

finalizing this proposed rule potentially could delay or prevent the U.S. Government from taking actions to ensure a smooth transition to inhaled drug products for the treatment of asthma and chronic obstructive pulmonary disease that do not contain ODSs. We note that interested persons have had ample notice that FDA was considering removing the essential-use designation for pirbuterol and the six other drugs that are the subject of this rulemaking, including the following:

- This issue was first considered at the July 14, 2005, meeting of the Pulmonary-Allergy Advisory Committee (see 70 FR 24605, May 10, 2005). The trade press reported on this meeting; and minutes and a transcript of the meeting were placed on the Internet.²

- At the 17th Meeting of the Parties to Montreal Protocol (Dakar, Senegal, December 12 through 16, 2005), the Parties decided that developed countries should provide a date to the Ozone Secretariat before the 18th meeting of the Parties (New Delhi, October 30 through November 3, 2006), by which time a regulation or regulations will have been proposed to determine whether MDIs, other than those that have albuterol as the only active ingredient, are nonessential.³ The U.S. Government provided information to the Ozone Secretariat that a proposed rule that would eliminate the essential-use designation of pirbuterol and the six other drugs that are the subject of the proposed rule should publish by the end of May 2007.

- We also announced our intention to publish a proposed rule by the end of May 2007 that would eliminate the essential-use designation of pirbuterol and the six other drugs that are the subject of the proposed rule in the Unified Agendas⁴ published in the **Federal Register** on December 11, 2006 (71 FR 73195 at 73223), and April 30, 2007 (72 FR 22489 at 22156).

Because interested persons have had ample notice of this rulemaking dating back at least to May 2005, we do not intend to grant further requests for extension of the comment period on the proposed rule.

² "CFC-Only Asthma Drugs Likely to Lose 'Essential Use' Designation," *The Pink Sheet*, July 18, 2005, p. 15; minutes of the meeting and a transcript of the meeting are available at <http://www.fda.gov/ohrms/dockets/> (select "Advisory Committee Materials," then "2005," then "Pulmonary-Allergy Drugs Advisory Committee").

³ For more information, see the discussion in the proposed rule (72 FR 32030 at 32031 and 32032).

⁴ The Unified Agenda (also known as the Semiannual Regulatory Agenda), published twice a year in the **Federal Register**, summarizes the rules and proposed rules that each Federal agency expects to issue during the next 6 months.

As discussed in the previous paragraphs, FDA believes this extension will allow adequate time for interested persons to submit comments on the proposed rule, and that rescheduling the public meeting was unnecessary. The deadline for registration passed soon after the request to reschedule the meeting was made and interested persons had already made travel and other arrangements to participate on the scheduled date. Anyone who was unable to participate in the meeting still has the opportunity to submit written comments for an additional 30 days, as outlined in this notice.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the proposed rule (see **DATES**). Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 1, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 622

Federal Highway Administration

23 CFR Part 771

[Docket No. FTA-2006-26604]

RIN 2132-AA87

Environmental Impact and Related Procedures

AGENCIES: Federal Transit Administration (FTA), Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) provides interested parties with the opportunity to comment on proposed changes to the joint FTA/FHWA procedures that implement the National Environmental Policy Act (NEPA). The revisions are prompted by enactment of the Safe,

Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which prescribes additional requirements for environmental review and project decisionmaking that are not appropriately reflected in the existing joint NEPA procedures. Pursuant to provisions of SAFETEA-LU, this NPRM proposes to add new categorical exclusions (CEs) from the NEPA process. This NPRM also proposes other minor changes to the joint procedures in order to improve the description of the procedures or to provide clarification with respect to the interpretation of certain provisions. The FTA and the FHWA seek comments on the proposals contained in this notice.

DATES: Comments must be received by October 9, 2007.

ADDRESSES: *Written Comments:* Submit written comments to: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE., Washington, DC 20590.

Comments. You may submit comments identified by the docket number (FTA-2006-26604) by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Web site:* <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management System, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE., Washington, DC 20590.

- *Hand Delivery:* To the Docket Management System; U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE., Washington, DC 20590 between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) of this notice. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading under **SUPPLEMENTARY INFORMATION**.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to the Docket Management System. (See **ADDRESSES**.)

FOR FURTHER INFORMATION CONTACT: For the FHWA: Carol Braegelmann, Office of Project Development and Environmental Review (HEPE), (202) 366-1701, or Janet Myers, Office of Chief Counsel (HCC), (202) 366-2019, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. For the FTA: Joseph Ossi, Office of Planning and Environment (TPE), (202) 366-1613, or Christopher Van Wyk, Office of Chief Counsel (TCC), (202) 366-1733, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., for FHWA, and 9 a.m. to 5:30 p.m., e.t., for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144). Section 6002 of SAFETEA-LU created 23 U.S.C. 139, which contains a number of new requirements that the FTA and the FHWA must meet in complying with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347). In addition to these new requirements, section 6010 of SAFETEA-LU requires the FTA and the FHWA to initiate rulemaking to establish, to the extent appropriate, CEs for activities that support the deployment of intelligent transportation infrastructure and systems.

In a **Federal Register** notice published on November 15, 2006 (71 FR 66576), the FTA and the FHWA made available final joint guidance implementing the provisions of section 6002 of SAFETEA-LU. The final guidance is available at <http://www.fhwa.dot.gov/hep/section6002/>.

This document proposes to codify changes mandated by section 6002 of SAFETEA-LU in the joint NEPA procedures at 23 CFR Part 771 to eliminate confusion or inconsistencies could otherwise result. For example, the joint procedures currently provide that a comment period of "not less than 45 days" shall be established for draft environmental impact statements (EISs), but there is no upper limit provided on the number of days for that comment period. Section 6002 of SAFETEA-LU establishes a comment period for draft EISs of "not more than 60 days," with certain exceptions. A second example is the need under section 6002 to extend invitations to take an active role in the

process to "participating agencies," a newly created class of agencies that may have an interest in a project under study. There is no parallel requirement in the existing regulation. The joint NEPA procedures would be revised to accommodate these types of issues, as well as other changes to the environmental review process.

There are other environmental review requirements in section 6002 of SAFETEA-LU that are neither inconsistent with the current joint procedures, nor part and parcel of a "routine" environmental review process. Such provisions are accommodated adequately through guidance. For example, a participating agency "issue resolution" process is expressly provided for in section 6002, but the FTA and the FHWA propose not to incorporate processes of that type into the joint NEPA procedures. Since we propose to codify changes mandated by section 6002 of SAFETEA-LU in the joint NEPA procedures at 23 CFR part 771 only to the extent that confusion or inconsistencies could otherwise result, applicants and others participating in the environmental review process for highway or transit-related projects are advised to become thoroughly familiar with the provisions of section 6002. Those provisions supplement the NEPA implementing regulation of the Council on Environmental Quality (CEQ) and the joint FHWA-FTA environmental regulation, and must be followed.

