the functions of the Permit Management Office and the Environmental Quality Board in certain highways and transportation projects where the Department of Transportation and Public Works and the United States Department of Transportation act as co-lead agencies in the preparation of an environmental impact statement under Section 102(C) of the National Environmental Policy Act of 1969, as amended, and Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, as amended, for purposes of improving and streamlining the environmental evaluation of such projects by the Government of the Commonwealth of Puerto Rico and of the United States of America, thus enabling the preparation of a single environmental document and improving public involvement and interagency coordination in such environmental review processes; and for other purposes.

STATEMENT OF MOTIVES

Act No. 9 of June 18, 1970, as amended, known as the “Environmental Public Policy Act” (hereinafter, Act No. 9), was the first legislation outside of the federal framework that required the preparation of an Environmental Impact Statement (EIS) (see, U.S. Environmental Protection Agency, Office of Research and Development, Environmental Impact Requirements in the States: NEPA’s Offspring (1974)). Six months earlier, on January 1st, 1970, the Federal Government had approved the National Environmental Policy Act of 1969, (NEPA), which served as a model for our main environmental legislation.

NEPA's Section 102(2)(C) provided that all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, an EIS on the impact of such actions. Similarly, Act No. 9, *supra*, provided that the departments, agencies, municipalities, public corporations, and instrumentalities of the Commonwealth of Puerto Rico and its political subdivisions shall prepare an EIS before taking any action or promulgating any government decision that significantly affects the quality of the environment.

Subsequently, Act No. 9 was repealed by Act No. 416-2004, as amended, (hereinafter, Act No. 416), which also provides in Section 4B(3) for the preparation of an EIS. Said Section, for all intents and purposes, was identical to Section 4C of Act No. 9 and its homologous Section in NEPA, Section 102(2)(C). As stated in *Misión Industrial de Puerto Rico v. J.C.A.*, 145 DPR 908, 920 (1998), Act No. 9 was mostly taken, almost literally, from NEPA. See, N. Martí, Article 4C of The Environmental Public Policy Law: A need for clarification, 36 Rev. Col. Abogados 771 (1975). Act No. 416 and its predecessor are essentially identical in all that pertains to the environmental review process on the preparation of an EIS.

Disseminating NEPA's Method as an Environmental Impact Assessment Technique. Puerto Rico was not the only jurisdiction that relied on NEPA as a source or guideline for the use of the environmental impact assessment method in the preparation of EISs. According to Professor Nicholas Robinson, from the Congress adoption of NEPA's Section 102(2)(C) to 1992, more than seventy-five (75) jurisdictions at the international level had adopted the environmental impact assessment method as a decision-making tool.

By January 1976, thirty (30) states and Puerto Rico required the preparation of EISs, although they did not necessarily have statutes as comprehensive as NEPA. This type of state legislation is commonly known as State Environmental Policy Acts (SEPA). Thirteen (13) states and Puerto Rico had comprehensive legislation such as NEPA. Fourteen (14) states required EISs for certain types of actions or activities, or for certain geographical areas, agencies, or activities.

Five (5) years after NEPA's approval, Puerto Rico and states such as California, Hawaii, Connecticut, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, Texas, Virginia, Washington, and Wisconsin had adopted legislation requiring the preparation of EISs. By 1981, twenty-eight (28) jurisdictions required the preparation of EISs. Sixteen (16) of those jurisdictions and Puerto Rico followed NEPA's model and four (4) others had promulgated comprehensive executive orders establishing procedures equivalent to EISs. Nine (9) states required environmental assessments for certain limited specific purposes.

Costs Associated with the Formulation of EISs in Concurrent NEPA/SEPA Processes. When a proposed action or project requires —particularly a high-profile one in terms of scale, size, type, or impact— the approval of state and municipal bodies, as well as that of the Federal Government, such activity may be subject to both NEPA and the corresponding SEPA. Since the different SEPA are based on NEPA, including Act No. 416, they serve the same analytical functions, that is, assessing the potential impact of proposed actions or projects on the environment and protected assets such as the air, water, soil, historical sites, certain wildlife species, among others, and the alternatives thereof.

The potential duplication and the expenses inherent to the use of a public policy instrument, such as the requirement to report environmental impacts, entails the consideration of the institutional costs to be incurred. For example, the U.S. Department of Energy stated that the payment to a contractor to prepare an EIS from 2003 to 2012 ranged between sixty thousand (60,000) and eight point five (8.5) million dollars. A report to the Council on Environmental Quality (CEQ), a federal entity with functions similar to those of the Environmental Quality Board as to the promulgation of procedural and substantive provisions relating to the EIS process, estimated that, in 2003, an EIS typically cost from \$250,000 to \$2 million.

