

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration**

[Docket Number: FTA-2006-23636]

**Notice of Availability of Final Guidance on New Starts Policies and Procedures, Updated Reporting Instructions and New Starts Rating and Evaluation Process****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of availability.

**SUMMARY:** This notice announces the availability of the Federal Transit Administration's (FTA) Final Guidance on New Starts Policies and Procedures which was initially issued for comment on January 19, 2006. This final Policy Guidance updates procedures for project planning and development to receive New Starts funding, in accordance with the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) [Pub. L. 109-59, August 10, 2005]. The guidance explains changes to the New Starts program that will become effective on May 22, 2006. This notice also announces the availability of updated Reporting Instructions for the Section 5309 New Starts Criteria, which should be followed when reporting New Starts information for evaluation during the fiscal year (FY) 2008 project rating cycle, as well as any requests to enter into preliminary engineering, final design or a full funding grant agreement, and a detailed description of the FY 2008 Evaluation and Rating Process, which is an appendix to the Reporting Instructions. Finally, this notice provides the schedule for reporting of information for FTA's FY 2008 evaluations. FTA finds that there is good cause to make this guidance effective upon publication of this notice because sponsors of projects seeking New Starts funding must have adequate time to prepare information that FTA will use to evaluate projects for inclusion in the President's FY 2008 budget request to Congress.

**DATES:** *Effective Date:* These policies and procedures will take effect on May 22, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ron Fisher, Office of Planning and Environment, telephone (202) 366-4033, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 or [Ronald.Fisher@dot.gov](mailto:Ronald.Fisher@dot.gov).

**SUPPLEMENTARY INFORMATION:****1. Availability of the Final Guidance and Comments**

A copy of the proposed and Final Policy Guidance and comments and material received from the public, as well as the updated Reporting Instructions and Evaluation and Rating Process for the Section 5309 New Starts Criteria, are part of docket FTA-2006-23636 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may retrieve the guidance and comments online through the Document Management System (DMS) at: <http://dms.dot.gov>. Enter docket number 23636 in the search field. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.gpoaccess.gov/fr/index.html>.

**2. Background**

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 3011 of SAFETEA-LU made a number of changes to 49 U.S.C. 5309, which authorizes the Federal Transit Administration's (FTA's) fixed guideway capital investment program known as "New Starts." On January 19, 2006, FTA published a Notice of Availability of Guidance on New Starts Policies and Procedures and Request for Comments in the **Federal Register** (71 FR 3149). The guidance explained proposed changes to the New Starts program that were proposed to become effective April 30, 2006, as well as longer-term changes to the New Starts program that FTA plans to be the subject of rulemaking in the future. FTA requested—and received—comments on both aspects of the guidance in the January notice. The immediate changes discussed in more detail below apply to all New Starts submittals received after May 22, 2006. FTA finds that there is good cause to make this guidance

effective upon publication of this notice because sponsors of projects seeking New Starts funding must have adequate time to prepare information that FTA will use to evaluate projects for inclusion in the President's FY 2008 budget request to Congress. As proposed in the January 19, 2006 Notice, the longer term changes will be covered in a subsequent rulemaking and comments on those issues will be summarized as part of the forthcoming Notice of Proposed Rulemaking. Accordingly, this notice announces the availability of FTA's Final Guidance on New Starts Policies and Procedures. This notice also announces the availability of Reporting Instructions for the Section 5309 New Starts Criteria for the submittal of New Starts information to be evaluated and reported in the FY 2008 Annual Report on New Starts, as well as for all requests to enter preliminary engineering and final design throughout the remainder of calendar year 2006 and 2007 or until FTA releases a revised set of instructions. The Reporting Instructions include as an appendix a detailed description of the New Starts Evaluation and Rating Process. These documents are available in the docket, which can be accessed by going to <http://dms.dot.gov>, or on FTA's Web site for New Starts Planning and Project Development at [http://www.fta.dot.gov/15052\\_ENG\\_HTML.htm](http://www.fta.dot.gov/15052_ENG_HTML.htm).

**3. Response to Comments and New Starts Program Changes To Be Effective May 22, 2006**

The purpose of this notice is to announce the availability of the Final Policy Guidance on New Starts Policies and Procedures and the FY 2008 Reporting Instructions and Evaluation and Rating Process for the Section 5309 New Starts program, reflecting the changes implemented as a result of comments received on the January 19, 2006 Notice of Availability. FTA will issue a Notice of Proposed Rulemaking (NPRM) later this calendar year to address the remainder of the issues discussed in the draft Policy Guidance made available by that Notice.