This NPRM proposes to revise 23 CFR 771.117 by adding new CE provisions and revising one existing provision. One newly proposed CE is for stand-alone intelligent transportation systems (ITS) projects. Section 6010 of SAFETEA-LU mandates the initiation of a rulemaking process to establish, as appropriate, a CE from the need to prepare either EISs or environmental assessments (EAs) for activities that support the deployment of intelligent transportation infrastructure and systems. ITS, an initiative begun with enactment of the Intermodal Surface Transportation Efficiency Act (ISTEA) (Pub. L. 102-240, 105 Stat. 114) in 1991, encompass a broad range of wireless and wire line communications-based information and electronics technologies. When integrated into the transportation system's infrastructure, and into vehicles themselves, these types of technology may relieve congestion, improve safety, and enhance productivity.

ITS include many types of technology-based systems that are generally divided into intelligent infrastructure systems and intelligent vehicle systems. Information about

these systems and how they can be applied, as well as their costs and benefits, is available at the DOT's ITS Applications Overview Web site, which can be found at <http://www.itsoverview.its.dot.gov>. A hyperlink to "Lessons Learned" that can be accessed at this Web site provides additional insights into deployment of intelligent infrastructure systems and intelligent vehicle systems at various locations throughout the United States.

There are presently scores of applications of ITS in both the infrastructure and vehicle categories. Virtually all applications of ITS fit within one or more existing CEs in the existing joint NEPA procedures, such as approval of utility installations (23 CFR 771.117(c)(2)), installation of signs, pavement markers, traffic signals, and railroad warning devices (where no substantial land acquisition or traffic disruption will occur) (23 CFR 771.117(c)(8)), ridesharing activities (23 CFR 771.117(c)(13)), and activities that do not involve or lead directly to construction (23 CFR 771.117(c)(1)).

Categorical exclusion of activities that support the deployment of intelligent transportation infrastructure and systems also finds substantiation in the CEs of other Federal departments and agencies, including the U.S. Department of Homeland Security (DHS) and agencies within that department. A 200-page "Administrative Record for Categorical Exclusions (CATEX)" supporting the DHS CEs provides additional substantiation for categorically excluding activities that support the deployment of intelligent transportation infrastructure and systems. That administrative record can be reviewed at http://www.dhs.gov/xlibrary/assets/nepa/Mgmt_NEPA_AdminRecdetailedCATEXsupport.pdf. The substantiation by the DHS includes a comparative review of other Federal agency CEs that reflect similar activities and impacts. The class of actions identified in the DHS administrative record is virtually identical to activities that support deployment of intelligent transportation infrastructure and systems: "Construction, installation, operation, maintenance, and removal of utility and communication systems (such as mobile antennas, data processing cable, and similar electronic equipment) that use existing rights-of-way, easements, utility distribution systems, and/or facilities." (See CE E1 in the DHS administrative record referenced above). Those activities are similar to, and would have the same impacts as, the ITS activities proposed for a CE herein.

Several other classes of action identified in the DHS administrative record also support categorical exclusion of activities that support deployment of intelligent transportation infrastructure and systems. Foremost among those classes of action are those identified as CEs B8 and B9.¹ Actions categorically excluded under the DHS CE B8 include acquisition, installation, maintenance, operation, or evaluation of security equipment. Examples include cameras and biometric devices, as well as access controls, screening devices, and traffic management systems. Actions categorically excluded under CE B9 include acquisition, installation, operation, or evaluation of physical security devices, or controls to enhance physical security. Examples include motion detection systems, use of temporary barriers, fences, and jersey walls on or adjacent to existing facilities or on land that has already been disturbed or built upon, and remote video surveillance systems.

The environmental procedures of the Federal Railroad Administration (FRA) also contain a class of categorically excluded actions quite similar to activities that support deployment of intelligent transportation infrastructure and systems. Under section 4(c)(18) of the FRA's procedures, "[r]esearch, development and/or demonstration of advances in signal communication and/or train control systems on existing rail lines provided that such research, development and/or demonstrations do not require the acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail line" qualifies for categorical exclusion from the need to prepare either an EIS or an EA. See FRA Procedures for Considering Environmental Impacts, 64 FR 28545, 28547 (May 26, 1999), also available at <http://www.fra.dot.gov/Downloads/RRDev/FRAEnvProcedures.pdf>.

Upon review and consideration, the FTA and the FHWA determined that the ITS activities proposed for inclusion as CEs herein are substantially equivalent to those of the DHS, the agencies within that department, and the FRA. The proposed ITS CE will continue to provide for unusual circumstances that would require an EIS or EA.

For purposes of establishing applications of ITS as normally categorically excluded from the need to prepare EISs and EAs, listing each ITS

application separately would be burdensome, require continual updating, and would be wholly inconsistent with the CEQ's guidance encouraging agencies to consider broadly defined criteria that characterize the types of actions that, based on the agency's experience, do not cause significant environmental effects. Accordingly, this NPRM proposes to add a new CE for ITS activities, under broadly defined criteria, to the list in 23 CFR 771.117(c). Consistent with the statutory definitions of "intelligent transportation infrastructure" and "intelligent transportation system" in SAFETEA-LU section 5310, the deployment of "electronics, photonics, communications, or information processing used singly or in combination to improve the efficiency or safety of a surface transportation system" would be categorically excluded.

A second newly proposed CE arises from section 3024 of SAFETEA-LU, which added a provision at 49 U.S.C. 5324(c) that allows the FTA to participate in the acquisition of a pre-existing railroad right-of-way (ROW) prior to the completion of the NEPA process for any project that would eventually use that railroad ROW. This type of action contemplates only a change in ownership, usually from a private freight railroad company to a public transit agency. No operational changes or construction would be permitted on the ROW until such time as the environmental review of the proposed construction or change in operations has been completed. The action is fairly similar to an existing CE (23 CFR 771.117(d)(12)) and parallels in content and impact the types of activities that have been categorically excluded by the Surface Transportation Board (STB).

The STB's environmental procedures (49 CFR 1105.6(c)(2)) categorically exclude from the need to prepare either an EIS or an EA any action that does not result in significant changes in rail carrier operations, including acquisition of a rail line. The STB also categorically excludes actions that could result in some operational changes the grant of trackage rights, for example—which contemplates an arrangement where a company that owns the line retains all rights, but allows another company to operate over certain sections of its track (see 49 CFR 1105.6(c)(4)). Significant changes to rail carrier operations can cause certain environmental impact thresholds to be exceeded. The thresholds involve operational changes—basically increased rail

operations—that may negatively affect energy consumption and air quality. Under the CE proposed here for acquisition of a pre-existing railroad ROW, operational changes or construction would not be permitted.

The environmental procedures of the FRA also contain a class of categorically excluded actions quite similar to acquisition of a pre-existing railroad ROW. Under section 4(c)(17) of the FRA's procedures, "[a]cquisition of existing railroad equipment, track and bridge structures * * * and other existing railroad facilities or the right to use such facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently * * * existing on the subject properties" qualifies for a CE from the need to prepare either an EIS or an EA. See FRA Procedures for Considering Environmental Impacts, 64 FR 28545, 28547 (May 26, 1999), also available at <http://www.fra.dot.gov/Downloads/RRDev/FRAEnvProcedures.pdf>.