EISs prepared pursuant to SEPAs are equally costly and may also result in project delays. Although there is no public information available for Puerto Rico, it is believed that the costs associated with the preparation and subsequent approval of EISs for projects with a significant potential impact or high-profile, or comprehensive or technologically complex projects shall exceed tens of thousands of dollars and shall bring about significant delays to the eventual development and completion of the project. In the case of highway projects, the cost of an environmental document as well as the scientific and engineering-related research may range between two point five (2.5) and three (3) billion dollars. But there is no certainty as to whether the proposed action or project would be completed.

Furthermore, NEPA-based actions involving challenges to EISs are not successful in general. For instance, according to a report of the Government Accounting Office (GAO), the federal government successfully defended its decisions in more than 50% of the cases between 2008 and 2011. For example, in 2011, the Federal Government prevailed in 68% of NEPA-based actions. However, legal actions have the effect of delaying the commencement of actions or projects included in the environmental document and increasing costs due to the risk of litigation and litigation expenses. Since the purposes of NEPA and SEPA overlap,

the requirement to comply with both statutes results in a duplication of efforts and in inefficiencies, a situation that has been subject to criticism due to the long processes and the costs entailed.

The identified inefficiencies may result in the concurrent or consecutive repetition of efforts and activities when an action, development or project is subject to both NEPA and SEPA. This situation was promptly identified by the Federal Government when it began implementing NEPA.

Measures to Streamline NEPA Processes. Undersigned on March 5, 1970, two months after NEPA's approval, Executive Order 11514, 35 Fed. Reg. 4247, provided that the federal agencies shall, firstly, consult with appropriate Federal, State, and local agencies in carrying out their activities as they affect the quality of the environment; and secondly, encourage State and local agencies to adopt similar procedures to inform the public about those activities that affect the quality of the environment.

Environmental Impact Statements are the tangible output of the NEPA examination process. Their purpose is to provide, during project planning and before project implementation, a full and fair discussion of significant environmental impacts expected from the proposed project. Before NEPA and SEPAs, there was little or no supervision of public or private activities with a potentially detrimental environmental impact. Subsequently, activities at the federal level as dissimilar as the realignment of highways, *City of Carmel by the Sea et al. v. U.S. Dept. of Transportation*, 123 F. 3d 1142 (1997), or the restoration of a federal court, *Save the Courthouse Committee v. Lynn*, 408 F. Supp. 1323, 1327, 1343. (S.D. N.Y. 1975), required the presentation of an EIS. The situation in Puerto Rico is not different. The preparation of EISs has been required for activities as dissimilar as the adoption by the Department of Health of regulations on the use of pesticides, see, *Salas Soler et al. v. Secretary of Agriculture*, 102

D.P.R. 716 (1972); the construction of a new highway on the east of Puerto Rico, known as Route 66, see, *Colón-Cortés v. Pesquera*, 150 D.P.R. 724 (2000); the construction of an aqueduct and sewer system on the north of Puerto Rico, known as the Superaqueduct; see, *Misión Industrial et al. v. Junta de Planificación et al.*, 142 D.P.R. 656 (1997), the restoration of the hotel facilities at Condado, known as the Condado Trío, see, *Mun. de San Juan v. J.C.A.*, 152 D.P.R. 673 (2000); the construction of a gas pipeline between the south and the north of the Island, known as the Vía Verde Project, see *Lozada Sánchez et al. v. A.E.E.*, 2012 TSPR 50, 184 DPR ____ (2012); or the development of a residential, commercial, and tourist project in the Municipalities of Aguada and Aguadilla, see, *In re: Municipio de Aguada y Municipio de Aguadilla v. J.C.A.*, 2014 TSPR 7, 190 D.P.R. ____.

The Issue of the Duplication of NEPA Process and Related Procedures. As a result of the efforts to streamline the preparation of environmental documents and, in general terms, improve the NEPA processes, President Carter issued Executive Order 11991 in 1977. This prompted the Council for Environmental Quality (CEQ) to adopt regulations providing for the coordination of environmental studies or review processes with state governments and municipalities. See, National Environmental Policy Act-Regulations, 43 Fed Reg 55,978 (Nov. 29, 1978) (coded in 40 C.R.F. pt. 1500). Section 1506.2(b) describes measures to address the issue of the delays caused by the duplication of similar processes, implemented for the benefit of the same institutional and citizen populations, under NEPA and SEPAs. Such measures include the cooperation between federal and state or local agencies which shall include: (1) joint planning processes; (2) joint environmental research and studies; and (3) joint public hearings, among others. Moreover, cooperation is required for the preparation of joint environmental documents, that is, such cooperation shall to the fullest extent possible include joint EISs, particularly where State laws or local ordinances have EIS requirements in addition to but not

in conflict with those in NEPA. These regulations were promulgated bearing in mind, specifically, the assistance provided by Federal instrumentalities to jurisdictions that administer “little-NEPAs” such as Puerto Rico. The preamble to the new regulations (43 Fed. Reg. 5978, 55986) stated that, approximately, half of the states already have some sort of EIS requirement, either adopted by legislation or promulgated administratively. Under such circumstances, cooperation by Federal agencies was required to achieve compliance with both state and federal requirements so that all the applicable requirements are met in a single document.

