request under the Privacy Act pursuant to this part.

* * * * *

§ 1212.704 [Corrected]

■ 3. In paragraph (a) remove the word ''Installations'' and add in its place the word ''Centers'' and remove the words ''Component Centers'' and add in its place the words ''Component Facilities.''

Nanette Jennings,

NASA Federal Register Liaison Officer.

[FR Doc. 2013–02778 Filed 2–6–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FTA–2011–0056]

RIN 2132–AB03

Environmental Impact and Related Procedures

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

ACTION: Final rule.

SUMMARY: This final rule makes revisions to the joint Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) regulations that implement the National Environmental Policy Act (NEPA). The revisions are aimed at streamlining the FTA environmental process for transit projects, in response to the August 31, 2011, Presidential Memorandum titled ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review.'' The revisions also respond to Executive Order 13563's directive to periodically review existing regulations to determine if they can be made more effective and/or less burdensome. The new categorical exclusions (CEs) established by this rule, which affect actions by FTA and FTA grant applicants, are intended to improve the efficiency of the environmental review process by making available the least intensive form of review for those actions that typically do not have the potential for significant environmental effects, and, therefore, do not merit additional analysis and documentation associated with an environmental assessment or an environmental impact statement.

DATES: Effective on February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Megan Blum at (202) 366–0463, Terence Plaskon at (202) 366–0442, Office of Planning and Environment (TPE); or Christopher Van Wyk at (202) 366–1733, Office of Chief Counsel (TCC), Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Executive Summary

The Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) published a Notice of Proposed Rulemaking (NPRM) on March 15, 2012. In the NPRM, FTA proposed: (1) The creation of ten new categorical exclusions (CEs) to be located in a newly proposed section of the regulation at 23 CFR 771.118; (2) the expansion of public involvement methods to include electronic means; (3) the addition of language on early scoping into the regulations; (4) a modification to the list of project types that normally result in the preparation of an Environmental Impact Statement (EIS); and (5) the inclusion of an FTA review role in contracting for Environmental Assessment (EA) and EIS projects. The comment period closed on May 14, 2012.

Numerous organizations submitted substantive comments to FTA that generally were positive in tone. Many comments requested clarification of terms or phrases, and several comments requested modification of the CE language and/or adding additional examples to the CEs found under section 771.118(c). Other than comments on preamble terminology itself, these comments were addressed by either providing the requested clarifications or modifying the CE language or examples.

Some of the more substantial revisions made in response to comments received on the proposed rule include: (1) The removal of an ''adverse effect to historic properties'' condition from section 771.118(c)(3); (2) the addition of ''operating assistance'' to section 771.118(c)(4); (3) a distinction between bridge projects (i.e., section 771.118(d)(2) covers projects involving new construction or reconstruction of a bridge, while section 771.118(c)(8) covers bridge rehabilitation and maintenance); and (4) the deletion of the proposed requirement that FTA review the project scope prior to contract finalization for preparation of EAs and EISs). FTA also made a number of minor revisions to the proposals in the NPRM, which are described in detail in this final rule.

Additionally, since the close of the comment period for the NPRM, the President signed into law the Moving Ahead for Progress in the 21st Century Act (MAP–21). This final rule is consistent with provisions in MAP–21, and FTA and FHWA will initiate further rulemaking to implement the various environmental provisions contained in MAP–21. FTA made one edit in particular with respect to MAP–21: FTA removed the ''railroad'' limitation from the early acquisition of right-of-way CE pursuant to MAP–21's revision to 49 U.S.C. 5323. Previously, an FTA grant applicant was permitted to acquire only railroad right-of-way prior to the completion of NEPA, but with the statutory revision, FTA grant applicants are now permitted to acquire any right-of-way, at their own risk, prior to the completion of NEPA. FTA received comments on its proposed CE for early acquisition in the NPRM, and the changes made by the final rule to the early acquisition provision in the regulation and to the CEs for early acquisition mirror the MAP–21 statutory language.

Of the five major changes FTA and the FHWA included in the March 2012 NPRM noted in the beginning of the Executive Summary, four are being carried forward in this final rule: (1) The creation of ten new CEs to be located in a newly proposed section of the regulation at 23 CFR 771.118; (2) the expansion of public involvement methods to include electronic means; (3) the addition of language on early scoping into the regulations; and (4) a modification to the list of project types that normally result in the preparation of an EIS. FTA intends that the preamble language contained in this final rule be used as guidance when applying the changes made by this final rule. This rule will become effective immediately upon publication, as described in the ''Immediate Effective Date'' section below.

Background

This final rule makes a number of revisions to the procedures that govern how FTA complies with the National Environmental Policy Act (NEPA). The regulation being revised, Part 771 of Title 23, Code of Federal Regulations (CFR), is a joint FTA and FHWA regulation, but nearly all of the revisions are written specifically to apply to actions by FTA and FTA grantees. The rule does contain a minor, non-substantive revision to a footnote discussing supplementary guidance, which applies specifically to the FHWA

as well. The remaining revisions, including the ten new CEs, apply to FTA.

FTA's primary goal in developing this final rule has been to streamline the environmental review process to facilitate compliance with NEPA by providing for more efficient reviews of proposed actions while continuing to protect environmental and human health. In a Presidential Memorandum on the subject, ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review,'' issued August 31, 2011, President Obama challenged the heads of Federal agencies to ''take steps to expedite permitting and review, through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes.'' This final rule is consistent with that direction, and also consistent with Executive Order 13571 issued on April 27, 2011, titled ''Streamlining Service Delivery and Improving Customer Service,'' through which President Obama challenged Federal agencies to develop and implement plans for, among other actions: ''improving the customer experience by adopting proven customer service best practices and coordinating across service channels (such as online, phone, in-person, and mail service)''; ''streamlining agency procedures to reduce costs and accelerate delivery, while reducing the need for customer calls and inquiries''; and ''identifying ways to use innovative technologies to accomplish the customer service activities above, thereby lowering costs, decreasing service delivery times, and improving the customer experience.'' The general public, especially anyone affected or served by a transit project, is a primary ''customer'' served by FTA's environmental review process. Moreover, this final rule is consistent with a goal of Executive Order 13604 issued on March 22, 2012, titled ''Improving Performance of Federal Permitting and Review of Infrastructure Projects,'' which is to ''significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure projects by the Federal Government, while improving environmental and community outcomes'' and is aimed at ensuring that the ''Federal permitting and review processes * * * provide a transparent, consistent, and predictable path for both grant applicants and affected communities.''

FTA, therefore, aims to maximize the use of the Internet, in accordance with the President's Order, to provide efficient customer service to the public through expedited delivery of NEPA documents and other environmental documents prepared by or for FTA. But recognizing not every customer has access to the Internet, FTA will continue to use other means of providing public access to FTA's environmental documents, as well.

This final rule is consistent with the requirement in Section 6 of Executive Order 13563, ''Improving Regulation and Regulatory Review,'' issued by President Obama on January 18, 2011. Section 6 calls on Federal agencies to periodically review existing regulations to ''determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.'' This rule streamlines existing regulations while maintaining their effectiveness by making available the least intensive form of environmental review for those actions that typically do not have the potential for significant environmental effects, and, therefore, do not merit additional analysis and documentation.

In addition to the recent Presidential direction noted above, the regulations of the Council on Environmental Quality (CEQ) implementing NEPA direct agencies to ''review their policies, procedures, and regulations * * * and revise them as necessary to insure full compliance with the purposes and provisions of the Act'' (40 CFR 1500.6). The joint FTA/FHWA shared environmental procedures were last modified in 2009 with revisions to comply with certain provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), but the procedures have not undergone a complete retrospective analysis by the two agencies since their creation in 1987. A notice of proposed rulemaking (NPRM) proposing major revisions to this regulation was published on May 25, 2000, but was never finalized. The NPRM for this final rule was published in the **Federal Register** on March 15, 2012.

FTA notes that since the publication of its NPRM, on July 6, 2012, the President signed ''Moving Ahead for Progress in the 21st Century,'' or ''MAP–21'' (112 Pub. L. 141, 126 Stat. 405), which, beginning on October 1, 2012, provides renewed authorization for Federal surface transportation programs. MAP–21 also contains a number of changes to the environmental review process for FTA and the FHWA, some of which (such as the requirement for new CEs) are similar to the provisions proposed through and finalized by this rulemaking. FTA and the FHWA have determined that this final rule comports with some provisions of MAP–21, even though this rulemaking was initiated prior to the enactment of MAP–21.

In line with MAP–21, FTA recognizes the use of CEs, whenever appropriate, as a way to improve NEPA efficiency. It has been more than ten years since FTA comprehensively considered the CEs listed in the environmental procedures as they apply to transit projects, and more than 20 years since changes to the CEs were made as a result of a comprehensive review. For this reason, FTA is now updating, through this final rule, the CEs for particular types of proposed transit projects and other proposed FTA actions. The CEs listed in paragraphs (c) and (d) of 23 CFR 771.117 are now designated for actions within the FHWA's authority through this final rule and will no longer apply to FTA-only actions. Additionally, FTA is creating a new section, 23 CFR 771.118, which contains the CEs that will apply to FTA actions and contains the new lists of CEs created through this rulemaking action that are designated for actions within FTA's authority. All references to a regulatory section or paragraph below, for which the CFR Title is not specified, refer to Title 23, Code of Federal Regulations.