This NPRM proposes to add the acquisition of pre-existing railroad ROW to the activities that are categorically excluded from the need to prepare either an EIS or an EA in 23 CFR 771.117(c). Under the CE proposed here, operational changes or construction would not be permitted. The context of this provision within chapter 53 of title 49 U.S.C. suggests that the proposed CE would apply to FTA actions only.

The proposed revision of an existing CE would amend 23 CFR 771.117(c)(5) to clarify the CE relating to Federal land transfers. A Federal land transfer is a conveyance by the FHWA of land owned by the United States to a State department of transportation (State DOT) or its nominee when such land or interest in land is necessary for a transportation project. The transfer typically uses a highway easement deed. The FHWA's regulations governing Federal land transfers are located at 23 CFR 710.601. This CE has been in the FHWA environmental regulation since 1980. See 45 FR 71972 (Oct. 30, 1980).

The current language of 771.117(c)(5) provides that the "[t]ransfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action" is categorically excluded. This language categorically excludes Federal land transfers for projects for which FHWA has no involvement apart from the Federal land transfer. An example of such a situation is the perfection of title to an existing highway over Federal land for which no document of title previously had been delivered to the State DOT and recorded. This situation may exist for any number of reasons, such as where a highway had been built

¹ Other parts of the DHS administrative record that describe categories of action that are similar in many respects to activities that support deployment of intelligent transportation infrastructure and systems include CEs A7, B7, D1, and E2.

based on a right-of-entry but was not followed by execution of a deed. The Federal land transfer in such cases is merely to perfect title and is not followed by project construction or any subsequent FHWA action. In the FHWA's experience, use of the CE for this situation is appropriate, but that use is not clear under the existing wording because in such cases there is no "subsequent action" following the land transfer.

In addition, there is confusion whether or not the existing CE applies to all Federal land transfers undertaken by the FHWA even if the transfer is part of a larger project undergoing NEPA review. We believe that the CE for Federal land transfers is intended to be applicable to a minority of Federal land transfers. The majority of Federal land transfers are for Federal-aid highway construction or re-construction projects. For those projects, there is no need for a CE for the Federal land transfer because the FHWA must comply with NEPA for the underlying transportation project itself. The NEPA documentation for the underlying project will include an analysis of environmental impacts resulting from the acquisition and use of all of the ROW needed for the highway project, including any ROW acquired through a Federal land transfer. Evidence supporting this view appears in 23 CFR 710.601(d)(7), which requires the application for a Federal land transfer to include "[a] statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), and 23 U.S.C. 138."

The proposed revision to the CE in 771.117(c)(5) on Federal land transfers would amend the language to read: "Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA." This language will clarify the circumstances under which the CE applies. The reference to 23 U.S.C. 107(d) would be added because the authority for Federal land transfers for Interstate highway projects appears in 23 U.S.C. 107(d) and is in addition to the authority for other highway projects, which appears in 23 U.S.C. 317.

Another provision added by section 6002 of SAFETEA-LU establishes a 180-day statute of limitations for FTA and FHWA projects. That 180-day time period commences with publication in the **Federal Register** of a notice that informs the public that one or more

Federal agency decisions on a project is final. The FTA and the FHWA propose to reference this new limitation on claims in their joint NEPA procedures. Detailed information on the actual mechanisms for carrying out this provision appear in the section 6002 final guidance that is available at <http://www.fhwa.dot.gov/hep/section6002/>.

One of the overarching goals of SAFETEA-LU is to relieve congestion on the nation's roadways in order to promote fuel savings, to improve air quality, and to enhance passenger safety, among other objectives. To pursue this goal in the most expeditious manner possible, consistent with applicable authorities, the Administration is contemplating the addition of one or more new CEs for projects that reduce transportation system congestion (see <http://www.fightgridlocknow.gov>) and meet the criteria for categorical exclusion from NEPA review.

Congestion management activities include measures such as value pricing² and converting existing high occupancy vehicle (HOV) lanes to high occupancy toll (HOT) lanes.³ Based on experience to date, most of these types of projects would normally qualify for a CE because they are not major Federal actions affecting the quality of the human environment. Thus, the Administration is considering the addition of one or more CEs to explicitly identify those congestion management activities that typically meet CE criteria. To that end, the Administration requests comments, including data and information on the experiences of project sponsors and others with these types of projects, to assist with determining their appropriate class of action under NEPA. Interested parties are also invited to

² Value pricing concepts presently include variably priced lanes or tolls, cordon charges, or area-wide charges (see <http://ops.fhwa.dot.gov/publications/congestionpricing/sec2.html>).

³ An HOV lane, sometimes called a carpool lane, is a lane reserved for the use of carpools, vanpools and buses. HOV lanes usually are located next to the regular, unrestricted, ("general purpose") lanes. HOV lanes enable those who carpool or ride the bus to bypass the traffic in the adjacent, unrestricted lanes. HOT lanes are limited-access, normally barrier-separated highway lanes that provide free or reduced cost access to qualifying HOVs and also provide access to other paying vehicles not meeting passenger occupancy requirements. By using price and occupancy restrictions to manage the number of vehicles traveling on them, HOT lanes maintain volumes consistent with non-congested levels of service during peak travel periods. HOT lanes utilize sophisticated electronic toll collection and traffic information systems that also make variable, real-time toll pricing of non-HOV vehicles possible. For more detailed information on HOV lanes, see <http://ops.fhwa.dot.gov/freewaymgmt/hov.htm> and on HOT lanes, see http://www.itsdocs.fhwa.dot.gov/JPODOCS/REPTS_TE/13668.html.

submit written evidence about particular congestion management activities that they believe qualify as CEs and specific regulatory language that might be used in one or more CEs for these types of projects.

We considered whether revisions are needed to part 771 to address non-CE projects that involve private sector participation, tolling, or contain other innovative financing or congestion management features. Examples of such projects include the conversion of an existing "free" highway to a tolled facility, or the construction of a new facility that includes tolls. Questions about the scope of NEPA analysis required in such cases have become more frequent as a result of SAFETEA-LU provisions that facilitate innovative financing and congestion management measures.

For example, we have been asked whether a "no toll" alternative must always be examined in the analysis of alternatives or whether the addition of tolls after the completion of an environmental impact statement requires a supplemental environmental impact statement. The analysis of alternatives must include all reasonable alternatives, and if "no toll" alternatives are demonstrably unreasonable, there is no reason to examine them in detail. Very often, the inclusion or absence of tolls has little or no additional or distinct environmental impact. In these cases, there is no reason to treat toll alternatives as different from "no toll" alternatives. Similarly, if tolls are added later in the project development process and do not result in different environmental impacts, no supplemental environmental impact statement would be required. However, if tolls do result in significantly different traffic behavior, further analysis will be required to determine if the environmental impacts are different, perhaps concluding that a supplemental environmental impact statement is necessary using the existing standards in 23 CFR 771.130. In other words, we have concluded that existing law and guidance sufficiently articulate the applicable standard, which is that the level of analysis is determined by the significance of the potential impacts of the project. The presence of tolling or other innovative measures does not change the standard for deciding the level of analysis needed. However, we are interested in comments on the need for revisions to part 771 on this topic.