Thus, the regulations promulgated for the implementation of the NEPA specifically encourage federal agencies to cooperate with the states in order to reduce to the fullest extent possible the duplication of similar requirements between the NEPA and state and local regulations, such as those of Puerto Rico. Likewise, such regulations promote the holding of joint hearings and the preparation of joint environmental research, studies, reviews, and EISs. In brief, Federal agencies shall cooperate to ensure that state and Federal requirements are met so that a single environmental document complies with all the applicable laws.

However, Congress considered such measures to be insufficient to reduce costs and the duplication of efforts, and to expedite the development and subsequent construction of certain types of projects: highways or transportation projects. Consequently, on two recent occasions, under the administration of two different Presidents, legislative measures were adopted, to wit: the “Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users” (SAFETEA-LU) in 2005, by President George W. Bush, and “Moving Ahead for Progress in the 21st Century Act,” (MAP-21) (P.L. 112-141) in 2012, by President Barack Obama, for the purpose of reducing delays and costs associated with the development of public transportation projects. Both laws include citizen participation guarantees different from those under NEPA, and introduce process

improvements and interagency collaboration and coordination requirements aimed at expediting project delivery.

Streamlining NEPA Processes for Transportation or Highway Projects: SAFETEA-LU. Concerns raised by inefficiencies in the environmental study or review process of high-profile and complex highway or transportation projects, and the resulting delays in their completion prompted Congress to take action to streamline the environmental process specifically, thus improving interagency and intergovernmental cooperation for this kind of works. See, CRS Report RL 33267, The National Environmental Policy Act: Streamlining NEPA, CRS Report for Congress, Feb. 13, 2006. Although streamlining measures had been adopted previously, one step further was taken in 2005 with the approval of the federal law known as the SAFETEA-LU.

A transportation or highway project may be affected by dozens of federal, state, and local environmental requirements, administered by multiple agencies. Congress identified improved interagency cooperation as a critical element to the success of environmental streamlining. The measures adopted included codifying existing NEPA regulatory requirements, such as: designating the U.S. Department of Transportation (DOT) as the lead agency for transportation projects; specifying the role of the lead and cooperating agencies, and allowing deadlines for decision making to be set. Among other measures, Section 6002 of SAFETEA-LU provides for more efficient environmental reviews, designates responsible agencies, and establishes a jurisdictional term of 180 days to file a claim seeking review of a permit, license, or approval issued by a Federal agency for a highway project after the publication of a notice in the Federal Register announcing that said permit, license, or approval is final.

The environmental review process set forth in Section 6002 is mandatory for every DOT project for which an EIS is prepared. Under Act No. 416, if an EIS fails to incorporate the requirements of SAFETEA-LU, specifically procedural requirements relating to public involvement in the different development phases of an environmental document, it is deemed to be insufficient to conduct the environmental analysis for a transportation project sponsored by the DOT and its instrumentalities such as the Federal Highway Administration (FHWA).

SAFETEA-LU combines the planning and development process of highway projects into one structured process to allow the involvement of and interaction between government agencies or instrumentalities and the people. To prevent delays environmental aspects must be addressed early in the planning stage of a project, thus promoting greater cooperation and communication between the FHWA and its state counterparts. The procedures established by SAFETEA-LU are mandatory for every highway and public transportation project for which an EIS is prepared under NEPA.

Roles of Agencies and Government Coordination under SAFETEA-LU.- This federal legislation highlights which are the agencies responsible for streamlining environmental processes, to wit: the lead agency, joint lead agencies, participating agencies, and cooperating agencies. Act No. 416 only mentions the “lead agency,” whereas Regulations No. 7948 of November 30, 2010, known as the “Regulations for the Evaluation and Processing of Environmental Documents of the Environmental Quality Board” (hereinafter, Regulations 7948), whereby the provisions of Act No. 416 are implemented, only refers to the “consulted agency” and the “lead agency” (See, Rule 109 C and D, respectively). Rule 109 defines “consulted agency” as “the government agency that, because of their involvement or expertise, is asked by the Permit Management Office (PMO) to provide recommendations regarding a submitted environmental document.” Moreover, it

defines “proposing agency” [lead agency] as “the PMO or any other agency, entity, instrumentality, department or Autonomous Municipality with jurisdiction over the action to be undertaken...” Rule 109W also defines the term “Concerned Government Entity.” It is one of the different agencies listed in the rule, among which are, the Highways and Transportation Authority (HTA) and the DTOP. These are equivalent to, depending on the project, proposing or consulted agencies.