The list of new CEs in section 771.118(c) is intended to cover the actions that previously applied to FTA in section 771.117(c), though the CE language was expanded for purposes of efficiency in accordance with CEQ guidance, ''Establishing, Applying, and Revising CEs under NEPA'' (75 FR 75628). FTA will also be providing guidance that directs FTA field offices to no longer use the lists of CEs in sections 771.117(c) and (d), but instead use the new lists in sections 771.118(c) and (d). The guidance will also provide direction on implementing and interpreting the new CEs.

The CEs adopted in section 771.118(c) are organized into ten defined categories of actions, each accompanied by examples representing the types of FTA activities that fall within each category. As explained in the NPRM, this approach is in compliance with the CEQ regulations (40 CFR 1508.4), which

describe CEs as ''a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations * * * and for which, therefore, neither an EA nor an EIS is required.'' CEQ's November 2010 guidance on establishing CEs reiterates CEQ's recommendation to Federal agencies to characterize the types of CE actions through broadly defined criteria, when appropriate, including clearly defined eligible categories and constraints, followed by examples. The examples FTA decided to list within each of the new CEs are intended to be representative of the types of activities that fit within the defined criteria of the CE; they are not intended to limit the CE or to broaden it beyond those activities that do not typically, either individually or cumulatively, cause significant environmental effects.

Consistent with past practice for categories of actions, which based on FTA's experience normally do not result in significant environmental effects, FTA will continue to use the categorical exclusion in section 771.118(d) for the examples listed in that paragraph as well as for other actions that are shown, through documentation, not to have significant environmental impacts. To do so, FTA requires documentation to support that CE designation as appropriate, as is stated in section 771.118(d), which mirrors the former section 771.117(d). These CEs encourage grant applicants to propose project actions located and designed so that no significant impact will occur. FTA is deleting, however, some items in the list of illustrative examples in the former section 771.117(d) from the new list in section 771.118(d) as they are duplicative of CEs found in section 771.118(c) or applicable to the FHWA. Additionally, FTA is including new examples of actions that are slightly more broad than some of the actions proposed in the NPRM for section 771.117(c) based on comments received on that section and based on the fact that the actions that can be categorically excluded are not limited to the examples listed in section 771.118(d) (see Section-by-Section Analysis of this final rule). The items listed under section 771.118(d) are examples of actions that could be processed as CEs by FTA. Through this final rule FTA is not making a substantive determination that the actions represented by the new examples are categorically excluded, but rather is simply providing examples of the types of actions that do not normally result in significant effects and typically can be categorically excluded through documentation showing no significant environmental impacts result from the action. Each of the examples in section 771.118(d) represents a less restrictive form of actions listed as CEs in section 771.118(c). FTA considered the comments received on those CEs in section 771.117(c) and its past experience with such actions in adding new examples to the list at section 771.118(d). Although MAP–21 Section 1318 requires rulemaking that would propose, to the extent appropriate, moving two of those examples from section 771.118(d) to the listed activities in section 771.118(c), specifically sections 771.118(d)(1) and (3), FTA is leaving those two examples in section 771.118(d) until such time as the rulemaking required by MAP–21 Section 1318 is conducted to allow for further notice and comment on a proposal to move them to section 771.118(c).

This rulemaking action does not change the requirements for approving projects as CEs, either for ''listed'' CEs (in section 771.117(c) for the FHWA and section 771.118(c) for FTA) or for ''documented'' CEs (in section 771.117(d) for the FHWA or section 771.118(d) for FTA). For listed CEs, there should be a documented description of the project or activity (for FTA grantees this is typically contained in, or accompanies, a grant application) sufficient to show that the action fits within the listed CE and that no unusual circumstances exist that would make the application of the CE improper. For documented CEs, there should be sufficient documentation to demonstrate that the project meets all criteria for a CE, including any conditions specified in the regulation for the (d) list CE in question.

The CEs adopted by this final rule have been substantiated with supporting documentation, which includes, but is not limited to, comparative benchmarking and expert opinion. The supporting documentation includes FTA Findings of No Significant Impact (FONSI) for projects that fall within the ten broad categories. Comparative benchmarking provides support for the new CEs by using the experience of other Federal agencies that conduct actions of similar nature, scope, and intensity. Additionally, as described in the NPRM, FTA convened an expert panel to review and evaluate each of the new CEs with respect to concept, applicability, and potential environmental effects. Information describing the basis for the CEs determinations (i.e., the substantiation package) and information concerning the members of the expert panel, and their NEPA-related experience, can be found on the FTA Web site (*http://fta.dot.gov/about/12347.html*) and in the docket for this rulemaking in Regulations.gov under docket number FTA–2011–0056. The NPRM that was the basis for this final rule and the comments received on it can also be accessed there.

FTA examined data for the FONSIs used to substantiate the CEs proposed for FTA use (23 CFR 771.118). Based on a snapshot of available 2008 and 2009 data, the average amount of time from EA initiation to FONSI signature was approximately 16.3 months. As this estimate is based on a constrained sample (ranging from facility improvements to streetcar and Bus Rapid Transit implementation), FTA intends to track current and future projects in order to provide a more accurate assessment in the future. Currently, FTA anticipates an 85 percent time savings for future projects of similar scope to those found in the substantiation package when processed as categorically excluded projects through section 771.118.

As stated above, this rulemaking action stems in part from the U.S. Department of Transportation's ''Retrospective Review and Analysis of Existing Rules'' in response to Executive Order 13563. Information on that process can be obtained either on DOT's Web site at *http://regs.dot.gov/RetrospectiveReview.htm* or at Regulations.gov under docket number DOT–OST–2011–0025.

What This Final Rule Contains

The following section of this preamble includes a summary of the comments received in response to the NPRM and FTA's response to those comments. The summaries and responses are organized by the section number of the regulatory text to which they relate.

Directly following the summary and response to comments, the preamble includes a ''Section-by-Section Analysis'' of the revisions to the regulatory text made by this action. These explanations will aid the reader in understanding the reason behind each regulatory change.

Following the Section-by-Section Analysis is the ''Regulatory Analysis and Notices'' section, which includes descriptions of the requirements that apply to the rulemaking process and information on how this rulemaking effort fits within those requirements.

The final rule concludes with the actual revisions to the regulatory text in the amendatory language format required by the Office of the Federal Register. This language modifies FTA's environmental impact and related procedures on the effective date of the regulation.

Summary of Comments and Responses

FTA and the FHWA received substantive comments from 18 transit agencies, 8 State Departments of Transportation, 7 organizations, 2 Metropolitan Planning Organizations, 2 individuals, 1 business, and 1 Federal agency. Nearly all comments have been categorized by regulatory section number and summarized below, with a response following each section. There were some instances in which a commenter sought clarification of the meaning of preamble language in the NPRM rather than commenting on the actual regulatory proposal. Rather than summarize and respond to comments that sought clarification of preamble language (which was not intended to be definitive, but rather an explanation of the regulatory text itself), FTA has considered those requests for clarification in the drafting of the preamble language for this final rule. The language of the preamble can be used as guidance in interpreting the regulatory text in this final rule, but it is neither binding nor regulatory.

The following summary and response to comments refers only to FTA, given that all of the comments related to proposed regulatory text that would affect only FTA actions.

General Comments

Comment: FTA received comments on issues other than the specific changes proposed in the NPRM. Four comments generally supported the proposed rule changes and the goal of streamlining environmental review. Several comments recommended standard review times and standard approaches to environmental documents. One comment encouraged public notice of the availability of certain documents through electronic mail. One comment questioned the need for transit-oriented development as a priority. Finally, one comment recommended that FTA consider all forms of rider amenities in transit planning.

Response: FTA appreciates the comments we received, including those generally in support of the proposed rule change and our goal of environmental streamlining. FTA encourages timely review of environmental documents, though the agency recognizes that individual projects are unique and that mandating standard review times would be impractical. In addition, FTA is committed to the use of electronic media as appropriate, and the response to comments on Section 771.111 indicates this commitment. Finally, FTA acknowledges all other comments that are not directly addressed herein, and notes that those comments were not within the scope of this rulemaking action.

Section 771.105 Policy

Comment: FTA received no comments on the proposed changes in this section.

Response: FTA is adopting the proposed change as final.

Section 771.109 Applicability and Responsibilities

Comment: FTA received no comments on the proposed changes in this section.

Response: FTA is adopting the proposed change as final.

Section 771.111 Applicability and Responsibilities

Comment: FTA received eight comments about its proposal in section 771.111(i)(1) that grant applicants for capital assistance in the FTA program may announce project milestones to the public using electronic or paper media. Five comments expressed support for use of the Internet and electronic media in the environmental process. One comment recommended FTA continue to support communities with limited Internet access, primarily in low-income areas, by continuing to make paper copies of documents available. One comment requested FTA clearly outline its desire to modernize options for public involvement through electronic media, including whether grant applicants can use electronic media exclusively. One comment recommended FTA consider requiring grant applicants to retain materials related to the environmental process online for a certain time period, as some projects may be complex or have limited Internet resources.

Response: FTA is aware that not everyone has access to the Internet and electronic media. FTA is not lessening any public involvement requirements through this rulemaking. Rather, FTA is revising the regulation to encourage its grant applicants to use various means in seeking public input, with an emphasis on electronic means as a supplement to traditional means. Electronic media can broaden access to project information and expedite the project review process. FTA encourages its grant applicants to retain certain environmental documents (e.g., decision documents, public meeting materials) for a project posted on the Internet until the initiation of transit operations.