The section-by-section analysis that follows cites the provisions of SAFETEA-LU that result in inconsistencies with the joint environmental procedures, as currently

constituted, and advances proposed amendments that conform to the supplemental environmental review requirements. Other minor changes to help eliminate confusion among practitioners, or to bring the regulation into better alignment with current practice, are also proposed. Because of the limited scope of this rulemaking, there will continue to be some inconsistencies between provisions in the part 771 regulation and provisions of statutes and regulations adopted under Title 23 and Title 49 since the last comprehensive revision of part 771. The FTA and the FHWA anticipate addressing such matters in a subsequent, more comprehensive rulemaking proceeding.

Section-by-Section Analysis

General Note: This NPRM contains references to regulations or other documents that are the subject of current rulemaking proceedings, such as the regulations pertaining to Section 4(f) (49 U.S.C. 303) that currently are contained in 23 CFR 771.135. Any final rule resulting from this NPRM will adopt revised references as appropriate to reflect the final results of other rulemaking proceedings.

Section 771.101 Purpose

The Administration is proposing very minor changes to emphasize that this regulation is supplemental to the CEQ regulation at 40 CFR parts 1500–1508, to update the statutory references, and to use the statutorily defined term “public transportation” in referring to FTA actions (49 U.S.C. 5302(a), as amended by section 3004 of SAFETEA–LU).

Section 771.105 Policy

No change in policy is proposed, but the footnote in this section would be updated to reference recent Administration guidance on environmental matters and to give the Web sites where information is available.

Section 771.107 Definitions

Three new or revised definitions are proposed.

The definition of “Administration,” which has meant the FHWA or the FTA, would be extended to include a State that has been assigned responsibility for certain environmental requirements in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law, to the extent that the required agreement between the State and the FHWA or the FTA allows the State to act in place of the Administration. Sections 325, 326, and 327 of Title 23 allow the FHWA and, in the case of section 326, the FTA,

to assign certain specified environmental responsibilities to a State through a written memorandum of understanding (MOU) or agreement. When the FHWA or the FTA enters into such MOU or agreement, the State will act in lieu of the Administration for those responsibilities that are specified in this regulation as Administration responsibilities and that have been assigned to the State through the MOU or agreement.

One example of how this extended definition would operate is the delegation to a State, under 23 U.S.C. 326, of responsibility to determine whether projects satisfy the criteria for categorical exclusion from the need to prepare either EISs or EAs. Under 23 U.S.C. 326, when the FHWA enters into a MOU with a State, the MOU specifies the scope of the NEPA CE decision-making authority in 23 CFR 771.117(c) and (d) that the FHWA assigns to the State. That is, the MOU expressly identifies certain types of projects or activities for which the NEPA CE decision will be made by the State. The State will determine whether individual actions within those assigned types of projects or activities qualify for CE status under 771.117 and the CEQ regulation at 40 CFR 1508.4. When making those assigned CE decisions, the State acts in the place of the FHWA and carries out the functions of the “Administration” under the part 771 regulation.

The proposed definition of “applicant” is new. It is being proposed because of the provision in SAFETEA–LU section 6002 (codified at 23 U.S.C. 139) that gives different roles in the environmental review process to project sponsors who are recipients of FHWA or FTA funding and project sponsors who merely seek an approval, such as a change in access control, that does not involve funding. It is important to recognize this distinction between direct funding recipients and project sponsors that are not direct recipients of funding, such as private entities and local public agencies sponsoring highway projects. The Administration expects that the involvement of the latter type of project sponsors will increase in the coming years as the use of innovative financing techniques and public-private partnerships grows. The definition would also clarify that, under the Federal Lands Highway Program and in other situations where a Federal agency would actually implement the project, the Federal lead agencies must perform the responsibilities of the applicant specified in the rule.

The proposed definition of “lead agencies” is new. The new definition

would implement the provision in section 6002 of SAFETEA–LU (23 U.S.C. 139(c)(3)) that requires that State and local governmental entities that are the direct recipients of FHWA or FTA funding serve as joint lead agencies with the Administration. Additional lead agencies, as envisioned by the CEQ regulation (40 CFR 1501.5(b)), may also be involved, and the proposed definition recognizes this possibility.

Section 771.109 Applicability and Responsibilities

Changes are proposed in paragraphs (a), (c), and (d).

The words “by the Administration” would be deleted in paragraph (a)(3) in recognition of the new role of non-Federal lead agencies described herein.

Paragraph (c) would be replaced in its entirety. The new paragraph would establish which agencies will serve as lead agencies in the environmental review process and would identify the rules that govern the roles of other agencies and private entities.

The role of an applicant that is a State or local governmental entity and is the direct recipient of Administration funding for the project was substantially altered by SAFETEA–LU section 6002 (23 U.S.C. 139(c)(3)). Such applicant must serve as a joint lead agency with the Administration in managing the environmental review process and the preparation of the appropriate environmental document. Paragraphs (c)(1) and (c)(2) would so provide.

SAFETEA–LU section 6002 defers to the CEQ regulation to establish some of the other roles of agencies. For example, the CEQ regulation (40 CFR 1501.5 and 1501.6) addresses when a lead agency other than those mandated by section 6002 should be brought into the process, and when an agency must be brought in as a cooperating agency. The proposed revisions in paragraphs (c)(3) and (c)(4) follow suit in deferring to the CEQ regulation on these roles.

Paragraph (c)(5) would retain provisions relating to the authority, provided by section 102(2)(D) of NEPA itself, of a statewide agency to prepare an EIS.

Paragraph (c)(6) substitutes the term “project sponsor,” from SAFETEA–LU section 6002, for “applicant” in order to update and clarify the existing regulatory language relating to the roles available to private institutions or firms in the environmental review process.

A statutory reference in paragraph (d) would be updated.

Section 771.111 Early Coordination, Public Involvement, and Project Development

Paragraph (a)(1) would be amended for consistency with section 6002 of SAFETEA-LU by deleting the sentence that suggests an oversight role, rather than a joint lead agency role, for the Administration. Paragraph (a)(2) would be added to acknowledge the relationship between the planning process under sections 3005, 3006, and 6001 of SAFETEA-LU and the environmental review process, and to provide a footnote reference to guidance issued by the Administration on linking planning and NEPA.

Paragraph (b) would be amended to eliminate an inconsistency with SAFETEA-LU section 6002 (23 U.S.C. 139(e)) regarding the initiation of the environmental review process.

Paragraph (d) would be amended for consistency with SAFETEA-LU section 6002 (23 U.S.C. 139(d)) regarding the identification of, and invitations to, participating agencies, and to distinguish between participating and cooperating agencies. A footnote reference to guidance the Administration has issued on SAFETEA-LU section 6002 would also be added.

Paragraph (h)(1) would be amended to add a reference to 23 U.S.C. 139, which includes certain new public involvement requirements that are relevant in this context. Paragraphs (h)(2)(vii) and (viii) are proposed to be added so that the list of public involvement requirements derived from various statutory provisions is complete. The new paragraphs would address, respectively, the requirements in SAFETEA-LU section 6002 (23 U.S.C. 139(f)(1) and 139(f)(4)(A)) that an opportunity for public involvement be provided in defining the purpose and need for the proposed action and in determining the range of alternatives, and in SAFETEA-LU section 6009 (49 U.S.C. 303(d)(3)(A)) that public notice and an opportunity for public review and comment be provided prior to a Section 4(f) de minimis impact determination.