Under SAFETEA-LU, the DOT is the lead agency in the environmental review process for every transportation or highway project sponsored by the Federal Government. NEPAs’ practice of allowing joint lead agencies is maintained. The state project sponsor serves as the joint lead agency in conjunction with the FHWA, for purposes of preparing any environmental document under NEPA, and may prepare any such environmental document required in support of any proposed action, provided that the FHWA, as lead agency, furnishes guidance in such preparation and independently evaluates such document, which document is approved and adopted prior to any subsequent action by FHWA. Joint lead agencies are responsible for facilitating the environmental review process and preparing any appropriate environmental analysis or review document. The DOT ensures that the project sponsor complies with all design and mitigation commitments made jointly by the DOT and the project sponsor for any environmental document. It shall also ensure that such document is appropriately supplemented if project changes become necessary. Finally, the lead agency shall have the authority and responsibility to take such actions as are necessary and proper, within the scope of its authority, to expedite the resolution of the environmental review process for the proposed action or project. It is also responsible for preparing or ensuring that any environmental document required under NEPA is completed.

SAFETEA-LU creates a category of agency involvement—participating agencies—which do not exist under NEPA or Act No. 416. The creation of participating agencies seeks to encourage government agencies at any level, with jurisdiction over or an interest in the proposed project, to be active participants in the NEPA evaluation. The lead agency shall be responsible for inviting and designating participating agencies in accordance with the provisions of SAFETEA-LU. The lead agency identifies, as early as practicable, any other Federal and non-Federal agencies, (e.g. state agencies or municipalities that may have an interest in the project) and invites them to become participating agencies in the environmental review process thereof.

Any Federal agency that is invited by the lead agency to participate in an environmental review process is designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that it has no jurisdiction or authority with respect to the project; has no expertise or information relevant to the project; and does not intend to submit comments on the project. Designation as a participating agency does not imply that the participating agency supports a proposed project; or has any jurisdiction over, or special expertise with respect to the evaluation of, the project.

An agency may also be designated a cooperating agency, according to NEPA's regulations. In such capacity, a cooperating agency participates, at the earliest possible time and to the extent its resources allow, in NEPA's environmental review process, in the scoping process; on request of the lead agency, assuming responsibility for developing information and preparing environmental analyses including portions of the EIS on which the cooperating agency has special expertise. At the lead agency's request, make staff support available to enhance the latter's interdisciplinary capability. According to the

FHWA, a cooperating agency means any agency other than the lead agency that has jurisdiction by law, or special expertise with respect to the environmental impact involved in a proposed project or project alternative. On the other hand, participating agencies are those with an interest in the project, whereas cooperating entities have a higher degree of authority, responsibility, and involvement in the environmental review process. If an agency does not accept an invitation to serve as cooperating agency, it is treated as a participating agency.

Act No. 416 identifies the PMO as the proponent [lead] agency and with interest or recognized expertise in relation to any action that requires compliance with the provisions of Section 4(b)(3) on the preparation of EISs for projects with a significant environmental impact.

Notification of Initiation of the Environmental Review Process and Involvement of the Public and Agencies. In projects covered by SAFETEA-LU, the project sponsor shall notify the FWHA of the type of work, termini, length, and general location of the proposed project, together with a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the FHWA that the environmental review process should be initiated. The public shall be notified upon publication in the Federal Register and the press on the initiation of an environmental review or study process for a highway or transportation project.

Contrary to the practice under Act No. 416, under SAFETEA-LU, the lead agency provides an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project. This occurs prior to preparing an environmental document, even a preliminary one. Once input is received, the lead agency proceeds to define the project's purpose and need for purposes of any environmental document which the lead agency is responsible for preparing.

Agencies and the public also participate in the process of determining the range of alternatives to be considered for the project. Following the participation process, the lead agency determines the range of alternatives for consideration in any document which the lead agency is responsible for preparing. The input to determine the purpose and need, and the range of alternatives may be concurrent or sequential. However, if the opportunities are concurrent, and if the purpose and need statement is substantially altered as a result of the public and participating agency involvement, then the lead agencies must consider whether an opportunity for involvement in the range of alternatives that derive from the new purpose and need is warranted. Neither Act No. 416 nor Regulations 7948 provide for public or agency involvement in the statement of the purpose and need for proposed actions.

Lead agencies coordinate and determine, on a case by case basis, when and in what form participating agency and public involvement shall occur. After considering the input of other agencies and the public, lead agencies discuss and work out their differences and reach agreements on the statement of purpose and need for the project, because other activities that depend on the identification of alternatives shall be delayed until the lead agencies agree.

The lead agency also determines, in collaboration with participating agencies the methodologies to be used and the level of detail required in the analysis of each alternative for a project. The FHWA emphasizes on the use of the scoping process to solicit public and agency input on the use of analysis methodologies to evaluate the direct and indirect impact of the proposed actions. If the scoping process is used in EIS's processes under Act No. 416, it generally fails to include public and agency involvement.