Comment: FTA received eight comments in support of its proposal in section 771.111(i)(2) regarding early scoping. One comment recommended FTA provide clarification regarding the content of an early scoping notice and its publication in the **Federal Register.**

Response: An early scoping notice must provide enough information to allow the public and relevant agencies to participate effectively. The notice should clearly describe the process of early scoping and include information about any related planning study by the metropolitan planning organization or sponsoring transit agency. Early scoping cannot substitute for the normal scoping process unless the early scoping notice states that this outcome is being pursued and the early scoping process accomplishes all normal scoping requirements.

Section 771.113 Timing of Administration Activities

Comment: FTA received one comment requesting the removal of the words ''hardship and protective'' from the sentence beginning ''Exceptions for hardship and protective acquisitions of real property are addressed in * * *'' in section 771.113(d)(1). The comment explains that the proposed section 771.118(c)(6) exempts certain real property acquisitions outside those categorized as hardship and protective acquisitions.

Response: FTA acknowledges section 771.113(d) must be revised to reflect the change of sections where FTA's lists of CEs are located in regulation and to reflect the expansion by MAP–21 Section 20016 of early acquisition authority from railroad right-of-way to any right-of-way needed for a transit project. Accordingly, FTA added amendatory text to this final rule that updates the provisions on carrying out property acquisition prior to conclusion of the environmental review process. The provisions now include references to the FTA CEs in section 771.118 and no longer contain a reference to ''railroad,'' reflecting the broadening of that authority by MAP–21. In addition, a discussion in the Section-by-Section analysis below describes the fact that section 771.118(c)(6) could cover hardship acquisitions, protective acquisitions, and the acquisition of real property interests needed for transportation right-of-way as long as the restrictive language in section 771.118(c)(6) is met and there are no unusual circumstances that would make the CE classification improper. Some

descriptive documentation would still be required for the use of the CE in section 771.118(c)(6) to allow FTA to ensure that the acquisition of property comports with the requirements for early acquisition.

Section 771.115 Classes of Actions

Comment: FTA received one comment requesting clarification regarding what type of transit infrastructure is included under the term ''a fixed transit facility,'' as listed in section 771.115.

Response: As provided in section 771.115, examples of what might constitute a ''fixed transit facility'' include rapid rail, light rail, commuter rail, and bus rapid transit. FTA considers infrastructure supporting these services also to be fixed transit facilities.

Section 771.118 FTA Categorical Exclusions

FTA received a number of comments on CEs in general, not focused specifically on any particular CE. The summaries of and responses to those comments directly follow and precede the summary and response to comments on specific CEs.

Comment: FTA received 23 comments expressing support for FTA's proposed rulemaking. Nine of these comments suggested that FTA should periodically revisit and update the list of CEs; of these comments, several suggested FTA should establish a schedule that would direct FTA to re-evaluate the CE list at specific time intervals.

Response: FTA is committed to revisiting our CE list on a regular basis, and, per the new section 771.118(e), FTA will, at a minimum, initiate rulemaking proposing to add a type of action to the list of CEs where a pattern emerges of granting CE status under section 771.118(c) for a particular type of action.

Comment: FTA received one comment requesting, in recognition of ferry systems that function as an extension of both the highway system and the transit system, that FTA explain how the proposed CEs would apply to routine actions conducted by public ferry systems.

Response: All forms of transit were considered in the development of the new CEs. The CEs apply to public ferry systems, eligible for FTA assistance, no differently than they would to other forms of public transportation.

Comment: One comment recommended that no project should receive a CE in areas with untested soils and unidentified underground infrastructure.

Response: FTA has carefully substantiated all of the new CEs adopted by this final rule, but there is always the possibility that ''unusual circumstances,'' such as the presence of contamination not easily dealt with through routine remediation, would cause FTA to instead evaluate an action through an EA or EIS.

Comment: One comment noted that without additional clarification on FTA plans to integrate listed and documented CEs, it is difficult for transit agencies to comment on this proposal. One comment noted the proposed CEs fail to produce their intended purpose: to create for FTA a set of CE provisions that are similar to the existing CEs. The comment questioned whether FTA could use the proposed CEs.

Response: FTA is uncertain of the basis for these comments, as FTA neither intended to integrate the listed and documented CEs nor to create a set of CEs that are similar to FTA's former CEs. Rather, FTA is adopting a regulatory framework that continues to distinguish between the two types of CEs. FTA's intention was for the new list of CEs to be categorically different from the list that has not been substantially revised since 1987, reflecting both changes in FTA's programs since that time and new knowledge concerning the environmental impacts of FTA's actions learned over the years.

Comment: FTA received one comment requesting the proposed CE list in section 771.118(c) include an exemption for the emergency procedures included in existing section 771.117(c)(9).

Response: The CE in section 771.117(c)(9) is for emergency repairs eligible under Section 125 of Title 23, U.S. Code, which is a statutory program that establishes a fund for the emergency repair of highways, roads, and trails. It is not expected that FTA would have an action under that statutory provision given its limited applicability. Emergency repairs of transit facilities could be categorically excluded under section 771.118(d) if the action were demonstrated to not have, either individually or cumulatively, significant effect on the human environment. In addition, FTA will consider the extent to which emergency-related activities could be categorically excluded through other rulemaking actions, including rulemaking for section 1315 of MAP–21.

Comment: FTA received one comment requesting the addition of a new category for all bridge projects to the list of CEs at section 771.118, citing potential confusion arising from including bridge projects in both proposed lists in sections 771.118(c) and 771.118(d).

Response: FTA acknowledges the similarity between sections 771.118(c)(8) and 771.118(d)(2), and has revised the language in section 771.118(d)(2) to remove the words ''rehabilitation, reconstruction or'' such that the documented CE will cover ''bridge replacement or the construction of grade separation to replace existing at-grade railroad crossings.'' The action covered by section 771.118(c)(8) would be focused on maintenance, rehabilitation, and reconstruction, as discussed below. FTA will consider whether it is appropriate to place actions related to bridge projects in section 771.118(d)(2) or in section 771.118(c) as part of rulemaking for MAP–21 Section 1318.

Comment: FTA received five comments addressing the specificity with which FTA should construct the lists of CEs. One of these comments emphasized the need for FTA to remain flexible so that CEs are ''as widely applicable as possible'' and are not defined by a list of allowable activities. Several other comments recommended adding an explanation stating the examples are not meant to be exhaustive (e.g., add ''including, but not limited to'' as appropriate). Another comment requested more clarity and distinction between the listed and documented CEs. This comment and others, however, also recommended removal of all examples in the proposed section 771.118(d) list. Some of these comments recommended that, consistent with the existing and proposed versions of section 771.118(e), those activities noted in draft sections 771.118(d)(2) through (4) be moved to section 771.118(c). The commenters suggested that the remaining example, in section 771.118(d)(1), should be deleted as unnecessary and the revised provision should end with the sentence: ''The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.'' Several of these comments, in suggesting the move of examples from section 771.118(d) to section 771.118(c) that concern hardship and protective acquisition of property, recommended including a note that grant applicants must provide information to FTA that substantiates a request for hardship or protective acquisition of property.

Response: The examples included for all CEs are illustrative actions of the use of the CE and are not an exhaustive list

of the potential applications of that CE. This is made clear by the use of the language ''such as'' to introduce the list of examples, which has the same meaning as ''including, but not limited to,'' as suggested by one commenter. FTA chose the list of examples in section 771.118(d) based on FTA's experience that those activities are most likely to require a greater degree of documentation from both a grants-making perspective and an environmental perspective (i.e., to ensure the classification of a CE is appropriate and there are no unusual circumstances associated with it that reflect the potential for significant environmental impacts). FTA has decided to keep several examples listed to provide for some idea of the scope and scale of activities that FTA generally would categorically exclude pursuant to section 771.118(d). FTA does not intend to change the scope and scale of activities that can be categorically excluded pursuant to section 771.118(d) under this final rule from those covered under section 771.117(d) that had been in place for FTA for approximately 25 years, but FTA is changing the list of examples of the types of actions that can be categorically excluded under section 771.118(d) to focus on those activities and actions entirely by FTA (which primarily involves the partial funding of transit projects by FTA). FTA is identifying some types of actions that had been examples in section 771.117(d) as listed CEs in the new section 771.118(c). Many of the examples in section 771.117(d) were not carried over to section 771.118(d) due to their primary applicability to the FHWA or because they are covered by the categories listed in the new section 771.118(c). Because FTA has carefully substantiated those categories of actions, less documentation will generally be required to show the CE determination is appropriate, resulting in quicker approvals for those actions. As always, unusual circumstances must be considered for the proposed project, which may require appropriate environmental studies to be conducted to determine whether the project is eligible for a CE. Based on the result of these studies, a documented CE, an EA, or an EIS may be the appropriate class of action decision that results. Moreover, documentation may be required in some cases for compliance with laws other than the NEPA. Finally, FTA will continue to include CEs for property acquisition in both sections 771.118(c)(6) (with some limitations) and 771.118(d)(3).