Paragraph (i) would be revised to implement the provision in SAFETEA-LU section 3023 (49 U.S.C. 5323(b)) regarding public notice and hearings, and public review and comment, for transit capital projects. The requirement for a public hearing during the circulation period of a draft EIS accords with new 49 U.S.C. 5323(b)(1)(B) and is proposed to be retained. For other projects that substantially affect the community or its public transportation

service, an adequate opportunity for public review and comment must be provided under 49 U.S.C. 5323(b)(1)(A). The past transit practice of printing legal notices in newspapers to offer an opportunity for a hearing on every section 5309 grant, regardless of the class of action, is no longer necessary.

Section 771.113 Timing of Administration activities

Paragraph (a) would be modified for consistency with SAFETEA-LU section 6002 (23 U.S.C. 139(c)). The proposed revision recognizes that the lead agencies, which in the majority of cases will include the Administration and the applicant, are jointly responsible for executing the environmental review process. The third sentence, which addresses limitations on actions mandated by CEQ regulation (40 CFR 1506.1), also would be amended. The change would remove the reference to the CE for hardship and protective acquisitions in 771.117(d)(12) and add language acknowledging that the law provides some exceptions to the timing in 771.113. The proposed revision would relocate the discussion of exceptions to paragraph (d). This paragraph, which is not intended to be all-inclusive, would include references to the existing CE for hardship and protective acquisitions in 771.117(d)(12), the new transit exception provided by SAFETEA-LU section 3024 (49 U.S.C. 5324(c)) for railroad ROW acquisitions, the exception in 49 U.S.C. 5309(h)(6) for certain rolling stock acquisitions, and existing exceptions applicable to the Federal-aid Highway Program that appear in FHWA regulations in 23 CFR part 710. These proposed changes are to provide clarity. The Administration requests comments on whether additional revisions are needed to clarify the alignment between the 771.113(a) timing provision and the CEQ regulations and judicial decisions on this topic.

Paragraph (a)(2) would be amended to use the term "Administration," because responsibilities related to 23 U.S.C. 128 may be assigned to a State pursuant to 23 U.S.C. 325, 326, or 327.

Paragraph (b) was originally included in the regulation to address FHWA funding issues. The statement that the completion of NEPA and related requirements does not constitute a commitment of Federal funding applies equally to the FTA program, and always has. To eliminate the inference drawn by some that the statement is not true for FTA, paragraph (b) would therefore be amended by excising the lead-in phrase "[f]or FHWA."

Section 771.117 Categorical exclusions

The FHWA is proposing to revise the language of paragraph (c)(5) to clarify that the CE does not apply to all Federal land transfers. The majority of such transfers provide ROW for projects that are themselves subject to NEPA. In such instances, "the FHWA's NEPA documentation for the project will consider all significant environmental impacts of the project, including any resulting from the acquisition and use of ROW needed for the project. Therefore, the proposed revision clarifies that this CE only applies when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

The Administration is proposing to add a new CE to the list in subparagraph (c)(21) to implement SAFETEA-LU section 6010, which requires the Administration to initiate rulemaking that considers establishing CEs for activities that support the deployment of intelligent transportation infrastructure and systems. Intelligent transportation system is defined in section 5310(3) of SAFETEA-LU to be "electronics, photonics, communications, or information processing used singly or in combination to improve the efficiency or safety of a surface transportation system." Intelligent transportation infrastructure is defined in SAFETEA-LU section 5310(2) to mean "fully integrated public sector intelligent transportation system components as defined by the [DOT] Secretary."

The Administration has much experience with deploying ITS, including stand-alone systems and systems that are elements of, or are associated with, major construction projects. An example of the former would be an incident management system, which may include video monitors installed along an existing freeway, together with a radio dispatch system for emergency response and towing. An example of the latter would be the construction of a bus rapid transit (BRT) line and stations on an urban arterial roadway, that includes, as part of the project, the installation of GPS sensors in buses, connected by radio to a central controller (i.e., a computer) that monitors the locations of buses and provides traffic signal pre-emption for buses traveling along the arterial.

The FTA and the FHWA experience has shown that a stand-alone ITS project that is not an element of a larger construction project typically does not have significant impacts on the human environment. The Administration is proposing in new paragraph (c)(21) that

the stand-alone ITS activities be categorically excluded, in accordance with SAFETEA-LU section 6010. The Administration is not proposing to exclude an ITS activity when it is an element of a larger construction project. In this case, the magnitude and location of the construction activities will, in all likelihood, dictate the appropriate class of action. In addition, even though an ITS project might satisfy CE criteria for NEPA purposes, that does not affect the requirements applicable to the ITS activity under other Federal and State environmental laws.

The FTA proposes to add a new CE to the list in subparagraph (c)(22) to facilitate the implementation of the provision in SAFETEA-LU section 3024 (49 U.S.C. 5324(c)). This new provision of law allows the Administration to assist in acquiring a pre-existing railroad ROW, usually from a private freight railroad company that is interested in liquidating the asset, without having first performed a NEPA review of any project that may in the future occupy that ROW.

On occasion, the FTA has been directed by Congress, through specific earmarks, to assist a public transportation agency financially in the acquisition of a private railroad ROW. In these cases, the project described in the earmark was strictly the acquisition of ROW, and the funding provided in the earmark was adequate only to acquire the ROW. No project that would use the ROW had been planned at all, or had not been planned to the point that it was sufficiently well-defined to permit its NEPA review. In these cases, FTA has, through its applicant, conducted environmental reviews of the acquisition itself, and has determined that the change in ownership of the ROW, without any change in the use of the ROW, would not have any significant environmental effects. For example, the railroad ROW on which the Trinity Railway Express, a commuter rail line, operates between Dallas and Fort Worth was acquired by the public transportation agencies with FTA assistance. It remained strictly a freight railroad operation for many years after its acquisition. No significant impacts resulted from the change in ownership. The construction of commuter rail was considered in a separate, unrelated NEPA review conducted many years later.

The FTA is therefore proposing to add the acquisition of pre-existing railroad ROW under 49 U.S.C. 5324(c) to the list actions that are known not to have significant environmental impacts. The proposed revision to paragraph (c)(22) specifies that no project development

may proceed, including any project to intensify the transportation use of the acquired ROW, until that project has been subjected to a NEPA review that considers alternatives.

Paragraph (d)(12) would be amended by deleting advance land acquisition loans under 49 U.S.C. 5309(b). The authority to make such loans has been eliminated from 49 U.S.C. 5309 by SAFETEA-LU section 3011. The definitions of hardship and protective acquisition have been removed from a footnote added to the text of the paragraph. In addition, a typographical error is proposed to be corrected.