*Reporting Instructions and Rating and Evaluation Process for the FY 2008 Section 5309 New Starts Submission*

FTA adopts as final the proposal made in the Notice that, for the FY 2008 New Starts submissions, there be no change from the approach used for the FY 2007 New Starts submissions in the framework and methodology for evaluating and rating New Starts projects, and the decision rules that support it.

*Comments:* FTA received no comments on the proposal to continue the same approach used for the FY 2007 New Starts submissions for evaluating and rating New Starts projects for the FY 2008 New Starts submissions.

*FTA Response:* Accordingly, FTA will not change the current framework and methodology for evaluating and rating New Starts projects, and the decision rules that support it. All of the measures and their weights for developing New Starts ratings remain consistent with the process spelled out in the Major Capital Investment Projects Final Rule issued in December 2000, as modified in 2005 to incorporate SAFETEA-LU changes which could be accommodated prior to rulemaking. FTA further encourages New Starts project sponsors to submit information on anticipated economic development of their proposed investments as an "other factor." The FY 2008 Reporting Instructions for the Section 5309 New Starts Criteria include, as an appendix, a description of the New Starts evaluation and rating process.

As in past years, modest changes are incorporated into the Reporting Instructions, including: (1) Updated breakpoints for the rating of project cost effectiveness, using the Gross Domestic Product Deflator, as was described in FTA's April 29, 2005 Dear Colleague Letter; (2) clarifying guidance, including "guiding principles" for the development of the "Baseline" alternative against which the incremental benefits of proposed New Starts are measured; and (3) a revised Certification of Technical Methods and Planning Assumptions. In addition, the Standard Cost Categories for reporting capital costs have been updated and the templates for reporting the New Starts criteria have been linked to reduce data entry requirements.

FTA notes that the deadline for formally reporting information on the New Starts project justification and local financial commitment criteria—i.e., the New Starts "templates" and supporting land use and financial information—for evaluation in the *FY 2008 Annual Report on New Starts* is August 18, 2006. In addition, FTA requests, for projects already in the New Starts "pipeline" (projects in preliminary engineering and final design), that information related to travel forecasts, operating and maintenance cost methodologies, capital costs (constant dollar and annualized, as reported in the Standardized Cost Category worksheets), and service annualization factors be submitted by July 14, 2006 if this information is different from what was submitted last

year. This advanced submission of information helps FTA staff to understand the information underlying the New Starts project justification criteria, and helps to ensure that the information reported in the formal New Starts templates is sufficient for FTA's evaluation and rating of candidate projects. Both the "advanced" and formal submission of information should be sent to the FTA Office of Planning and Environment (TPE), Room 9413, 400 Seventh Street, SW., Washington, DC 20590. In addition, FTA's consultants for financial and land use reviews will be contacting sponsors of projects in the pipeline in mid-August 2006 to provide additional direction on transmitting specific information to them for these reviews.

For sponsors who hope to have their project approved into preliminary engineering in time for inclusion in the *FY 2008 Annual Report*, a complete request (with previously FTA-accepted travel forecasts, baseline alternative, build and baseline capital costs, and achievement of other project readiness requirements) must be submitted to FTA no later than August 18, 2006. FTA encourages sponsors of such projects to contact FTA as soon as possible to assess their readiness for preliminary engineering and to prepare their request for advancement. Projects supported by incomplete or premature requests will not be considered for inclusion in the *FY 2008 Annual Report*.

FTA encourages sponsors of candidate New Starts projects to follow the *Reporting Instructions* closely, and to submit complete information according to the deadlines established above. FTA's period for completing its FY 2008 budget evaluations is very short. FTA staff is committed to working closely with project sponsors to resolve any questions or issues with their submittals, but cannot guarantee the acceptance and inclusion of any revised or updated information after September 30, 2006 in time for the FY 2008 evaluation. Project sponsors should contact the FTA Office of Planning and Environment, or their FTA Regional Office, if they have any questions regarding the submission of information for evaluation, or the process for developing such information.

Significant changes made to accommodate policy changes incorporated in the final Policy Guidance are described below.

#### *National Environmental Policy Act (NEPA) Scoping Prior to Entry Into Preliminary Engineering*

FTA adopts a requirement that NEPA Scoping be completed prior to FTA

approval of entry into preliminary engineering (PE). This requirement is in effect for any request to enter PE that is submitted after the effective date of this Notice.