Comment: FTA received one comment noting that the regulatory preamble contains an important statement allowing FTA and FHWA to rely on CEs listed in either section 771.117 or 771.118 for multimodal projects. The comment suggests adding this statement to the operative language of the proposed sections 771.117(a) and 771.118(a).

Response: The language mentioned by the commenter was intended to make clear that for a project with both an FTA and an FHWA action, FTA could use the CEs in section 771.118 for an FTA action on the project and the FHWA could use the CEs in section 771.117 for the FHWA action on the same project, provided that the combined environmental effect of the FHWA and FTA actions were not significant. In addition, section 1314 of MAP–21 contains a provision that allows, under certain circumstances, one modal administration of the Department of Transportation to use the CEs of another modal administration for a multimodal project. Guidance is currently under development on the use of that CE authority.

FTA's intent was not to allow FTA to continue to apply the actions listed in section 771.117 to FTA projects. That would be unnecessary, as FTA drafted the list of CE categories in section 771.118 such that it contains all actions FTA might wish to take pursuant to the former section 771.117. Moreover, FTA retains the ability to categorically exclude actions not otherwise covered explicitly by the categories of CEs in section 771.118 through its documented CE authority in section 771.118(d). Retaining the ability to continue to categorically exclude any action that could have been categorically excluded prior to this final rule is important for multimodal projects, and to do otherwise would have the opposite effect of streamlining the process. Thus, FTA does not believe it is necessary to add further explanatory language to the regulatory text, but instead relies upon this clarification here in the preamble.

Comment: FTA received several general comments advocating that specific activities should be covered by CEs. One comment requested the regulation clearly state that stations and facilities being rehabilitated within an existing right-of-way should be automatically classified as CEs. This comment notes that, if the basic function of the station will remain the same, and there are no land acquisitions associated with the project, experience shows that there will be no significant environmental impacts other than those due to temporary and minor construction activities. A second comment requested FTA expand the proposed list in section 771.118(d) specifically to include modernization or minor expansions of transit structures and facilities, such as bridges, stations, or rail yards. A third comment requested that FTA add to section 771.118(d)(1) ''modernization and resurfacing of parking facilities.''

Response: FTA intended that rehabilitation of stations and facilities and ''modernization and resurfacing of parking facilities'' within an existing right-of-way would be clearly covered by the new CE in section 771.118(c)(8), unless unusual circumstances are present that suggest the potential for significant environmental impacts. Although FTA notes that significant environmental impacts due to very long-term construction activities would in fact require an EIS, FTA's experience has been that the types of construction impacts of the projects mentioned by the commenters are usually of short duration and tend not to rise to the level of significant. Because these types of activities are generally covered by section 771.118(c)(8), FTA will not add the example to the list in section 771.118(d).

Comment: FTA received one comment suggesting it would be helpful if FTA would better define and reduce the scope and extent of supplementary documentation required for review of the current list of CEs in section 771.117(d).

Response: FTA has focused this rulemaking on the new CEs located in section 771.118(c), and to the extent that actions previously approved as ''documented'' CEs pursuant to former section 771.117(d) are now covered by the new CEs in section 771.118(c), those actions would no longer need additional documentation. FTA would expect a description of the project or activity contained within or accompanying the grant application sufficient to show that the action fits within the listed CE (i.e., section 771.118(c)) and that no unusual circumstances would result. That said, FTA acknowledges that in practice more documentation may often be created than is necessary for environmental review documents, which include EISs, and EAs, as well as documented CEs. FTA is not changing the documentation standards for those types of NEPA approvals; instead, FTA is attempting to bring practice in line with what is actually required through issuance of guidance, increased training, and better management of the process, all of which have previously been ongoing. Scoping should have as its objective the elimination of insignificant issues from

the scope of the study as much as the incorporation of significant ones. Thus, FTA intends that extraneous, unnecessary documentation will no longer be included for documenting compliance with NEPA, no matter what the class of action.

Comment: FTA received one comment cautioning that ''the consolidation and relocation of CEs should not inadvertently have the effect of requiring an EA or EIS for projects that do not qualify for the new undocumented CEs in section 771.118(c).'' The comment requested FTA confirm that ''when a project which was formerly covered by a documented CE in section 771.117(d) does not satisfy the qualifying criteria in a corresponding CE in new section 771.118(c), the documented CE procedure remains available,'' and that ''any action that would qualify for one of the CEs previously specified in section 771.117(d) still could seek a documented CE, notwithstanding the proposed revisions.'' Several other comments requested FTA consider a CE determination for all actions not noted under section 771.118(c) if the grant applicant produces documentation showing compliance with the broader definition of a CE noted in the proposed rule and in the CEQ regulations implementing NEPA.

Response: FTA agrees and acknowledges that the new list of CEs should not inadvertently have the effect of requiring an EA or EIS for projects that do not qualify for the new CEs in section 771.118(c). Any action that would qualify for one of the CEs previously specified in section 771.117(d), if it did not qualify for a CE under the new section 771.118(c), could still be approved as a documented CE under the new section 771.118(d), notwithstanding the changes of the final rule, as long as the documentation demonstrated that the action would not result in significant environmental impacts. FTA again notes that the examples of activities provided in our list of CEs are not exhaustive but illustrative and that a CE determination may be reached for an action not specifically included in the list of examples either under each CE category in section 771.118(c) or the list of examples under section 771.118(d).

Comment: FTA received several comments requesting clarification for when a more detailed environmental review is necessary. One comment requested unambiguous environmental review criteria that would favor the CE process over the more time-consuming EA or EIS where impacts are clearly minimal unless there is ''compelling'' evidence warranting a different course of action.

Response: FTA is not changing through this rulemaking the thresholds that determine the level of environmental review (also called ''class of action'') needed for any given FTA action. Rather, FTA has documented the types of actions that normally do not, individually or cumulatively, have a significant effect on the human environment and incorporated those into this regulation as CEs. No matter what benefits might result from processing an action with one class of action versus another, FTA will use the class of action that is appropriate given the potential impacts associated with the action. That is the case even for an action listed as an example in the new list of CEs in section 771.118(c). In other words, an action listed in the examples in section 771.118(c) would still require an EA or EIS if FTA determined unusual circumstances associated with the action could result in significant environmental impacts.

Comment: One comment expressed concern about the effect of the new rule on projects that might affect stormwater runoff, noise, or environmental justice. The comment stated the construction of a bus rapid transit project might require work that interferes with the geometry of an existing road, thus affecting onsite runoff and how such runoff is managed. The comment said managing such circumstances is already addressed in regulation for the FHWA under 23 CFR part 771. The comment suggested FTA create similar regulation or reference the FHWA regulation in the new rule. A second comment recommended the comparable CEs and documented CEs under sections 771.117(c) and (d) that would apply to the FHWA with the adoption of this new rule also be similarly revised.

Response: FTA cannot determine which section of 23 CFR part 771 the comment refers, but it may be a reference to section 771.117(a), which discusses the types of impacts that would make the use of a CE inappropriate. FTA has exactly duplicated that language in section 771.118(a). If the comment is referring to section 771.105(d), that paragraph applies as much to FTA as to the FHWA, as does any section of 23 CFR part 771 not explicitly limited to either the FHWA or FTA. The FHWA will consider revisions to 23 CFR 771.117 as part of rulemaking directed by MAP–21.

Comment: FTA received one comment expressing concern that some of the language in the revised CEs could result in new burdens and delays, rather than streamlining, in comparison to the existing CEs and associated NEPA procedures set forth in the current version of section 771.117.

Response: FTA cannot tell from this comment what is behind the concerns noted. The revisions are intended to streamline the FTA environmental review process for transit projects. FTA believes that the proposed CEs will improve the efficiency of that process by making available the least intensive form of review for certain actions that would have previously required CEs with more voluminous documentation or EAs. The new lists in sections 771.118(c) and (d) are intended to cover all actions that were previously covered by the list in section 771.117(c), as well as other actions for which FTA had substantiation.

Comment: One comment recommended supplemental guidance clarifying the outlined provisions be made available to the FTA regional offices to ensure consistency in implementing new environmental regulations.

Response: FTA plans to develop guidance on the use of these CEs and make it available to all of its offices. The guidance will likely be based on the content of the Section-by-Section analysis contained in this final rule.

Comment: Four comments provided recommendations regarding project review schedules. One comment urged FTA to include specific timelines for the review and approval of these types of projects. Another comment recommended a standard review time of 30 days be established for CE schedules. A third comment recommended that in setting deadlines for CEs, discussions involving FTA, participating agencies, and the grant applicant should take place in order to determine a realistic deadline for the project. Specifically, this comment recommends grant applicants and regulatory agencies agree on individualized CE deadlines in the beginning stages of the development process. The comment believes that any changes to the CE process should allow for project-specific flexibility in the setting of deadlines. The fourth comment expressed concern that the NPRM did not propose to require FTA to develop schedules for review or to commit to specific dates for the completion of the review of environmental documents. This comment stated that setting schedules can be a difficult and even risky task, but urged FTA to include this change in the final rule because doing so would be an important step in making the environmental review of transit projects more streamlined, less time-consuming, and more predictable.