Section 771.119 Environmental Assessments

The FTA is proposing to delete the option provided exclusively to FTA applicants in the second sentence of paragraph (c) of circulating an EA without FTA approval. There are several reasons for this proposal: (1) SAFETEA-LU section 6002 (23 U.S.C. 139(c)(6)) requires that the FTA, as lead agency, take an active role in completing the environmental review process expeditiously. The FTA will facilitate the EA process through active involvement in developing an EA that meets Federal requirements prior to its circulation; (2) the FTA has experienced cases where an EA circulated by an applicant without FTA approval was so deficient that major revisions and recirculation were necessary. An up-front review by the FTA would avoid such duplication of effort and associated delay; and (3) the FTA began the process of conforming its NEPA requirements as closely as possible with the FHWA's, in accordance with a requirement to that effect that appeared in two previous surface transportation authorizing laws, ISTEA and the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat 107). As a result, the FTA's practice in most FTA regional offices already conforms with the proposed change. The change would provide consistency among all FTA regional offices and applicants.

A typographical error in paragraph (g) is proposed to be corrected.

Paragraph (j) is proposed to be added for consistency with SAFETEA-LU section 6002 (23 U.S.C. 139(b)(1)), which gives the Administration the discretion of applying the environmental review process described in SAFETEA-LU section 6002 to EA projects.

Section 771.123 Draft Environmental Impact Statements

The new requirement in SAFETEA-LU section 6002 (23 U.S.C. 139(e)) for project sponsor notification of the Administration is proposed to be added to paragraph (a).

Paragraphs (b) and (c) would also be modified for consistency with SAFETEA-LU section 6002 (23 U.S.C. 139(c)). The proposed revisions recognize that the lead agencies, which in the majority of cases will include the Administration and the applicant, are jointly responsible for scoping (paragraph (b)) and preparation of the draft EIS (paragraph (c)).

Paragraph (d) would be revised to acknowledge that, in accordance with CEQ regulation, any of the joint lead agencies may select and manage a contractor to assist in the preparation of the EIS.

Paragraph (i) would be modified for consistency with the comment deadline periods established in SAFETEA-LU section 6002 (23 U.S.C. 139(g)(2)).

Paragraph (j) is proposed to be revised in two ways: (1) The words that describe the FTA program in question would be changed for consistency with the latest definitions in 49 U.S.C. 5302(a) and the current statutory section heading in 49 U.S.C. 5309; and (2) the requirement for a locally preferred alternative report following the draft EIS would be deleted from this regulation. The locally preferred alternative report is a New Starts program requirement, not a NEPA requirement, and is more appropriately addressed in the New Starts regulation (49 CFR part 611).

Section 771.125 Final Environmental Impact Statements

Paragraph (a)(1) would be modified for consistency with SAFETEA-LU section 6002 (23 U.S.C. 139(c)). The revision would recognize that the lead agencies, which in the majority of cases will include the Administration and the applicant, are jointly responsible for the preparation of the final EIS. A cross-reference to paragraph 109(d) on mitigation that was inadvertently omitted from the original regulation would be added to assist the reader in connecting related provisions.

Paragraph (c)(3) requiring the prior concurrence of FTA Headquarters in all final EISs for major transit capital investments is deleted. This concurrence has become perfunctory as the size of the transit New Starts program has grown, and it is no longer needed. The FTA Headquarters can still require prior concurrence for final EISs that fall in the categories listed in

paragraphs (c)(1) and (2), including actions involving national policy issues, actions with major unresolved issues or opposition on environmental grounds by a State or local government, and any action which the Administration's Headquarters determines should require its prior concurrence. Paragraph (c)(1) is proposed to be revised to clarify that the list of the types of projects requiring prior FTA or FHWA Headquarters concurrence is not intended to be all inclusive, and that, at its discretion, the FTA or the FHWA Headquarters may require prior concurrence in other cases.

The FTA and the FHWA propose to clarify a reference in paragraph (e) and correct a capitalization error.

Section 771.129 Re-Evaluations

The proposed revision in this section is not substantive. The paragraphs would simply be rearranged, without any change in wording, into an order that most people would find more logical. The meaning would not be changed by the re-sequencing.

Section 771.130 Supplemental Environmental Impact Statements

A typographical error in paragraph (a)(2) would be corrected.

Paragraph (e) would be updated, without substantive change, for consistency with the latest definitions in 49 U.S.C. 5302(a) and the current statutory section heading in 49 U.S.C. 5309.

Section 771.131 Emergency Action Procedures

There is no change proposed to the wording of this section. However, the new definition of "Administration" would change the meaning of this section in certain circumstances, namely when a State acts in lieu of the Administration under an MOU signed in accordance with 23 U.S.C. 325, 326, or 327. The FTA and the FHWA intend that, in the absence of a provision in such MOU that explicitly addresses emergency action procedures, the responsibility and authority to develop emergency action procedures is retained by the FTA and the FHWA.

Section 771.133 Compliance With Other Requirements

We propose to substitute "Administration's" for "FHWA" in the final sentence of this section. The effect of the change would be to make it clear that when a State is acting in the place of the FHWA or FTA pursuant to 23 U.S.C. 325, 326, or 327, the State may be assigned the authority to certify compliance with the requirements of 23 U.S.C. 128. Additional edits to the last

sentence are proposed for clarity, without changing the substance of the sentence.

Section 771.135 Section 4(f) (49 U.S.C. 303)

No revision to section 771.135 of the regulation is proposed in this NPRM. The FTA and the FHWA, however, are currently engaged in a separate rulemaking by the Administration that proposed, through an NPRM (71 FR 42611, July 27, 2006), to delete section 771.135 and create a new 23 CFR part 774 to implement Section 4(f), as amended by SAFETEA-LU.

Section 771.139 Statute of Limitations

The FTA and the FHWA propose to add this new section to provide, in accordance with 23 U.S.C. 139(l), that agency decisions under NEPA, Section 4(f) determinations, project-level air quality conformity determinations, and other final Federal decisions on a project, that are announced in the **Federal Register**, may not be challenged unless such claim is filed within 180 days of the publication of a **Federal Register** notice announcing the decisions(s). The proposed revision includes a reference to information on the Administration's interpretation of the provision, and detailed implementation guidance that applies to FHWA projects.

Regulatory Notices

All comments received on or before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA and the FTA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after the close of the comment period.

Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed

action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA and the FTA have determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The agencies have also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional government functions. We invite State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities and that impose "substantial and direct compliance costs" on such communities. We have analyzed this proposed rule under Executive Order 13175 and believe that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. Therefore, a tribal impact statement is not required. We invite Indian tribal governments to provide comments on the effect that adoption of specific proposals may have on Indian communities.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If your business or organization is a small entity and if adoption of proposals contained in this notice could have a significant economic impact on your operations, please submit a comment to explain how and to what extent your business or organization could be affected.

National Environmental Policy Act

This proposed action would not have any effect on the quality of the environment under the National

Environmental Policy Act of 1969 (NEPA) and is categorically excluded under 23 CFR 771.117(c)(20). The proposed action is intended to incorporate new statutory requirements into the agencies regulations and to add new CEs from the NEPA process. Additionally, this proposed rule seeks to improve the description of the procedures and to provide clarification with respect to the interpretation of certain provisions.