Conduct of NEPA Scoping prior to PE approval already occurs in situations where an alternatives analysis (AA) study is undertaken as part of a draft environmental impact statement (DEIS). For AA studies performed prior to initiation of the NEPA process—with the expectation that subsequent environmental work be limited to the preferred alternative emerging from the AA study—FTA would simply require that normal NEPA Scoping be performed at the outset of the NEPA process, prior to consideration of advancement of the project into PE. By proposing this requirement FTA expected to produce more efficient and mutually-supported NEPA and New Starts reviews, which share the similar objective of informed decision-making. This requirement was intended to foster earlier interaction and, ideally, general consensus among the scoping participants about the alternatives to be considered during NEPA review. Scoping prior to PE allows for resolution of these issues during the planning process instead of discovering them in PE and having to do additional planning analyses to address them. To the extent that planning issues are resolved prior to PE, FTA expected this change would shorten the time that a project remains in PE.

*Comments:* Comments were evenly distributed between those who supported and opposed this proposal, and those who desired more guidance or clarification of the issue. Specific comments included concerns that this requirement would prolong the project development schedule, resulting in increased costs for consultant services and construction, and that it is difficult to achieve buy-in and understanding of the planning process by local elected officials and the public.

*FTA Response:* Rather than lengthening the project development schedule, it is FTA's belief that confirmation of a locally preferred alternative through NEPA Scoping strengthens the local planning decision and mitigates against situations where another alternative emerges during PE, potentially causing project development delays. Further, FTA believes that obtaining local consensus is a key component to streamlining the project development process. Accordingly, FTA will require that project sponsors submit the results of the NEPA Scoping process as part of the information submitted to FTA for requests to enter into PE. FTA

recognizes that the scoping process can take 3 to 4 months to complete. Project sponsors should build this step into the schedule, recognizing that scoping can occur while FTA is reviewing the ridership, cost, and financial information that support the request to enter into PE. Sponsors who are contemplating a request to enter into PE in the next few months should contact FTA immediately about beginning the scoping process.

#### *Include New Starts Evaluation Information in NEPA Documents*

FTA adopts a requirement that all environmental documents for a New Starts project include key information related to ratings under the New Starts criteria, standard language that describes the New Starts process, and the latest available New Starts rating for the project. However, FTA will not require a project sponsor to submit additional information for rating purposes at the time the environmental document is ready to be issued. The most recent rating and, if necessary, an explanation of any information that may change the rating, will suffice.

The Council on Environmental Quality's (CEQ) NEPA regulations (40 CFR 1502.23) state that "an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision." FTA proposed this requirement because it considered the New Starts rating information and evaluation process information to be "relevant and important to a decision" because it indicates the likelihood of funding from the New Starts program.

*Comments:* The majority of comments were opposed to this proposal as described in the January 19, 2006 Notice. Some thought that the inclusion of the New Starts rating information would compromise the NEPA process and expose FTA to litigation risks based on the information, causing unnecessary delay. Some thought that the information would confuse the audience for NEPA documents as the information is unknown to them. Others thought that the proposal should be part of a formal rulemaking process and/or that additional time for consideration should be provided prior to adoption by FTA.

*FTA Response:* In the 1980's and early 1990's, New Starts rating information was routinely included in environmental documents, similar to other types of technical information found in these documents. This information was produced for all of the alternatives. Descriptions of the

relevance of the information related to project merit along with a brief description of how it is used for FTA's ratings minimizes any misunderstanding of its significance. FTA legal counsel believes that by including this information in environmental documents, FTA would not be subject to any additional risk than we currently are under the Administrative Procedure Act, which enables a plaintiff to contest any government decision that they believe is arbitrary and capricious. FTA also does not believe that this provision, which follows good planning practice and CEQ requirements, needs to be cited in a regulation. Furthermore, FTA is convinced that by providing full disclosure as part of the NEPA document, downstream challenges to the project will be reduced.

For environmental documents prepared prior to entry into PE, FTA will require that information relating to the New Starts criteria be presented along with a brief description of how the information is used for FTA's ratings. For projects which have received an FTA rating, the actual rating would also be presented. This policy applies specifically to the locally preferred alternative (i.e. the proposed New Starts project); however, in cases where the DEIS is prepared during the alternatives analysis phase of project development, FTA strongly encourages (but will not require) that information in support of the New Starts rating process be developed and reported for all studied alternatives, as a means of enhancing local stakeholders' understanding of the potential competitiveness of the alternatives for New Starts funding. In response to the comments received, which indicated concerns about which documents would be covered by this requirement, and the difficulty in crafting appropriate language for inclusion in the environmental documents, FTA wishes to make clear that the proposal applies to all NEPA documents, both environmental assessments (EAs) and environmental impact statements (EISs), and that standard language, which is available from FTA, would accompany the New Starts rating to provide context for the New Starts rating and process. Further, FTA notes that by making clear that the requirement is reporting of only the most recent New Starts rating rather than a new rating by FTA (which some comments felt was implied by the draft Guidance), there should be no delay in the development of the environmental documents in order to await

development of an updated rating by FTA.