Response: FTA encourages timely review of environmental documents, though FTA recognizes that individual projects and their impacts are unique, which makes standard review times impracticable. One of the main goals FTA has had through this rulemaking has been to reduce the time associated with approving a project through a CE. Projects approved through the new list of CEs in section 771.118(c) normally would not require further NEPA approvals. FTA does expect documentation that shows the project fits the category of action in section 771.118(c) and that no unusual circumstances are present that would make the CE determination improper. In many cases, a thorough project description in the grant application will be sufficient. In the other cases, if the project has the potential to result in impacts to resources protected under other environmental laws, additional documentation and review time would be needed for that documentation. For example, the consultation required under Section 106 of the National Historic Preservation Act already has regulatory timeframes in 36 CFR part 800 associated with consultation between FTA and the State Historic Preservation Officer. That consultation process cannot be shortened through review times mandated by an FTA regulation. FTA will continue to focus on evaluating projects quickly and efficiently, and is confident this final rule will streamline the process substantially.

Comment: FTA received one comment recommending that funding requests for projects under proposed section 771.118(c) require a project description to confirm the project fits the CE category and a statement that the project does not involve unusual circumstances as detailed in section 771.118(b) be used in order to further the streamlining effort. The comment suggests that where section 771.118(c) projects may adversely affect properties on or eligible for the National Register of Historic Places, the grant applicant could request FTA initiate, or authorize the grant applicant to initiate, consultation under Section 106 of the National Historic Preservation Act. The comment suggests that no other technical evaluations be required and recommends FTA's response be required within a specified timeframe.

Response: FTA's intent is to reduce the paperwork for the types of activities we determined normally do not, individually or cumulatively, have a significant effect on the human environment. As previously noted, FTA expects that in most cases a project description in the grant application will be sufficient for purposes of determining whether a project fits within one of the categories of CEs in section 771.118(c). FTA would also expect, as the comment suggested, that compliance with environmental requirements other than those of NEPA could be handled separately, although it would be perfectly appropriate to mention compliance with those requirements in the grant application, as FTA's approval of the CE would need to wait for compliance with the other requirements in accordance with section 771.105(a). FTA noted previously why mandated review times would not be appropriate given each project has unique impacts and issues that cannot be predicted in advance.

Comment: FTA received one comment urging FTA to consider allowing state transit agencies to self-certify CE status for the projects in section 771.118(c), with periodic audits by FTA to ensure regulatory compliance. Self-certification would not only speed the development of individual projects, but also free FTA staff time for other work.

Response: FTA acknowledges that many state transportation agencies have programmatic CE agreements with the FHWA. Historically, FTA has had a grant structure for funding individual transit projects that has not lent itself well to a programmatic CE agreement approach, but FTA will continue to evaluate the possibility of this approach in the future.

Comment: FTA received one comment requesting FTA require consulting parties, including the consulting State or Tribal Historic Preservation Officer, to respond within 30 days of receipt of documentation of historic resources and effects and to allow the Section 106 and NEPA processes to proceed if no response is received within that time frame. This requirement would be consistent with both the Section 106 regulations and the overall effort to streamline the review and approval of transit projects.

Response: Consultation under Section 106 of the National Historic Preservation Act is not within the scope of this rulemaking action. Further, FTA could not change the requirements associated with that process through rulemaking, as those requirements are contained in regulations issued by the Advisory Council for Historic Preservation. FTA has, however, sought to ensure that the Section 106 process is done quickly and efficiently, and FTA will continue to pursue streamlining approaches for that process separately.

Section 771.118(c)

The following paragraphs on section 771.118(c) are arranged in order of occurrence in the regulation, and each is introduced with the section number and proposed rule text of the new CE.

771.118(c)(1) Acquisition, installation, operation, evaluation, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: utility poles, underground wiring, cables, and information systems; and power substations and transfer stations.

Comment: FTA received 16 comments on proposed section 771.118(c)(1); one of these comments was in reference to the preamble. Several comments supported the proposed CE. Four comments requested FTA explicitly define the types of activities that qualify. Five comments requested FTA clarify activities that are included ''within'' or ''adjacent to'' existing transportation right-of-way. One comment suggested this CE be limited to activities ''within'' existing right-of-way and not ''adjacent to,'' because ''adjacent to'' is too subjective and may not adequately limit the activities intended to be included in this CE. One comment noted that failing to define ''discrete'' may lead to unintended environmental consequences. One comment suggested that FTA define the term with consideration for Executive Order 13154, ''Federal Leadership in Environmental, Energy, and Economic Performance,'' which encourages sustainability, and Executive Order 13423, ''Strengthening Federal Environmental, Energy, and Transportation,'' which encourages the integration of renewable energy.

Response: FTA intended for this CE to apply to utility relocation and accommodation activities when limited in scope and generally confined to the property considered the traditional transportation right-of-way. This CE covers utility activities occurring within the boundaries of the right-of-way, including those utility activities taking place primarily within the right-of-way that may extend onto adjacent property, as well as utility-related activities (e.g., landscaping or re-vegetation) that occur within the right-of-way or on immediately adjacent property. FTA will consider the present use of the adjoining property and the amount of such property involved in determining whether this CE is appropriate. ''Discrete'' utilities are those that are separate from a larger transit project or other larger project, such as the modernization of an entire rail transit

line that includes station expansions, station redesign for access by the disabled, and upgrading the traction power. FTA admits the use of the term ''transfer station'' may have been interpreted as a bus transfer station, rather than a utility power station and has clarified that terminology.

Comment: Four comments suggested FTA include additional activities in this CE. One comment suggested changing the language to ensure readers know the listed activities were not exhaustive. One comment suggested adding ''catenary and signal work.'' One comment suggested adding ''maintenance'' and ''rehabilitation'' activities. Several comments suggested adding ''replacement.'' Finally, one comment suggested FTA state that ownership of the utility is not a factor in determining whether this CE may be applicable.

Response: The examples included for this and all CEs are illustrations of the use of the CE and are not an exhaustive list of its application. This CE covers ''catenary and signal work'' given that these activities are substantially similar to the listed examples. Likewise, this CE covers ''maintenance'' and ''rehabilitation'' activities as well as the environmental impacts of these activities are likely the same or less than an ''improvement.'' FTA is adding ''replacement'' to the list of activities under this CE, as replacement is substantially similar to installation in terms of impacts and may be the most common utility activity occurring within transit rights-of-way. Finally, ownership of the utility is not a factor in determining the application of this CE. For example, a utility company may own an easement on the transit right-of-way, but an action on their part may not involve an FTA action, and as such may not result in application of FTA's NEPA regulation.

771.118(c)(2) Acquisition, construction, rehabilitation, and improvement or limited expansion of stand-alone recreation, pedestrian, or bicycle facilities, such as: a multiuse pathway, lane, trail, or pedestrian bridge; and transit plaza amenities.

Comment: FTA received 12 comments on proposed section 771.118(c)(2) that covers certain pedestrian and bicycle facilities and similar or related facilities. Several of these comments were in reference to the preamble. Some of the comments supported the proposed CE. Some of the comments requested FTA define the term ''limited expansion.'' One comment requested FTA define the term ''transit plaza amenities.'' One comment suggested FTA clarify the term ''stand-alone.'' This comment suggested this CE should not apply to stand-alone facilities, but to the acquisition, construction, etc., of facilities associated with an already existing station, so long as the facilities are not a part of a larger new project.

Response: FTA views the expansion of such facilities covered by this CE as being ''limited'' where the expansion is smaller in magnitude than the original facility and is confined to the original environmental setting. Transit plaza amenities are those features of a facility that add to its desirability as viewed by the traveling public (e.g., wayfinding signs, bike lockers, ticket vending machines, benches, and landscaping). FTA uses the term ''stand-alone'' to mean a facility that is capable of operating independently. FTA uses the term, as applied here, to avoid including facilities that are part of a larger proposed project with the potential for significant environmental impacts.

Comment: Several comments suggested FTA include additional activities in this CE. One comment suggested FTA include ''ferry terminal passenger overhead loading structures'' because rehabilitation, construction, and improvements to these structures do not ''materially expand the environmental footprint of existing structures.'' One comment suggested FTA add ''maintenance activities'' because they are similar to the activities already listed.

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers ferry terminal passenger overhead loading structures in that these structures are virtually synonymous with ''pedestrian bridge.'' FTA agrees that maintenance activities are similar in impact to the activities already listed and included ''maintenance'' in this final rule.

Comment: One comment suggested this CE should not extend to new construction with new surface disturbance and significant changes in or increase in use because stand-alone facilities such as pedestrian and bike paths can impact ''sizeable swaths of habitat.''

Response: FTA usually constructs this type of facility in urbanized areas and sizeable swaths of habitat are not impacted. If sizeable swaths of habitat are impacted, then that unusual circumstance would likely require FTA and the grant applicant to conduct appropriate environmental studies under section 771.118(b)(1) to determine whether the CE classification is proper.

771.118(c)(3) Limited activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities, including those that are listed or eligible for listing on the National Register of Historic Places when there are no adverse effects under the National Historic Preservation Act; retrofitting for energy conservation; and landscaping or re-vegetation.

Comment: FTA received 21 comments on proposed section 771.118(c)(3); one of these comments was in reference to the preamble. Several comments supported the proposed CE. Several comments suggested FTA not limit the historic transportation activities to those not having an adverse effects under the Section 106 regulation (36 CFR Part 800), with several comments specifically suggesting removing the language ''when there are no adverse effects under the National Historic Preservation Act.'' One of these comments noted that not all adverse effects constitute a ''significant impact'' under NEPA. Similarly, one comment suggested this CE be consistent with sections 771.117(c)(6) and (7), both of which lack the ''no adverse effect'' language.