Coordination Plan, Scheduling, and General Process Management. Under SAFETEA-LU, the lead agency is responsible for drafting a Coordination Plan for coordinating public and agency involvement in, and comment on, the environmental review process for a proposed project. The level of detail of the Coordination Plan is determined by the lead agency and includes how lead agencies have divided the responsibilities for compliance, and how the plan provides opportunities for input from other agencies and the public, and identifies how said input shall be channeled.

The lead agency may establish as part of the coordination plan—strongly encouraged, but not required— after consultation with each participating agency a schedule for completion of the environmental review process for the proposed project or action. If established, concurrence in the schedule by the participating agencies is required, and factors such as the responsibilities of participating agencies under applicable laws; the resources available to the cooperating agencies; overall size and complexity of the project; the overall schedule for and cost of the project; and the sensitivity of the natural and historic resources that could be affected by the project shall be considered. If a schedule is established, just cause shall be required for any proposed modification, and the concurrence of the affected cooperating agencies shall be required to shorten the same. The public and agencies shall have the opportunity to provide their input for the Coordination Plan and proposed schedule.

The lead agency shall establish deadlines for comments by the public and agencies on a draft or preliminary EIS during the environmental review process for a proposed action or project. Such period shall not exceed sixty (60) days after publication in the Federal Register of notice of the date of public availability of such document. For all other comment periods established by the lead agency for agency or public comments, a period of not more than thirty (30) days after the

publication in the Federal Register of notice of the availability of the document is established. The lead agency may modify such periods by agreement of the project sponsor and all participating agencies or for just cause. The period established under Regulations 7948 is shorter: thirty (30) calendar days after the publication of notice of the availability of the EIS.

Lead agencies and the participating agencies are required to work cooperatively to identify and resolve issues or disputes that could delay completion of the environmental review process or could result in denial of any approvals required for the project under applicable laws. For such purposes, the lead agency shall make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping. Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. SAFETEA-LU defines issues of concern as any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for a proposed action or project.

Essential Nature of Public Involvement under SAFETEA-LU.- The public policy of the FHWA establishes that, to the fullest extent possible, all environmental investigations, reviews, and consultations shall be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document, such as the required EIS. Public involvement is an essential process, which must be developed, according to the FHWA, from a systematic and interdisciplinary approach. The use of a multiplicity of involvement mechanisms such as public workshops or meetings, verbal or

written input, conference calls, public notices, distribution of printed materials, or any involvement technique or medium is promoted.

Prior to SAFETEA-LU, there was no public involvement on purpose and need and on the range of alternatives in advance of the draft or preliminary EIS. SAFETEA-LU created these and other public involvement opportunities. The lead agency now must provide opportunities for public involvement in defining the purpose and need and determining the range of alternatives to be considered. The FHWA rules or guidelines that implement the SAFETEA-LU provide that public involvement can occur early during the transportation planning process, or later during the scoping process as determined by lead agencies on a case-by-case basis. The public must be provided with the opportunity to comment on the draft of the EIS before it becomes a Preliminary EIS and to comment on any other materials on which comment is requested. Neither Act No. 416 nor Regulations 7948 provide similar involvement opportunities.

SAFETEA-LU introduced practices regarding streamlining objectives thus modifying NEPA's statutory or regulatory provisions, which do not exist under Act No. 416, to wit:

- The establishment of a new entity in the NEPA process, known as the "lead agency," which includes those that have the intent of submitting comments on NEPA documents, such as the EIS, in addition to those that meet the definition of cooperating agency.
- The processes to be followed by lead and participating agencies in the joint development of the statement of purpose and need and alternatives for the project, including setting deadlines for comment.
- Public involvement in the process of developing the statement of purpose, need, and goals of the proposed action, before preparing a Preliminary EIS.

- Public involvement in the process of developing alternatives for the proposed action, before preparing a Preliminary EIS.

Changes introduced to Act No. 416 by Act No. 161 and Fundamental Differences with the Federal Statute. With the approval of Act No. 161-2009, as amended, known as the “Puerto Rico Permit Process Reform Act,” the Environmental Compliance Evaluation Division (DECA, Spanish acronym) of the Permit Management Office assumed the following powers, among others, previously exercised by the EQB:

- To receive environmental documents, including EISs, prepared in accordance with Section 4(b)(3) of Act No. 416; and
- To obtain recommendations from other government entities, by means of their representatives detailed in the PMO, on the proposed action and the environmental documents.

DECA, in turn, makes recommendations to the Executive Director of the PMO, who eventually determines whether or not the environmental document is acceptable. The public involvement process under Act No. 416 begins with the publication of a Public Notice of Intent to Present an Environmental Document. Said notice informs of the availability of a draft environmental document or EIS, if it were the case, for public review. Even though it is similar to NEPA, there are fundamental procedural differences between SAFETEA-LU and Act No. 416 regarding specifically the form, manner, and time for public involvement in the development of an environmental document, including the formulation of the scope of the document, the statement of purpose and need, and the range of alternatives for evaluation.