Statutory/Legal Authority for this Rulemaking

This rulemaking is issued under authority of sections 3023, 3024, 6002, 6003, 6004, 6005, and 6010 of the SAFETEA-LU, the latter of which requires the Secretary of Transportation to initiate rulemaking to establish, as appropriate, CEs for ITS projects. In addition, this NPRM implements changes made by section 6002 to the process by which the FTA and the FHWA comply with NEPA.

Executive Order 12866 and DOT Regulatory Policies and Procedures

The FTA and the FHWA have determined preliminarily that this action is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032).

Executive Order 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." We anticipate that the direct economic impact of this rulemaking would be minimal. Some of the changes that this rule proposes are requirements mandated in SAFETEA-LU. We also consider this proposal as a means to clarify the existing regulatory requirements. These proposed changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. This notice does not propose any new information collection burdens.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the affects on State, local, and tribal governments and the private sector.

Executive Order 12630 (Taking of Private Property)

We have analyzed this proposed rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. We do not anticipate that this proposed rule would effect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that this is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 13045 (Protection of Children)

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We certify that this proposed rule is not an economically significant rule and would not cause an environmental risk to health or safety that may disproportionately affect children.

List of Subjects

49 CFR Part 622

Environmental impact statements, Grant programs—transportation, Public transit, Recreation areas, Reporting and recordkeeping requirements.

23 CFR Part 771

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public lands, Recreation areas, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed to amend Chapter VI of Title 49 and Chapter I of Title 23, Code of Federal Regulations, by amending 49 CFR Part 622 and 23 CFR Part 771, respectively as set forth below:

Federal Transit Administration

Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

1. Revise the authority citation for part 622 to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303, 5301(a) and (e), 5323(b), and 5324; 23 U.S.C. 139 and 326; Pub. L. 109-59, 119 Stat. 1144, section 6010; 40 CFR parts 1500-1508; 49 CFR 1.51.

Federal Highway Administration

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

2. Revise the authority citation for part 771 to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303, 5301(e), 5323(b), and 5324; Pub. L. 109–59, 119 Stat. 1144, section 6010; 40 CFR parts 1500–1508; 49 CFR 1.48(b) and 1.51.

3. Revise § 771.101 to read as follows:

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulation). Together these regulations set forth all FHWA, FTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and public transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, 327, and 49 U.S.C. 303, 5301(e), 5323(b), and 5324(b) and (c).

4. Amend § 771.105 by revising paragraph (a) and its footnote to read as follows:

§ 771.105 Policy.

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.¹

5. Amend § 771.107 by revising paragraph (d) and adding paragraphs (f) and (g) to read as follows:

§ 771.107 Definitions.

(d) *Administration.* FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in

¹ FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes: the FHWA Technical Advisory T6640.8A, October 30, 1987; “SAFETEA—LU Environmental Review Process: Final Guidance,” November 15, 2006; Appendix A to 23 CFR part 450 titled “Linking the Transportation Planning and NEPA Processes”; and “Transit Noise and Vibration Impact Assessment,” May 2006. The FHWA and the FTA supplementary guidance, and any updated versions of the guidance, are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7 and on their respective Web sites at <http://www.fhwa.dot.gov> and <http://www.fta.dot.gov>, or in hard copy by request.

carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law.

(f) *Applicant.* Any State or local governmental entity, or federally-recognized Indian tribe, that requests funding approval or other action by the Administration and that the Administration works with to conduct environmental studies and prepare environmental documents. When another Federal agency, or the Administration itself, is implementing the action, then the lead agencies (as defined in this regulation) may assume the responsibilities of the applicant herein. If there is no applicant, then the Federal lead agency will assume the responsibilities of the applicant hereunder.

(g) *Lead agencies.* The Administration and any other agency designated to serve as a joint lead agency with the Administration under 23 U.S.C. 139(c)(3) or under the CEQ regulation.

6. Amend § 771.109 by removing the words “by the Administration” from paragraph (a)(3) and by revising paragraphs (c) and (d) to read as follows:

§ 771.109 Applicability and responsibilities.

(c) The following roles and responsibilities apply during the environmental review process:

(1) The lead agencies are responsible for managing the environmental review process and the preparation of the appropriate environmental document.

(2) Any applicant that is a State or local governmental entity that is, or is expected to be, a direct recipient of funds under title 23 U.S.C. or chapter 53 of title 49 U.S.C. for the action shall serve as a joint lead agency with the Administration in accordance with 23 U.S.C. 139, and may prepare environmental documents if the Federal lead agency furnishes guidance and independently evaluates the documents.

(3) The Administration may invite other Federal, State, or local governmental entities or federally-recognized Indian tribes to serve as joint lead agencies in accordance with the CEQ regulation. If the applicant is serving as a joint lead agency under 23 U.S.C. 139(c)(3), then the Administration and the applicant will decide jointly which other agencies to invite to serve as joint lead agencies.

(4) When the applicant seeks an Administration action other than the approval of funds, the role of the applicant will be determined by the

Administration in accordance with the CEQ regulation and 23 U.S.C. 139.

(5) Regardless of its role under paragraphs (c)(2) through (c)(4) of this section, a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or a local unit of government acting through a statewide agency, that meets the requirements of section 102(2)(D) of NEPA, may prepare the EIS and other environmental documents with the Administration furnishing guidance, participating in the preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(6) The role of project sponsors that are private institutions or firms is limited to providing technical studies and commenting on environmental documents.

(d) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 106, it shall be the responsibility of the State highway agency to ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental documents unless the State requests and receives written FHWA approval to modify or delete such mitigation features.

7. Amend § 771.111 by revising paragraphs (a), (b), (d), (h)(1), and (i) and adding paragraphs (h)(2)(vii) and (h)(2)(viii) to read as follows:

§ 771.111 Applicability and responsibilities.

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified.

(2) The information and results presented in publicly available documents produced by, or in support of, the transportation planning process in 23 CFR part 450 may be incorporated into NEPA documents.³

³ On February 14, 2007, FHWA and FTA issued guidance on incorporating products of the planning process into NEPA documents as Appendix A of 23 CFR part 450. Titled “Linking the Transportation Planning and NEPA Processes,” the guidance is available on the FHWA Web site at <http://www.fhwa.dot.gov>, or in hard copy by request.

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

* * * * *

(d) During the early coordination process, the lead agencies may request other agencies having an interest in the action to participate, and must invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139.⁴ Agencies with special expertise may be invited to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

* * * * *

(h) * * *

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and 40 CFR parts 1500 through 1508.

(2) * * *

* * * * *

(vii) An opportunity for public involvement in defining the purpose and need and the range of alternatives, for any action subject to the project development procedures in 23 U.S.C. 139.

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) de minimis impact finding, in accordance with 49 U.S.C. 303(d).

* * * * *

(i) Applicants for capital assistance in the FTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental documents. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided, pursuant to 49 U.S.C. 5323(b).

* * * * *

8. Amend § 771.113 by revising the introductory text of paragraph (a), paragraph (a)(2), and first sentence of

paragraph (b), and adding paragraph (d), to read as follows:

§ 771.113 Timing of Administration activities.

(a) The lead agencies, in cooperation with the applicant (if not a lead agency), will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d):

* * * * *

(2) For actions proposed for FHWA funding, the Administration has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

* * * * *

(b) Completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. * * *

* * * * *

(d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:

(1) Section 771.117(c)(22) contains an exception for the acquisition of pre-existing railroad right-of-way for future transit use in accordance with 49 U.S.C. 5324(c).