#### *Require a New Starts Project To Achieve an Acceptable New Starts Rating Before the FEIS, ROD, or FONSI Is Signed*

FTA does not adopt a requirement that a proposed New Starts project must receive a rating of "medium" or better before it will sign a final EIS (FEIS), record of decision (ROD), or finding of no significant impact (FONSI). However, when it is clear that FTA will need to issue a supplemental environmental document in order to accommodate scope changes needed to justify a "medium" or better rating, FTA will not issue a FEIS or ROD until this supplemental document is completed. For projects not perceived as requiring a supplemental document, FTA will include a statement in the FEIS, ROD or FONSI as to how a New Starts rating of less than "medium" may affect the ability of the project to advance to implementation.

This policy was designed to minimize the need for additional environmental reviews due to subsequent changes in a project's scope needed to improve the New Starts ratings. The policy would not have eliminated all supplemental NEPA reviews, but it would have minimized the need for duplicative reviews in cases where it is known that the project must be changed to make it acceptable for New Starts funding. This policy was also designed to ensure that the FEIS provided the affected public with an accurate description of a project that is acceptable for New Starts funding.

*Comments:* There was significant opposition to the original proposal to require a project to receive a "medium" or better rating before the environmental document would be signed. Some respondents were concerned that preventing the issuance of a NEPA determination could interfere with project funding support from other sources. Others thought that if other Federal funding sources are being used for a project, the withholding of a NEPA determination solely due to the New Starts rating would prevent further project development with non-New Starts funding. Some thought that this requirement could prejudice the NEPA process by encouraging project sponsors to minimize costs by removing environmental or community benefits whose affects cannot be measured quantitatively to achieve a New Starts cost effectiveness figure that results in a "medium" or better New Starts rating. A few commenters noted that delaying a NEPA determination due to the New Starts rating would prevent a project

sponsor from acquiring right-of-way, and could result in property cost escalation if the NEPA determination milestone is delayed. One suggestion was that if a project's New Starts rating is less than a "medium," then measures to improve the rating should be included in the NEPA determination. Others thought that this requirement should be part of a formal rulemaking process and/or that additional time for consideration should be provided prior to adoption by FTA due to the extent of the proposed changes.

*FTA Response:* While FTA continues to believe that the requirement for achieving an acceptable New Starts rating prior to a NEPA determination is justifiable, many of the comments raised equally reasonable issues that suggested that additional and more detailed parameters for case by case flexibility were needed to determine when and how the New Starts rating would delay the issuance of a NEPA determination. Furthermore, one comment proposed a solution that addressed FTA's concerns as well as the concerns of the commenters. Therefore, except where it is absolutely clear that FTA will need to issue a supplemental FONSI, FEIS, or ROD in order to accommodate scope changes needed to justify a "medium" or better rating, FTA will issue such a document but include in it a statement as to how the New Starts process may affect the ability of the project to advance to implementation. This allows the environmental process to be completed. It allows the project sponsor to begin necessary land acquisition with its own funds. At the same time it puts the public as well as local decision-makers on notice of the possibility that the project may not ultimately receive New Starts funding. Standard language that will be included in the FEIS, FONSI, or ROD is available from FTA. For a multimodal project (highway and transit) in which the transit component does not advance without a supplemental document, but the environmental process for the highway component may be finalized, the highway component could be included in a stand-alone environmental document.

#### *Preservation of Information for Before and After Study*

To ensure that required information is identified and preserved during project planning and development, FTA adopts a requirement that project sponsors provide initial documentation of the information produced during alternatives analysis when they apply to begin PE, and to provide updated information and an analysis of any

changes from the previous phase of project development, when applying to enter FD and before receiving an FFGA.

In its December 2000 Final Rule on Major Capital Investment Projects, FTA required that project sponsors seeking full funding grant agreements (FFGAs) submit to FTA, before approval of an FFGA, a complete plan for the collection and analysis of information to identify the impacts of their projects and the accuracy of the forecasts prepared during project planning and development. SAFETEA-LU amended section 5309(g)(2)(c) to codify this regulatory requirement and now requires that project sponsors, as a condition of receiving a FFGA, assemble information on five key project characteristics generated during project planning and development: (1) Project scope; (2) transit service levels; (3) capital costs; (4) operating and maintenance costs; and (5) ridership patterns and revenues. SAFETEA-LU now requires FTA to use this information in preparing an annual report to Congress on the results of any before and after studies completed during that year.

*Comments:* Comments were generally supportive of this proposal. Some requested that more guidance and training on conducting a before and after study and data collection methods be provided before this requirement is set forth, and that the cost of conducting the study be an eligible New Starts expense. Some agencies supported the inclusion of land use and economic development measures in the before and after study. Other commenters believed that this proposal should be the subject of rulemaking.