First, whether or not the PMO serves as the lead agency of a proposed action, it is the agency that learns about the intent of an agency or private proponent to initiate an environmental review process. This can occur during the Pre-Consultation process, which takes place before the filing of the environmental document with the PMO, upon receipt of the notice of intent to initiate an environmental review process or during the Request for Recommendations phase, which is used to verify with the PMO the availability of infrastructure for the proposed action. The last two phases entail the informal filing of a draft environmental document. Said document should not be confused with the environmental document known as the Preliminary EIS, which is presented for public review in accordance with Rule 115E of Regulations 7948, although one can expect that the draft document filed for the Request for Recommendations and the document presented for public review would be the same. The PMO examines the draft and determines whether or not it shall consult with or procure an opinion on the proposed action from other government instrumentalities with interest therein, and oversees the formal public environmental review process, and lastly, certifies whether or not the requirements of Section 4(b)(3) of Act No. 416 have been met. Unlike the local law, NEPA and SAFETEA-LU do not provide for a separate agency to oversee the environmental review process and certify whether the provisions of Section 4(b)(3) of Act No. 416 are complied with. Under NEPA and SAFETEA-LU such responsibility falls on the lead agency.

Second, the environmental review process in Puerto Rico provides for the filing with the PMO of a draft environmental document whether by the interested agency or private entity, prior to initiating the interagency or public consultation processes and even, prior to stating the intent to carry out an action that may have a significant impact on the environment. Under NEPA and the FHWA regulations, firstly, a Notice of Intent on the decision to prepare an environmental document is

published. Then, the scoping process is conducted. The FHWA provides that the scoping process shall include input from the public and agencies in order to examine the purpose and need, range of alternatives and impact, and important subjects that will be addressed in the EIS to attain the NEPA's scoping objectives established by regulations. Taking into account the information generated during the scoping process, the lead agency under NEPA prepares a Draft EIS, which shall also be subject to public notice and comment.

Our process does not provide for a notice stating the intent to take an action that will require the preparation of an EIS, prior to preparing an environmental document, or even a draft thereof. It does not provide either for the involvement of agencies and the public in activities directed to identifying purpose and need, range of alternatives, and impact of the proposed action, and issues of greater importance that should be addressed in the environmental document. Thus, the environmental review process carried out under Act No. 416-2004, with the government agency and public involvement mechanisms established under Regulations 7948, do not comply with the elements of streamlining government affairs and of providing broad and timely public involvement required in the preparation of environmental documents by the FHWA under NEPA and SAFETEA-LU.

Measures Adopted in other Jurisdictions to Address the Issue of Reducing the Duplication of Efforts. A study recently conducted by the General Accountability Office (GAO) identified eighteen (18) jurisdictions, including Puerto Rico, that have NEPA- or SEPA-based legislation, regulations, or orders which require EISs for highway projects. To prevent the repetition or duplication of efforts arising from environmental documents based on rules with similar requirements and, in some cases, such as Puerto Rico, identical requirements, a number of SEPAs authorize or promote the preparation of documents that meets both federal and state NEPA and SEPA requirements, or use information,

documents, or analysis prepared for evaluation pursuant to NEPA. Some states allow the use of all or part of the documents generated in federal processes to meet state requirements; others adopt the entire federal process and have no need to carry out separate state processes. For instance, in Georgia, an environmental document prepared pursuant to NEPA is sufficient to meet SEPA requirements. In Indiana, if a state agency is required to notify a NEPA-compliant EIS, it is not required to notify an environmental document to the state government. California requires the use of EISs under NEPA. In New York, state requirements are waived if NEPA requirements have been met. Likewise, Washington does not require state documents if federal documents have been generated for the same project.

Measures Adopted in Puerto Rico to Implement NEPA's goal of Reducing the Duplication of Efforts. For over three decades, the jurisdiction of Puerto Rico has been following NEPA's environmental review process. However, contrary to other jurisdictions with similar legislation, we have failed to adopt a procedure to streamline the transportation or highway projects assessment process, through environmental documents, in accordance with NEPA and SAFETEA-LU procedures, which seek to reduce the duplication of costs, efforts, and procedures between the Federal Government and the states, thus safeguarding public and agency involvement.

In Puerto Rico, only Rule 111F of Regulations 7948 addresses said subject. It states that:

those proposing agencies that are in compliance with NEPA's Section 102(2)(C) and have circulated the environmental document to the pertinent federal government agencies, shall not have to prepare a new environmental document in order to obtain a determination of environmental compliance from the PMO, according to the

Environmental Public Policy Law, *supra*, provided that said document is in compliance with the criteria established in this Regulation.