(2) Exceptions for hardship and protective acquisitions of real property are addressed in § 771.117(d)(12).

(3) FHWA regulations at 23 CFR 710.503 establish conditions for FHWA approval of Federal-aid highway funding for hardship and protective acquisitions.

(4) FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion of NEPA. In 710.501(b) and (c), the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ

regulations at 40 CFR 1506.1 and other applicable Federal requirements.

(5) A limited exception for rolling stock is provided in 49 U.S.C. 5309(h)(6).

9. Amend § 771.117 by adding paragraphs (c)(21) and (c)(22), and by revising paragraphs (c)(5) and (d)(12) to read as follows:

§ 771.117 Categorical exclusions.

* * * * *

(c) * * *

(5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

* * * * *

(21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system.

(22) Acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c). No project development on the acquired railroad right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

* * * * *

(d) * * *

* * * * *

(12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel which is needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the

⁴ FHWA and FTA have developed guidance on 23 U.S.C. 139 entitled "SAFETEA-LU Environmental Review Process: Final Guidance," November 15, 2006, and available at <http://www.fhwa.dot.gov> or in hardcopy upon request.

land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

10. Amend § 771.119 as follows:

a. In paragraph (c), remove the second sentence.

b. In paragraph (g), capitalize the word "administration".

c. Add paragraph (j) to read as follows:

§ 771.119 Environmental assessments.

* * * * *

(j) If the Administration decides to apply 23 U.S.C. 139 to an action involving an EA, then the EA shall be prepared in accordance with the applicable provisions of that statute.

11. Amend § 771.123 by revising paragraphs (a), (b), (c), (d), (i), and (j) to read as follows:

§ 771.123 Draft environmental impact statements.

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the applicant, after consultation with any project sponsor that is not the applicant, has notified the Administration in accordance with 23 U.S.C. 139(e) and the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the **Federal Register**. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.111. For FTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were

eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c).

* * * * *

(i) The **Federal Register** public availability notice (40 CFR 1506.10) shall establish a period of not fewer than 45 days nor more than 60 days for the return of comments on the draft EIS unless a different period is established in accordance with 23 U.S.C. 139(g)(2)(A). The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) For FTA-funded major public capital investments, at the conclusion of the Draft EIS circulation period, approval may be given to begin preliminary engineering on the principal alternative(s) under consideration. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS or, where appropriate, a supplemental draft EIS.

12. Amend § 771.125 by removing paragraph (c)(3) and revising paragraphs (a)(1), (c)(1), and (e) to read as follows:

§ 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in § 771.109(b) and (d). The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

* * * * *

(c) * * *

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State, or local government agencies is needed; (ii) the social, economic, or environmental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; (v) the action involves national policy issues; or (vi) other considerations warrant review at the Headquarters office.

* * * * *

(e) Approval of the final EIS is not an Administration action as defined in § 771.107(c) and does not commit the Administration to approve any future grant request to fund the preferred alternative.

* * * * *

13. Revise § 771.129 to read as follows:

§ 771.129 Re-evaluations.

(a) After approval of the EIS, FONSI, or CE designation, the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

(b) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within three years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(c) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of PS&E) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

14. Amend § 771.130 as follows:

a. In paragraph (a)(2), revise the word "bearings" to read "bearing".

b. Revise the first sentence of paragraph (e) to read as follows:

§ 771.130 Supplemental environmental impact statements.

* * * * *

(e) A supplemental draft EIS may be necessary for FTA major public transportation capital investments if there is a substantial change in the level of detail on project impacts during project planning and development.

* * * * *

15. Amend § 771.133 by revising the last sentence to read as follows:

§ 771.133 Compliance with other requirements.

* * * The Administration's approval of a NEPA document constitutes its finding of compliance with the report requirements of 23 U.S.C. 128.

16. Add § 771.139 to read as follows:

§ 771.139 Statute of Limitations.

Notices announcing decisions by the Administration or by other Federal agencies on a transportation project may be published in the **Federal Register** indicating that such decisions are final within the meaning of 23 U.S.C. 139(l). Claims arising under Federal law seeking judicial review of any such decisions are barred unless filed within 180 days after publication of the notice. This 180-day time period does not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.⁵ This provision does not create any right of judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

Issued in Washington, DC, this 23rd day of July, 2007.

James S. Simpson,
Administrator, Federal Transit Administration.

Issued in Washington, DC, this 23rd day of July, 2007.

J. Richard Capka,
Administrator, Federal Highway Administration.

[FR Doc. 07-3781 Filed 8-6-07; 8:45 am]

BILLING CODE 4910-57-P

DEPARTMENT OF EDUCATION

34 CFR Part 691

[Docket ID ED-2007-OPE-0135]

RIN 1840-AC92

Academic Competitiveness Grant Program and National Science and Mathematics Access To Retain Talent Grant Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations for the Academic Competitiveness Grant (ACG) and National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) programs. The Secretary is amending these regulations to reduce administrative burden for program participants and to clarify program requirements.

DATES: We must receive your comments on or before September 6, 2007.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept

comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Under "Search Documents" go to "Optional Step 2" and select "Department of Education" from the "Federal Department or Agency" drop-down menu, then click "Submit." In the Docket ID column, select ED-2007-OPE-0135 to add or view public comments and to view supporting and related materials available electronically. Information on using [Regulations.gov](http://www.regulations.gov), including instructions for submitting comments, accessing documents, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

• *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Sophia McArdle, U.S. Department of Education, 1990 K Street, NW., room 8019, Washington, DC 20006-8544.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing on the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions will be posted to the Federal eRulemaking Portal without change, including personal identifiers and contact information.

FOR FURTHER INFORMATION CONTACT:

Topic	Contact person and information
General information and information related to recognition of rigorous secondary school programs and eligible majors.	Sophia McArdle. Telephone: (202) 219-7078 or via the Internet: sophia.mcardle@ed.gov .
Information related to successful completion of a rigorous secondary school program.	Jacquelyn Butler. Telephone: (202) 502-7890 or via the Internet: jacquelyn.butler@ed.gov .
Information related to grade point average	Anthony Jones. Telephone: (202) 502-7652 or via the Internet: anthony.jones@ed.gov .
Information related to academic year progression and prior enrollment	Fred Sellers. Telephone: (202) 502-7502 or via the Internet: fred.sellers@ed.gov .

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative

format (e.g., Braille, large print, audiotape, or computer diskette) on request to the first contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

As outlined in the section of this notice entitled "Negotiated Rulemaking," significant public

⁵ The FHWA published a detailed discussion of DOT's interpretation of 23 U.S.C. 139(l), together with information applicable to FHWA projects about implementation procedures for 23 U.S.C.

139(l), in Appendix E to the "SAFETEA-LU Environmental Review Process: Final Guidance," dated November 15, 2006. The implementation procedures in Appendix E apply only to FHWA

projects. The section 6002 guidance, including Appendix E, is available at <http://www.fhwa.dot.gov/>, or in hardcopy by request.