*FTA Response:* Preliminary guidance on before and after studies and a model before and after study plan are currently available from the FTA Office of Planning and Environment. The guidance makes clear that the costs of the study are an eligible FFGA expense. The guidance further reflects the proposed data and analysis submission requirements. The five factors proposed for inclusion in the before and after study are those specified in SAFETEA-LU. FTA agrees that land use and economic development analyses could provide useful information about the forecast and actual performance of projects, and encourages their inclusion in the studies, but will not require them at this time.

This proposal is a refinement of FTA's existing regulation based on the SAFETEA-LU requirement that FTA report on this information at each stage in the process. It does not result in any additional effort—only the timing of the

effort. FTA does not believe it is necessary that it be implemented through the rulemaking process.

#### *Certification of Technical Methods, Planning Assumptions, and Project Development Procedures*

FTA does not adopt a requirement that all individuals responsible for developing information critical for evaluation of New Starts certify that the information has been developed in accordance with FTA guidance and best professional practice. Rather FTA has enhanced the sponsoring agency's Chief Executive Officer's (CEO's) certification to include key assumptions that must be followed in developing the New Starts information. The revised certification can be found in the Reporting Instructions for the FY 2008 New Starts Criteria.

Currently, FTA requires that the General Manager or CEO of a project sponsor agency certify that the data and assumptions used to develop information for evaluating projects seeking New Starts funding have been developed according to a number of rules described in the certification statement. Despite this certification, which has been in effect for several years, FTA has found that information has been produced that is inconsistent with FTA guidelines. FTA's oversight has also revealed that best professional practices that have been routinely followed for decades are not always applied during project development. By assigning responsibility to an individual for his/her technical work, FTA hoped that accountability would be better recognized, thus ensuring more accurate information for decision-makers, both locally and at the Federal level. In addition, the certifications were intended to help FTA in identifying who was responsible for preparing cost and ridership estimates, information that is needed in order for FTA to prepare an accurate and fair Contractor Performance Assessment Report as required by SAFETEA-LU.

*Comments:* There was significant opposition to this proposal. Some stated that since information is often developed by multiple agencies and consultants, no individual can be identified as responsible for the work. Some expressed concerns about professional liability and Federal prosecution. Others stated that there are no industry-accepted standards or conventions to certify to and that FTA should only hold individuals responsible for adhering to definable standards described in FTA guidance. Others commented that FTA reviews

obviate the need for additional certifications.

*FTA Response:* FTA acknowledges that information is developed by various agencies and the resulting difficulty of a single individual certification. In response to the question of liability, the comments raise a legitimate concern which would require an in-depth legal analysis to adequately address. While states and some agencies have documented standards, there is no clear uniform definition of best professional practice across the country. Nonetheless, FTA does have established standards that are quite detailed. While FTA does review information from grantees, it is impossible to ensure that every aspect of a forecast has been performed correctly. Placing the responsibility for reliable forecasts on project sponsors better accomplishes the goal of credible project costs and benefits.

FTA believes that the requirement for accountability in the development of information is legitimate. While FTA could limit the certification to explicit pre-established standards, drawing on our existing guidance, the requirement may still be viewed as a reflection of a lack of trust by FTA rather than a true measure of accountability. Therefore, rather than requiring a certification by each of the individuals responsible for preparing the information, FTA is continuing the past requirement for a CEO's certification in the FY 2008 Reporting Instructions, but has expanded the scope of technical procedures and assumptions that is covered by the certification. The CEO can then decide how to assure him/herself that the underlying information is valid. The Certification of Technical Methods, Planning Assumptions, and Project Development Procedures is included in the FY 2008 Reporting Instructions.

#### *Identification of Uncertainties in the Development of Costs and Ridership Forecasts*

FTA does not adopt a requirement that project sponsors include a statement of uncertainties in its submittal at this time. FTA will issue guidance at a later point in time with respect to the information needed to satisfy several provisions of SAFETEA-LU requiring identification of uncertainty but it will be subject to a separate Notice and Comment process. Nonetheless, while not a requirement, FTA does encourage all project sponsors to describe the nature of uncertainties in costs and ridership forecasts. Current FTA guidance (*Procedures and Technical Methods for Transit Project*

*Planning*) on cost and ridership uncertainties provides general direction for this until more specific guidance is issued.