However, it is still necessary to file an environmental document with the PMO to make an environmental compliance determination. Moreover, any deviation from the provisions of Regulations 7948 may be construed to require the preparation of another environmental document, even if clearly more stringent parameters such as those under NEPA or SAFETEA-LU are met. The lack of certainty about the results and potential litigation risks at the federal and the local levels is evident. Even more so, it unnecessarily perpetuates a veil of uncertainty over the environmental review process, through an EIS, for multimillion-dollar transportation and highway projects.

SAFETEA-LU establishes for transportation projects with the FHWA specific public involvement requirements, which are more comprehensive than those required under Act No. 416 and Regulations 7948 for actions or projects of any kind. Likewise, it establishes well-structured government involvement mechanisms through the early integration of sponsor, joint lead, participating, and cooperating agencies in the environmental review process for transportation or highway projects. This also occurs, contrary to local rules, with the emphasis given to timely efforts for public involvement in the examination and discussion of critical aspects of the development and environmental review of transportation or highway projects, such as scoping, statement of purpose and need, and the range of alternatives, before preparing an EIS. It is evident that the NEPA and SAFETEA-LU processes applicable to an EIS of the FHWA as lead agency provide greater public involvement and transparency than the processes applicable under Act No. 416.

Government involvement mechanisms under SAFETEA-LU and Act No. 416 are conceptually similar: the same state institutions are involved, to wit, local

agencies and municipalities with an interest in or specific jurisdiction over a transportation project. Agencies such as the Department of Natural and Environmental Resources (DNER), the EQB, and the PMO, as well as the municipalities that may be in the route of a highway project or be affected by the same shall be invited by the DOT or the FHWA, as provided in SAFETEA-LU, to participate either as cooperating or participating agencies in the environmental review process. By providing for the circulation of EISs and requiring lead agencies to consult with any other government entity with jurisdiction over or interest in the environmental impact of any action to be taken or government decision to be promulgated and to obtain the opinion thereof with regard to said action or decision, Act No. 416 pursues the same objectives as NEPA and SAFETEA-LU, although Act No. 416 lacks the formal government involvement process structure established in the federal laws. This fact coupled with the emphasis on and implementation of greater public involvement mechanisms render it impractical—besides the costs and delays entailed—to subject a fully validated NEPA and SAFETEA-LU process for further review by the PMO to determine whether or not the environmental document is adequate. Even more so when, as provided in this legislative piece, the PMO and the EQB shall always be cooperating agencies in the environmental review process of proposed actions or transportation or highway projects where the DOT, the FHWA, and the DTOP, directly or through the Highways Authority act as joint lead agencies. The presence of the PMO and the EQB as cooperating agencies in SAFETEA-LU processes shall ensure that the environmental document incorporates all those local requirements or considerations, thus, an additional environmental compliance certification issued by DECA shall not be necessary.

For all of the above reasons, and bearing in mind the importance of transportation infrastructure projects for today's Puerto Rico, this measure amends

the environmental review processes for this kind of projects in the Island. The purpose of these amendments is to take full advantage of the Federal Government's vision incorporated in NEPA, towards achieving greater efficiency and reducing unnecessary delays through coordination and cooperation between state and federal agencies, but specifically, as provided in SAFETEA-LU and MAP-21, in transportation projects, with their essential elements of greater public involvement and better structuring of government roles compared to the processes that are currently in effect under Act No. 416.

This Legislative Assembly deems this legislative measure to be critical, and its goal is to boost Puerto Rico's world-wide competitiveness. It seeks to reduce unnecessary delays in projects aimed at improving existing transportation infrastructure or building others, without impairing environmental review and public involvement processes, which have been in effect in Puerto Rico since the approval of the "Environmental Public Policy Act," over forty-five (45) years ago.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1.- Section 4 of Act No. 416-2004, as amended, known as the "Environmental Public Policy Act," is hereby amended to read as follows:

"Section 4.- Duties and Responsibilities of the Government of the Commonwealth of Puerto Rico.-

A. ...

...

C. The Permit Management Office shall act as the proponent [lead] agency and as the body with competence over or acknowledged expertise in relation to any action which requires compliance with the provisions of this Section. Any recommendation required from a government body in relation to the environmental document shall be issued by the permit managers of the Management Office and by the Director of the Environmental Compliance

Division, except for recommendations required from the municipalities, the Environmental Quality Board, and the Planning Board, as the case may be, pursuant to the applicable legal and regulatory provisions. For the purposes of this Section, the Environmental Quality Board shall establish through regulations, the procedure that shall govern the preparation, evaluation, and processing of environmental documents. The above described regulations shall be drafted, approved, and adopted by the Environmental Quality Board upon considering the comments from the Planning Board. The determination of environmental compliance shall be deemed to be a reviewable decision that is final and independent from the final determination of the requested permit. In such cases in which the environmental compliance assessment requested from the Permit Management Office is not related to the permits issued by the same pursuant to the provisions thereof or any other action under the law, the assessment by the Permit Management Office on this particular matter shall not be deemed to be final in nature and the same shall be a component of the final determination of the department, agency, municipality, public corporation, or instrumentality of the Government of Puerto Rico or political subdivision, as the case may be, on the proposed action, and reviewable together with such final determination.