Response: FTA recognizes that not all adverse effects under Section 106 constitute a significant environmental impact for purposes of compliance with NEPA. For consistency with our other CEs, FTA deleted ''including those that are listed or eligible for listing on the National Register of Historic Places when there are no adverse effects under the National Historic Preservation Act.'' Such reference to Section 106 would suggest that Section 106 is an issue only for this CE and would lessen the attention paid to Section 106 for other CEs in which Section 106 compliance is not mentioned in the CE language; Section 106 applies to all actions covered by CEs that may affect a property on or eligible for the National Register of Historic Places.

Comment: FTA received five comments suggesting additional activities be covered under this CE. One comment suggested adding ''replacement of in-water creosote-treated timber piles, berthing, and other structures such as wingwalls, dolphins, and pilings underneath trestle and docks.'' This comment noted that removal of creosote-treated timber is an environmental priority for many Federal, State, and local agencies. One comment suggested adding ''stormwater management'' and ''roof replacement.'' Several comments suggested adding

''bridges'' and ''viaducts.'' One comment suggested adding ''other resource conservations measures (not just limited to energy).''

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers replacement of in-water creosote-treated timber piles, berthing, and other structures, as this constitutes rehabilitation of public transportation buildings, structures, or facilities. Likewise, this CE covers stormwater management as an activity designed to mitigate environmental harm. This CE covers roof replacement to the extent it fits within the CE's limitations (i.e., designed to mitigate environmental harm and causes no harm itself, or maintains and enhances environmental quality and site aesthetics, and employs construction best management practices). This CE covers rehabilitation of bridges and viaducts if they are considered public transportation structures. FTA agrees that ''other resource'' conservation measures (not just energy) should be included in the list of examples, and amended the final rule to include this activity.

Comment: There were ten comments requesting FTA remove the word ''limited.'' Four of these comments stated the term is unclear, ambiguous, or subject to misinterpretation. Four comments suggested eliminating the word to allow for an expansion of the activities included in this CE.

Response: FTA's expectation is that these CE activities would occur within or adjacent to the transportation right-of-way to be eligible for FTA assistance. Thus, these activities would be limited by FTA's funding program requirements. Removing the term ''limited'' would not broaden the application of this CE. Therefore, FTA agrees that this term is unnecessary and it is not included in the final rule.

771.118(c)(4) Planning and administrative activities which do not involve or lead directly to construction, such as: training, technical assistance and research; promulgation of rules, regulations, directives, or program guidance; approval of project concepts; and engineering.

Comment: FTA received six comments on proposed section 771.118(c)(4). One comment suggested FTA omit environmental requirements in their entirety for internal management and planning activities that have no environmental impact.

Response: FTA's intent with this rulemaking is to reduce the paperwork for activities that normally do not, individually or cumulatively, have a significant effect on the human environment. As noted above, FTA's expectation for the documentation required for a CE under section 771.118(c) is minimal, usually collected as part of the grant application process, and should not cause an undue burden. FTA cannot, through a categorical exclusion, change the applicability of other environmental laws that might apply.

Comment: FTA received six comments suggesting this CE include additional activities. Several comments suggested FTA include ''planning and technical studies'' to maintain consistency and avoid ambiguity. One comment suggested FTA include ''operating assistance to transit authorities to continue existing or increase service to meet routine demand,'' as included in former sections 771.117(c)(1) and (16). Several comments suggested certain geotechnical activities be included. One of these comments suggested adding geotechnical investigations that are necessary to define the elements of the proposed action or alternative so that grant applicants can assess structural, seismic, and environmental conditions. This comment also noted geotechnical investigation is often included as part of the scoping process. Another comment suggested adding technical borings, monitoring wells, utility potholing, archeological surveys, and similar subsurface investigations which would not lead directly to construction or environmental impacts.

Response: As stated above, the CE does not contain an exhaustive list of examples. This CE covers planning and technical studies. FTA agrees that ''operating assistance to transit authorities to continue existing or increase service to meet routine demand'' activity should be added to the CE as it is supported by past FTA documentation and regulations (i.e., section 771.117(c)(16)). FTA agrees that ''geotechnical investigations'' are routine activities that are a necessary part of the environmental review of a construction project and typically do not have significant environmental impacts, but FTA has chosen not to add the activity to the list of examples at this time, as some geotechnical work can be substantial and might not be appropriate for approval under this CE. That said, some geotechnical work (such as the use of ground penetrating radar), could be approved under this CE as long as it did not involve construction or lead directly to construction.

771.118(c)(5) Discrete activities, including repairs, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: the deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation; and retrofitting existing transportation vehicles, facilities, or structures.

Comment: FTA received 19 comments on proposed section 771.118(c)(5); eight of these comments were in reference to the preamble. One comment suggested FTA include ''ferry terminal passenger overhead loading or transfer spans'' to the CE list. One comment requested FTA add additional language to clarify that the CE does not include new construction with surface disturbance and significant change or increase in use. Several comments suggested FTA remove the term ''discrete'' because it is too subjective a term. Several comments suggested FTA add ''installation of fencing, signs, pavement markings, and small passenger shelters'' to the list of activities.

Response: As stated above, the CE does not contain an exhaustive list of examples. Section 771.118(c)(2) covers ferry terminal passenger overhead loading or transfer spans. Activities occurring under this CE would rarely include new construction with surface disturbance and significant change or increase in use. If this occurred, another CE in section 771.118(c) may apply, or FTA and the grant applicant would conduct and document appropriate environmental studies to determine if the CE classification under section 771.118(d) is proper. FTA agrees the term ''discrete'' is confusing and deleted it. The term was intended to distinguish stand-alone projects, such as the installation of communications equipment along an existing line, from an element of a larger project, such as construction of a new transit line that includes installation of communication equipment, among other elements. As suggested, FTA added ''replacements, and rehabilitations'' to the final rule for clarity. This CE covers ''installation of fencing, signs, pavement markings, and small passenger shelters,'' as these activities promote transportation safety, security, accessibility, and effective communication.

771.118(c)(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as: scenic

easements and historic sites for the purpose of preserving the site. This CE extends only to acquisitions that will not limit the evaluation of alternatives.

Comment: FTA received 19 comments on proposed section 771.118(c)(6); four of these comments were in reference to the preamble. One comment requested clarification of the phrases ''acquisition or transfer of an interest in real property'' and ''not within or adjacent to.'' FTA received four comments requesting ''or transfers'' be added to the second sentence of the CE. FTA received several comments requesting clarification that ''acquisitions or transfers'' include acquiring interests in real property where those real property interests will not limit the evaluation of alternatives.

Response: FTA uses the phrase ''Acquisition or transfer of an interest in real property'' to mean the act of purchasing or otherwise acquiring a property right in the property (e.g., absolute ownership, trackage right, easement, etc.). FTA uses the phrase ''not within or adjacent to'' to mean property that is not inside or adjoining other property considered environmentally sensitive. FTA agrees that including ''or transfers'' in the second sentence will clarify FTA's intent to apply this CE to both acquisitions and transfers of interest in real property. FTA further clarifies that the ''acquisitions or transfers'' under this CE will not limit the NEPA evaluation of alternatives for FTA-assisted projects built on the property. Note that a similar CE covering property acquisition in section 771.118(d)(3) would allow property acquisition without these limitations but would require documentation under section 771.118(d) to demonstrate that the CE applies.

Comment: FTA received one comment requesting clarification of the phrase ''substantial displacements, such as scenic easements and historic sites.'' FTA received one comment that noted the commenter interpreted this CE to include ''hardship acquisitions, provided that they do not result in a substantial change in the functional use of the property or in substantial displacements prior to completion of the [NEPA] process for any proposed change in the use of the property for the project under consideration.''

Response: FTA's reference to scenic easements or historic sites (for preserving the site) was to provide examples of special cases where this CE might apply. As noted previously, section 771.118(d)(3) covers other acquisition of property (including real property for hardship or protective purposes) where the limitations of section 771.118(c)(6) are not satisfied.

Comment: FTA received one comment suggesting the CE include the phrase ''until such time as the evaluation of alternatives is completed or suspended'' in order to clarify the timing of the change in the functional use of the property. One comment suggested the ''functional use'' criterion may be unnecessarily narrow because not all changes in functional use pose a potential for impacts. The comment suggested FTA revise the proposed criterion from ''does not result in a substantial change in the functional use of the property'' to read, ''does not result in a substantial physical change to the property.''

Response: FTA agrees with the recommendation to add, ''until such time as the evaluation of alternatives is completed or suspended'' though FTA revised the language to read, ''for future FTA-assisted projects that make use of the acquired or transferred property.'' FTA will keep ''functional use'' as a qualifying criterion for this CE because any change in the functional use of the property, if FTA-assisted, would require a separate NEPA evaluation of the project.

Comment: FTA received one comment that suggested additional activities be included in this CE. The comment requested FTA add ''Approval for Right of Way Disposal or Joint or Limited Use'' which was previously in section 771.117(d)(6).