Currently, forecasts of project costs and ridership are developed as discrete estimates, even though they contain uncertainties which diminish as the project is continuously refined in project development. Good planning practice and SAFETEA-LU requirements dictate that these uncertainties be more explicitly described when the cost and ridership forecasts are produced. More explicit representation of uncertainties is required by SAFETEA-LU because reliability of forecasts is now a factor in project justification. An understanding of uncertainties is essential in understanding the cause of forecasts changing during project development and operation as required for before and after studies and for assessing contractor performance. Further, an understanding of uncertainties will provide information to FTA as it implements the SAFETEA-LU Cost Incentive provision, which allows FTA to provide more New Starts funding at the time a project enters into a FFGA, if project costs are no more than 10% above and ridership no less than 90% of the estimates made when the project was admitted into PE.

*Comments:* Comments were evenly distributed between those who supported and opposed this proposal. There were concerns that the proposal would be time consuming and costly and would not eliminate risk and uncertainty from forecasts. Others thought that FTA should delay implementation of the requirement until guidance is issued that defines how uncertainties should be characterized. Some thought that including uncertainty raises questions about how this uncertainty would be addressed in the cost effectiveness measure for projects.

*FTA Response:* Rather than seeking to eliminate all project risk and uncertainty, FTA proposed that project sponsors report the nature of the uncertainty in project cost and ridership forecasts as a result of their analysis. This would allow both the project sponsor and FTA to use that information as they make decisions to advance the project. Current FTA guidance on capital cost estimation and travel forecasting discusses the role of uncertainty in forecasts and describes how these uncertainties could be reported. However, to ensure that uncertainties are being reported consistently by all grantees, further guidance is needed. While FTA acknowledges that a more explicit

reporting of uncertainty may raise questions about the uncertainty in the cost effectiveness measure; FTA did not propose to require the project sponsor to make multiple calculations of cost effectiveness based on the uncertainly analysis.

FTA continues to believe that such a requirement is necessary to satisfy several SAFETEA-LU requirements. Understanding uncertainty will allow FTA to better recommend funding among projects with similar costs and benefits, but with significant differences in uncertainties. A better understanding of uncertainties will facilitate a better understanding of why costs and ridership vary from predictions so that better approaches to forecasts can be developed for future projects. Additionally, because a major purpose of planning and project development studies is to disclose information for decision-making, a more explicit representation of uncertainties better informs decision-makers by providing richer information about the nature of project benefits and costs. However, the comments raised sufficient issues to convince FTA that it needs to provide more detailed guidance in order to obtain consistent results. Because of the need to issue this policy guidance and the 2008 Reporting Instructions in sufficient time for grantees to submit ridership and cost information by July 14, 2006, FTA did not have time to prepare this additional guidance; therefore, FTA will consider this issue either as part of the rulemaking process and/or under a separate Notice and Comment to address several provisions of SAFETEA-LU requiring identification of uncertainties. In the meantime FTA strongly encourages project sponsors to describe the nature of uncertainties when forecasts of costs and ridership are presented to FTA or in planning and project development documents.

#### *Project Development Agreements*

FTA will not require Project Development Agreements (PDAs) for specific projects at this time, but will work with any project sponsor who requests the use of such an agreement. This requirement may be revisited during the rulemaking process. Some projects in the New Starts pipeline have been unable to advance through PE and FD, primarily because of problems securing funding commitments, problems providing satisfactory information about expected project benefits, or major changes in project scope and definition. Occasionally, projects have experienced significant changes affecting scope and cost after

approval into PE, and have, consequently, become stalled or significantly reconfigured during PE or FD. To remedy this situation, FTA proposed to selectively require PDAs with sponsors of projects that are experiencing delays advancing through the process, or have identified risks which must be addressed and mitigated in order for the project to proceed in development. The PDA would have identified principal issues to be resolved, products to be completed, and schedules for reaching significant milestones during the course of PE and FD.

*Comments:* Comments indicated some support for this proposal, however many stated a need for further guidance or clarification on when PDAs would be implemented and what elements they would include. Some commenters were concerned that the use of PDAs at FTA's discretion "could result in inequitable treatment of some projects against all others." Others thought that development of PDAs would delay projects by adding another layer to the project development process. Others stated that the PDA is valuable as a partnering agreement provided that it is not required or used in a "punitive way." Some thought FTA should use requirements that are already in place, such as the annual New Starts submission and PE and FD approval points to fulfill the desired goals of the PDA.

*FTA Response:* FTA contemplated the PDA as achieving many objectives, including establishing milestones for demonstrating progress (so that failure in meeting these milestones would result in removal of the project from FTA's project development pipeline) as well as committing FTA to a scope and timetable of technical services to help the sponsor meet the milestones. While PE and FD approval letters can be enhanced to include items of importance, "warnings," commitments of FTA technical assistance, and other elements which would otherwise be covered under a PDA, FTA recognizes the value of PDAs, as they improve communication and coordination between FTA and project sponsors by clarifying expectations on the part of each. Based on this fact and the comments received, FTA will implement PDAs only in cases when it is mutually agreed upon by the project sponsor and FTA. In such cases, it is expected that the PDA would be a useful tool to guide agencies through project development and minimize delays in the process. Furthermore, FTA will continue to consider this requirement as part of the rulemaking.