The Environmental Quality Board and the Permit Management Office shall act as cooperating agencies as provided in Section 6002 of the ‘Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users’ (SAFETEA-LU), (Pub. L. 109-59) (2005) (23 U.S.C. sec. 139), as amended, for any roadway, bridge, highway project, or other ‘traffic and transportation facilities,’ as defined in Section 3 of Act No. 74 of June 23, 1965, as amended, in which the Department of Transportation and Public Works, or any instrumentalities or entities thereof are, in conjunction with the U.S. Department of Transportation or any instrumentalities or entities thereof, co-lead agencies in the

preparation of an Environmental Impact Statement or other environmental document under the ‘National Environmental Policy Act of 1969’ (NEPA), (Pub. L. 91-190), (42 U.S.C. secs. 4321-4370f), as amended, and Section 6002 of the ‘Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users’ (SAFETEA-LU), (Pub. L. 109-59) (2005) (23 U.S.C sec. 139), as amended. Any other agency, municipality, or instrumentality of the Commonwealth of Puerto Rico with interest in or jurisdiction over the proposed project, including agencies designated as concerned government entities under Act No. 161-2009, shall participate in the environmental review process as participating or cooperating agencies and provide their comments and recommendations in writing in accordance with subsection (d) of Section 6002 of SAFETEA-LU.

In the event that the Environmental Quality Board is the only agency with jurisdiction over the proposed action, there shall be no need to obtain a determination from the Environmental Compliance Evaluation Division of the Permit Management Office for the purposes of this Section.

In the event that the Department of Transportation and Public Works or any instrumentalities or entities thereof are, in conjunction with the U.S. Department of Transportation or any instrumentalities or entities thereof, co-lead agencies in the preparation of an Environmental Impact Statement or other environmental document under Section 102(C) of the ‘National Environmental Policy Act of 1969’ (NEPA), (Pub. L. 91-190), (42 U.S.C. secs. 4321-4370h, 4332 (C)), as amended, and Section 6002 of the ‘Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,’ as amended, (SAFETEA-LU), (Pub. L. 109-59) (2005) (23 U.S.C sec. 139), as amended, for any roadway, bridge, highway project, or other ‘traffic and transportation facilities,’ as defined in Section 3 of Act No. 74 of June 23, 1965, as amended, it shall not be necessary to obtain a determination of the Environmental Compliance Evaluation Division of

the Permit Management Office for purposes of this Section. In these cases, once a decision made by the agency, according to the Record of Decision or ROD, is notified in the Federal Register, the environmental impact statement or other environmental document approved in accordance with Section 102(C) of the ‘National Environmental Policy Act of 1969’ (NEPA), (Pub. L. 91-190), (42 U.S.C. Sec. 4332 (C)) shall be deemed to be sufficient for purposes of Section 4 of Title I of Act No. 416-2004, as amended. The Director of the PMO shall certify compliance or notify noncompliance with the Environmental Public Policy Act, Act No. 416, *supra*, within a jurisdictional term of fifteen (15) days upon notification on the Record of Decision.

The determination of the Permit Management Office may only be reviewed by the Court of First Instance within a jurisdictional term of fifteen (15) days, under *de novo* review. The determinations of the agency may only be revoked in those cases where the plaintiff shows a mistake of law, fraud, or gross abuse of discretion. In this case the Court of First Instance shall order the initiation of the environmental review process pursuant to Act No. 416-2004, to make a final determination of compliance. Nothing shall prevent the analyses, works, research, and all other information generated in the process initiated in accordance with the NEPA from being used in the local process. In this case, environmental documents shall be drafted in English and in Spanish and simultaneous interpretation be provided during the hearings to facilitate the participation of local public.

D. ...”

Section 3[sic].- Severability Clause.-

If any clause, paragraph, section, or part of this Act were held to be unconstitutional by a Court with jurisdiction, said holding shall not affect or invalidate the remaining provisions of this Act. The effect of such holding shall be

limited to the clause, paragraph, section, or part of this Act thus held to be unconstitutional.

Section 4[sic].- Effectiveness.-

This Act shall take effect immediately after its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following **Act No. 212-2015 (H. B. 2729 Conference)** of the **6th Regular Session** of the **17th Legislative Assembly of Puerto Rico**:

AN ACT to amend Section 4 of Act No. 416-2004, as amended, known as the “Environmental Public Policy Act,” and establish the functions of the Permit Management Office and the Environmental Quality Board in certain highways and transportation projects where the Department of Transportation and Public Works and the United States Department of Transportation act as co-lead agencies in the preparation of an environmental impact statement under Section 102(C) of the National Environmental Policy Act of 1969, as amended, etc.

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, on this 8th day of August, 2016.

Juan Luis Martínez Martínez
Director