Response: For FTA, the transit agency's disposal of property that it owns, but in which there is an FTA financial interest due to past grant(s), is not a Federal action for purposes of NEPA and the FTA environmental review process because, as several Federal courts have found, Federal agencies do not exercise sufficient control over these actions to trigger NEPA. *See, e.g., Woodham* v. *FTA, 125 F.Supp.2d 1106, 1110 (N.D. Ga. 2000); South Bronx Coalition for Clean Air* v. *Conroy,* 20 F. Supp.2d 565, 570–71 (S.D.N.Y. 1998). Thus, there is no need to categorically exclude these actions from NEPA because NEPA does not apply. Instead, disposition actions by transit agencies of their own property are governed by FTA rules that protect FTA's investment in transit, and the property owner can take any action within those rules with no discretion by FTA over which action is taken.

For joint development projects funded with FTA grants, FTA has added a new CE at section 771.118(c)(10) that would cover actions previously covered by section 771.117(d)(6).

771.118(c)(7) Acquisition, rehabilitation and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats and people movers that can be accommodated by existing facilities or by new facilities that qualify for categorical exclusion.

Comment: FTA received 14 comments on proposed section 771.118(c)(7); eight of these comments were in reference to the preamble. Of the remaining comments, several comments asked FTA to clarify phrases used in the proposed rule, including ''located within existing facilities;'' ''no substantial off-site impacts;'' and ''that can be accommodated by existing facilities or new facilities.'' One comment recommended FTA revise the language to clearly address installation of new equipment within the transit facility. Several comments suggested FTA add ''installation'' and ''replacement'' involving vehicles and equipment to this category.

Response: FTA uses the phrase ''located within existing facilities'' to mean equipment located within a property that is already dedicated to a transportation function or within an existing building. FTA uses the phrase ''no substantial off-site impacts'' to mean that minor, insignificant impacts may occur outside property lines. FTA uses the phrase ''that can be accommodated by existing facilities or by new facilities'' to mean that the existing facilities have sufficient excess capacity to accommodate the vehicles, or, if the transit vehicles require new facilities, the new facilities also meet the requirements for a categorical exclusion. If the new facilities required by the new vehicles require an EA or EIS, the vehicle acquisition would be evaluated as part of that larger project. FTA agrees with adding ''installation'' and ''replacement'' of vehicles or equipment to the CE and has done so.

771.118(c)(8) Maintenance and minimally intrusive rehabilitation and reconstruction of facilities that occupy substantially the same environmental footprint and do not result in a change in functional use, such as: Improvements to bridges, tunnels, storage yards, buildings, and terminals; and construction of platform extensions and passing track.

Comment: FTA received 40 comments on proposed section 771.118(c)(8); five of these comments were in reference to

the preamble. FTA received nine comments requesting clarification of terms and phrases, including ''minimally intrusive;'' ''facilities that occupy substantially the same environmental footprint;'' ''reconstruction;'' and ''footprint.'' Eight comments specifically suggested FTA delete ''minimally intrusive.'' A few comments suggested FTA replace ''environmental'' with ''physical,'' and one comment recommended FTA replace ''environmental footprint'' with ''general location.'' One comment requested FTA replace ''that occupy substantially the same environmental footprint'' with ''that does not result in substantial off-site impacts.'' One comment requested the category be further limited (e.g., ''actions that do not increase the environmental footprint of a facility'').

Response: FTA intended the term ''minimally intrusive'' to describe rehabilitation and reconstruction activity that would not have significant adverse environmental effects. FTA agrees that this term could be misinterpreted. Further, FTA finds this CE is substantially constrained by the other limitations in the CE and therefore removed ''minimally intrusive'' from the final rule. FTA uses the term ''reconstruction'' to mean a rebuilding of the facility. FTA intended the phrase ''facilities that occupy substantially the same environmental footprint'' to mean facilities that are geographically located on the same property and within the same developed or disturbed area; for purposes of clarity, FTA will use ''geographic footprint'' instead of ''environmental footprint.'' The term ''geographic footprint'' is intended to be slightly more general than the term ''engineering footprint,'' the use of which would confine project activities strictly to the locations where human-built structures or facilities already exist, whereas the term ''geographic footprint'' would include all areas already affected by the impacts of the facility. This also addresses the concern that this comment be further limited. In other words, confining these activities to those areas would ensure no potential for significant environmental effects.

Comment: FTA received 13 comments recommending revisions to the CE language. FTA received several comments stating the CE language is not clear and does not broaden the scope of activities included under this CE. One comment also proposed creating a new CE specifically for ''maintenance and improvement to rail-bed and track when carried out within the existing right-of-way.''

Response: FTA agrees that track and railbed improvements are projects that qualify under this CE, and are so commonly assisted by FTA grants they should be added to the list of examples. The language in the final rule reflects this change. FTA does believe that this CE broadens the transit-related CEs from the former section 771.117(c), and activities that do not qualify under this CE might still qualify under section 771.118(d), with documentation.

Comment: FTA received one comment stating the proposed replacement provision ''muddles the concept of restorative activities'' by providing examples of ''improvements,'' while at the same time disclaiming the availability of a CE for any project that will cause a change (i.e., an ''improvement'') in functional use. In other words, if a grant applicant intends a project to ''improve'' certain infrastructure through maintenance, rehabilitation, and reconstruction, the project is entitled to a CE. However, if the proposed action ''improves'' the functional use of the facility, a CE may not be available.

Response: FTA disagrees with this analysis. Maintenance, rehabilitation, and reconstruction of certain facilities would be included in this CE as long as the facilities occupy substantially the same geographic footprint, meaning the impact to the environment is essentially unchanged and the functional use of the facility is unchanged. An improvement to the facilities is not a change in functional use. For example, when a transit center is rehabilitated under this CE, it may be improved by incorporating the latest communications and passenger information technologies. If the transit center's function is changed by converting it into a bus maintenance facility, then it would not qualify under this CE, though it may qualify under section 771.118(d), with documentation. Thus, certain improvements would be allowed by this CE as long as the functional use does not change and the other conditions are met.

Comment: FTA received 12 comments requesting FTA include additional examples for section 771.118(c)(8). Proposed additional examples include ''track and railbed improvements;'' ''railbed maintenance and improvements within the existing right-of-way;'' ''stations'' or ''stations and station buildings;'' ''bridge replacement;'' ''renewal and/or component repair;'' and ''retaining walls.'' FTA received one comment requesting clarification whether track and railbed work is included in this CE. FTA received one comment requesting that ''terminals'' include ferry terminals, and one comment asking FTA to confirm rehabilitation of transit infrastructure (track, ties, supporting structures, and utilities) would be included in this CE.

Response: As stated above, the CE does not contain an exhaustive list of examples. FTA is adding ''track and railbed improvements,'' ''stations,'' and ''retaining walls'' to the list of examples because these activities are frequently assisted by FTA grants. ''Bridge replacement,'' however, is more appropriately addressed under section 771.118(d), which requires that it be appropriately documented. As written, this CE covers ''renewal and/or component repair,'' ferry terminals, and transit infrastructure rehabilitation.

Comment: FTA received one comment that asked whether all activities listed under former section 771.117(d)(3) fall under this CE.

Response: Most, but not all, of the activities falling under section 771.117(d)(3) would fall under section 771.118(c)(8). The types of actions in section 771.117(d)(3), specifically reconstruction of a bridge and construction of a new rail-highway grade separation, at this time would require documentation to demonstrate that the CE would apply and that no unusual circumstances would result. These types of projects are included in section 771.118(d)(2) of this final rule. Other than these larger projects, activities falling under section 771.117(d)(3) now fall under section 771.118(c)(8) in this final rule, as well.

771.118(c)(9) Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations), is minimally intrusive, and requires no special permits, permissions, and uses a minimal amount of undisturbed land, such as: buildings and associated structures; bus transfers, busways, and streetcar lines within existing transportation right-of-way; and parking facilities.

Comment: FTA received 58 comments on proposed section 771.118(c)(9); 11 of these comments were in reference to the preamble. FTA received nine comments on the term ''minimally intrusive.'' Comments suggested the term was ambiguous or subjective and recommended FTA either remove this language or provide further clarification of its meaning. FTA received 20 comments on the phrase ''requires no special permit, permissions.'' Comments suggested the phrase added confusion to the applicability of the CE as nearly all projects require some type of permit or permission, and recommended FTA

either remove this language or provide further clarification of its meaning. FTA received 11 comments on the phrase ''uses a minimal amount of undisturbed land.'' Comments suggested FTA remove this language, provide further clarification of its meaning, or change the language to ''uses previously disturbed land.'' FTA received 11 comments on the term ''bus transfers.'' Comments suggested the term was ambiguous or too limiting and recommended FTA either provide further clarification of its meaning or replace the language with the term ''bus transfer stations and intermodal centers'' in order to capture all appropriate bus facilities and broaden the applicability of this CE. FTA received 11 comments on the term ''streetcar lines.'' Comments suggested FTA replace this language with ''fixed guideways'' in order to be mode-neutral and broaden the scope of projects eligible under this CE.

Response: FTA agrees the term ''minimally intrusive'' is covered by the permit restriction and therefore removes it from the final rule. FTA agrees that the phrase ''requires no special permit, permissions'' is also not necessary, as it represents requirements under other laws that would require the same degree of compliance regardless of the NEPA class of action. FTA is removing that language as not necessary to the determination. Where special permits are required that raise questions about the environmental impacts of the proposed action, a documented CE, EA, or EIS may be appropriate if ''unusual circumstances'' are present that suggest there could be individual or cumulative significant effects to the environment. FTA intended the phrase ''uses a minimal amount of undisturbed land'' to mean a negligible amount of land in its natural state. Given the comment and the need for clarification, however, FTA is revising that language to read ''uses primarily land previously disturbed for transportation use.'' FTA believes that use of this phrase responds to the comment and clarifies the application.