#### *New Starts Funding Level Set at Final Design (FD) Approval*

FTA adopts a requirement that the amount of New Starts funding be set at the time the project is approved for entry into FD. To do so, FTA is broadening the scope of eligible PE activities for New Starts projects. To clarify the distinct nature of the activities which must be completed prior to entry into FD, FTA will refer to this stage of project development as "New Starts Preliminary Engineering." To address concerns raised regarding cost increases, FTA will entertain requests for higher levels of New Starts funding when, during FD but prior to execution of the Full Funding Grant Agreement, FTA determines that the increase in costs is beyond the grantee's control. In addition, once the project has been approved for entry into FD, the project would not be subject to any changes in New Starts policy, guidance and procedures.

Certain language in SAFETEA-LU indicates a desire by Congress to minimize, to the extent possible, project cost increases between the various stages of project development. FTA agrees and feels that the products of PE should include the final project scope and a highly accurate and conservative cost estimate that addresses all major project uncertainties. To encourage project sponsors to develop reliable and accurate cost estimates during PE, FTA proposed to cap the New Starts funding amount for a project as the amount requested when the project is approved to enter FD.

*Comments:* Comments on this proposal were evenly distributed between those who supported and those who opposed it, as well as those who neither supported nor opposed it, but offered concerns and alternatives. Some asked FTA to allow for some exceptions due to genuine, unavoidable and unforeseen inflation in commodity or construction prices. Others suggested that rather than cap the New Starts funding amount at the point of entry into FD, FTA should cap funding of a project at greater than some percentage over the PE cost estimates. Another suggestion was that if the cap is implemented, the point of entry into FD should coincide with the start of FFGA negotiations and that FTA should expedite those negotiations, and that a project approved for entry into FD should not be subject to any changes in New Starts policy guidance and/or requirements. Several commenters felt that this approach could impact or inhibit the use of innovative contracting procedures such as design build and

public private partnerships. However, another commenter stated the opposite, that this approach could present a problem for project sponsors using the traditional design, bid, and construct method. Finally, some comments asked that this change be subject to rulemaking.

*FTA Response:* FTA believes that the concerns expressed in the comments about recent cost increases have merit and thus has been studying ways to account for unavoidable, unexpected, and unforeseen circumstances such as the impact of natural disasters or other world events on commodity and construction prices. A specific policy paper on how FTA will treat these costs is under development. FTA plans to incorporate the outcome of that policy development process as part of this adopted policy.

FTA believes that adopting the suggestion of allowing costs (and the corresponding New Starts dollar amount) to rise some percentage over the PE estimate would remove any incentive for project sponsors to develop accurate cost estimates earlier in the project development process. With respect to concerns about the time between approval to enter into FD and the negotiation of a FFGA, FTA believes that the FD process will be shortened because by its definition the newly-defined New Starts PE process will require the project sponsor to develop information that has previously been deferred until FD in order to arrive at a sufficiently accurate and reliable cost estimate that a project sponsor and FTA will feel comfortable in locking in the New Starts funding level. Consequently, it is very likely that FTA could begin negotiations on an FFGA shortly after a project enters FD as some commenters suggested. By adopting the recommendation that projects not be subject to changes in New Starts policy, guidance, and procedures once the project is in FD, FTA is creating a process that provides more stability for grantees at this phase but allows FTA to proceed with desired policy/guidance changes without having to account for any negative impact on existing projects that are far along in the development process. It should be noted that this policy would not exempt a project from new statutory or regulatory guidelines, as it is outside FTA's authority to do so.

FTA does not believe this policy would inhibit the use of innovative contracting procedures. The policy has already been informally applied to most projects over the last several years and no grantees have indicated it poses this problem. Finally, FTA does not believe that completion of the rulemaking

process is necessary to continue to implement this policy. Because this is a discretionary program, it is not unreasonable that FTA would set some policy parameters on how it decides how much funding each project will receive. However, applying the policy now does not preclude FTA from raising this policy to a regulatory requirement as part of future rulemaking.

Accordingly, FTA adopts this policy but notes that we intend to entertain exceptions, consistent with a separate policy under development by FTA, on changes to cost beyond the grantees control that are identified during FD but prior to executing an FFGA. These cost increases are expected to be limited to unforeseen inflationary increases due to unusual occurrences (i.e. Hurricane Katrina, large commodity market fluctuations such as steel and concrete, etc.). FTA will decide on a case by case basis whether these circumstances apply to a given project and what dollar amount is attributable to these occurrences. FTA would then propose to provide its proportional share, based on the previously agreed to percentage 5309 federal share. Further, to assure that projects do not have to respond to changes in FTA policy, guidance, or procedures late in the project development process, projects will not be subject to changes in New Starts policy, guidance, and procedures once the projects are in FD.

Finally, FTA is developing "exit criteria" which will define in greater detail the conditions that must be met at the completion of New Starts PE. FTA understands that these expectations for New Starts PE may be different from the commonly accepted definition of PE (which often relates to completion of a certain portion of overall design efforts, or which relates to other project development milestones, such as completion of the NEPA process or other local permitting requirements). Therefore, to clarify that there are certain additional steps which must occur prior to approval to enter FD (particularly with respect to development of firmer cost estimates), FTA will now refer to this phase of project development as "New Starts Preliminary Engineering." FTA believes that the "exit criteria" together with this more precise terminology will go a long way towards clarifying when a New Starts project is ready to move from one step to the next.

#### *Possible Rules for Mode Specific Constants*

Due to the complexities of calculating a standard value, FTA will not adopt a change in the way that project sponsors

currently use mode specific constants at this time. FTA will continue to analyze options with the possibility of proposing a set of standard modal constants in the future.

FTA has long been aware of a technical issue related to the representation of unmeasured attributes of various transit modes in the mode-choice components of travel forecasting models. Current FTA policy on this issue effectively disadvantages New Starts projects proposed by metropolitan areas that currently have no fixed-guideway transit facilities. In response to this problem, FTA has been considering ways to permit project sponsors to represent the benefits of improvements in these unmeasured attributes (convenience, comfort, safety, and others) that are introduced by New Starts projects in a way that treats all projects fairly in competition for New Starts funding. Traditionally, these attributes have been represented by lump-sum "constants" in local models that predict the choice of mode by travelers. The need to preserve a level playing field for all project sponsors suggests that FTA will have to specify values of guideway constants for use in the forecasts. Several approaches are possible: (1) A standard guideway constant for all new guideway modes, (2) a set of constants that includes a different value for each guideway mode, or (3) a set of constants tied to the unmeasured attributes of guideways.

*Comments:* Comments were generally supportive of the assertion of modal constants in ridership forecasts, but with several concerns. Opinions on which of the three options suggested by FTA were also varied, with option 2 receiving the most support, followed by option 3, and finally, option 1. Some comments stated that locally derived mode-specific factors should be used in areas where those modes already exist and that regions that do have a validated constant should be allowed to use it. Others wanted more information on the values being suggested for use as modal constants before they could provide comment. One comment suggested that a panel of experts be assembled to make recommendations regarding these proposed changes and to establish constant values and permanent guidance.

*FTA Response:* Through intensive technical reviews of local travel forecasting models over the past four years, FTA and project sponsors have developed local forecasting models that derive constants that are more representative of the unmeasured attributes and less necessary as error-correction factors. Commonalities in the

constants—a relatively narrow range of 10–15 minutes of equivalent travel time—that have resulted from model improvement in several metropolitan areas have led FTA to conclude that the unaccounted attributes have a real impact that should be represented. All of the constants still have some role as correction factors, however. Consequently, an even-handed evaluation of competing projects nationally can be done only through a consistent framework that assigns the same mode-specific constants to projects in different locations that have the same characteristics. No hard conclusions on the proposed values are possible, by the transit industry or by FTA. This issue concerns the prediction of traveler responses to attributes of transit systems that are difficult—or impossible—to quantify. Its very nature leads to best-guess solutions. It has become evident that FTA's current handling of the issue puts a starter-line New Starts proposal at a disadvantage compared to proposals that would expand or extend existing guideway systems.

FTA is attempting to address that disparity in a way that treats all proposals consistently within a technical area that is subject to large unknowns. Whatever strategy emerges will be far from a hard conclusion but should, at a minimum, be fair to all competing proposals. FTA will ensure that the proposed approach, or a set of alternative approaches, is evaluated by professional experts in the field of transit ridership forecasting. An initial review of options will be on the agenda for an FTA technical workshop in June 2006 on ridership forecasting for New Starts. At this point, it has not been possible to test, review, and implement any approach in time for this guidance or for inclusion in the FY 2008 Reporting Instructions for the New Starts Criteria. Consequently, FTA will continue to refine alternative approaches to this problem and work towards implementation of a specific approach in the future. Any such changes will be subject to a separate Notice and Comment.

Issued in Washington, DC, this 16th day of May, 2006.

**Sandra K. Bushue,**

*Deputy Administrator.*

[FR Doc. E6-7781 Filed 5-19-06; 8:45 am]

**BILLING CODE 4910-57-P**