FTA agrees to replace ''bus transfers'' with ''bus transfer stations or intermodal centers'' in the final rule. Rather than replace ''streetcar lines'' with ''fixed guideways'' in the final rule, FTA will use the term ''busways, streetcar lines, or other transit investments'' to allow for other types of transit investments that would be appropriate for this CE.

Comment: FTA received eight comments suggesting FTA modify the CE language by adding ''operating'' prior to ''within existing transportation right-of-way'' to limit the actions that could be covered by this CE. One comment asked FTA to clarify why FTA did not include bus stations/stops, bus passenger shelters, bus lanes, bus bays, bus queue jumper and bypass lanes, and bus malls. One comment asked FTA to consider including ''electric trolleybus'' to the list of examples. Lastly, one comment noted many of the FTA FONSIs supporting this CE in the substantiating documentation include right-of-way acquisition. FTA interprets this comment to mean the commenter would like this CE to include projects that would primarily occur within the public right-of-way, but not entirely, and result in few displacements.

Response: Rather than include the term ''operating'' prior to ''within existing transportation right-of-way'' in this final rule, FTA added language to that particular CE example that attempts to get at the same point but with more specificity. Rather than using ''existing transportation right-of-way,'' FTA will use the terminology: ''areas of the right-of-way occupied by the physical footprint of the existing facility or otherwise maintained for transportation operations.'' This will provide the limitation requested by the commenter in a more specific way for this project example in this CE. Future rulemaking will address a CE designation for projects within the ''operational right-of-way,'' as required under section 1316 of MAP–21. FTA chose to limit the number of examples under this and all CEs because FTA meant for the list to be merely illustrative of its applicability. For example, FTA will not include ''electric trolleybus'' to the list of examples, even though they would be covered by the CE if the proposed action otherwise met the CE requirements. But as noted above, FTA has decided, to make this clearer, to broaden the example to ''busways, streetcar lines, or other similar transit investments.'' FTA decided not to allow some unspecified amount of land acquisition beyond public rights-of-way to be associated with this CE for streetcar and busway projects because the environmental impacts of the use of that land would be unknown. But projects functionally similar to those listed and requiring minor right-of-way acquisition may still be covered by the CE as long as ''unusual circumstances'' would not result in environmental impacts where the CE classification would be improper.

Comment: FTA received one comment suggesting that proposed section 771.118(c)(9) overlaps with the proposed sections 771.118(d)(1) and (d)(2), and that this could cause confusion when determining which CE to apply. This comment requested more clarity and distinction between undocumented and documented CEs. This comment also recommended removal of all examples in the section 771.118(d).

Response: For purposes of streamlining, FTA focused this rulemaking on the new section 771.118(c). FTA does not agree that examples falling under section 771.118(d) should be removed. FTA continues to believe that, at this time, grant applicants should submit documentation demonstrating the specific conditions or criteria for the examples listed are satisfied and that unusual circumstances will not result in significant environmental effects.

771.118(c)(10) Development activities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: police facilities, daycare facilities, public service facilities, and amenities.

Comment: FTA received 17 comments on proposed section 771.118(c)(10); several of these comments were in reference to the preamble. FTA received four comments that requested clarification of the range of activities falling within the definition of ''development activities.'' One comment suggested the proposed CE is limited to public service facilities and amenities, and does not include commercial or residential development. Four comments recommended FTA replace the term ''development'' with ''construction,'' ''facilities,'' ''structures,'' or ''buildings.'' One comment requested FTA clarify that the proposed uses must not adversely impact transit operations, safety, and future facility plans. One comment requested FTA clarify the phrase ''located on, above, or adjacent to existing transit facilities.'' Several comments requested FTA clarify the phrase ''do not substantially enlarge such facilities'' and one comment requested the CE be further limited because ''substantially'' is ''open to interpretation.'' Finally, one comment proposed that standard public notification and public comment opportunities associated with local land use decisions meant that a separate EA for development activities was unwarranted.

Response: FTA agrees the term ''development activities'' is excessively inclusive and therefore replaces it with the term ''development of facilities.'' FTA does not want to limit this CE to public service facilities and amenities,

and adds, ''commercial, retail, and residential development'' to the list of activities covered by this CE accordingly. FTA agrees the development must not adversely impact transit operations and safety. The environmental review process is not FTA's mechanism for enforcing operating and safety constraints in this situation; rather, MAP–21 has provided FTA with new authority in these areas. FTA uses the terms ''located on, above, or adjacent to'' in keeping with common usage and interpretation, but FTA is very unlikely to be involved in a project that does not have some transit connection. FTA uses the term ''substantially'' to limit the potential environmental impacts of the facilities covered by section 771.118(c)(10), but section 771.118(d) may apply when section 771.118(c)(10) does not. FTA agrees that typically an EA for the development activities described in this CE would not be triggered by local ordinances that require public notification procedures; an EA would be triggered based on uncertainty of environmental impacts. Comments on section 771.118(d) have all been covered in the responses above to general comments and to the comments on section 771.118(c).

Section 771.118(d)

Comment: FTA received one comment requesting clarification regarding whether the activities under section 771.118(d)(1) include adding bus lanes, bus shoulder lanes, busways, bus malls, bus bays, bus queue jumper and bypass lanes, HOV lanes, and/or HOT lanes, and whether the list also includes the conversion of a mixed-use traffic lane into a bus lane, HOV lane, HOT lane, or bus mall in addition to turn lanes and passing lanes.

Response: FTA recommends a grant applicant work closely with the FTA regional office to determine whether a particular project is eligible for FTA assistance and meets the requirements for any particular CE. In this instance, the comment provides some examples that appear to be new transit lanes to a highway. Some of the project examples in the comment may or may not, depending on additional unknown project details, include a transit component. The language of the example in section 771.118(d)(1) is written to cover the conversion of existing auxiliary lanes or shoulders to a transit purpose, not general purpose travel lanes, but it is only an example, and other similar projects could potentially be categorically excluded if a reasonable amount of documentation can show there is no potential for significant environmental impacts. Also, the new CE in section 771.118(c)(9) can be used for busways if the limitations in the CE language are met.

Comment: FTA received seven comments on the proposed documented categorical exclusion located within section 771.118(d)(2). One comment requested that FTA clarify the range of actions allowed under ''reconstruction'' and ''grade-separation to replace existing at-grade railroad crossings.'' Several comments suggested that FTA consider appending additional actions to this example, including ''grade separation to replace at-grade busway crossings'' and ''direct access ramps.'' Additionally, the comment recommended that FTA use either the term ''railroad-highway grade crossing'' or ''railway-highway grade crossing'' instead of ''at-grade railroad crossings.''

Response: Section 771.118(d) mimics section 771.117(d), except that it lists fewer examples in light of the separate FHWA and FTA lists and the more expansive list proposed for section 771.118(c). Given that the list of actions in the new section 771.118(d) are only examples of the types of actions that could be categorically excluded through the use of documentation, FTA does not see the need to modify the language in the example at this time. The projects represented by the edits to this CE language by commenters could certainly be categorically excluded if demonstrated as having no potential for significant environmental effects in the same way as a project represented by the language in the CE example.

FTA acknowledges, however, that the language in section 771.118(d)(4) must be modified to reflect the expansion by MAP–21 Section 20016 of early acquisition authority from railroad right-of-way to any right-of-way needed for a transit project (i.e., ''railroad'' was deleted). Despite the expansion to any right-of-way needed for a transit project, the conditions found in sections 771.118(a) and (b) must be met to qualify for a CE.

Section 771.119 Environmental assessments

The proposed changes to sections 771.119 and 771.123 were very similar in content, and, as a result, the comments on section 771.119 were essentially the same as the comments on section 771.123. Responses below address both Sections.

Section 771.123 Draft environmental impact statements

Comment: FTA received several comments in support of the proposed change to section 771.119(k) relating to outside contractors preparing EAs, and section 771.123(d) relating to outside contractors preparing draft EISs. FTA received 13 comments that opposed the proposed change and recommended that FTA eliminate this proposal from inclusion in the final rule. Twenty-seven comments suggested the proposal may have unintended impacts on project timeline, add uncertainty to the process, and delay preparation and completion of environmental documentation, all running counter to FTA's goal of making the environmental review process more efficient. Several comments suggested the proposal may be inconsistent with transit agency or local government environmental requirements or contracting requirements and may be inconsistent with State law. Thirteen comments recommended FTA should instead provide guidance to grant applicants before they contract the environmental work, and that this guidance provide standard outlines and suggested content for the contracts' statements of work (SOWs) for EAs and EISs. These commenters argued this guidance would provide significant support toward achieving FTA's streamlining goal. Seven comments recommended FTA define the term ''informal scoping'' and agency expectations for this step in the process. One comment suggested that rather than require FTA approval of a NEPA contractor's SOW, which can often be very long and detailed, a more streamlined approach would be to require FTA approval of a simple outline or table of contents for the EA or EIS describing the alternatives and elements of the environment to be studied in the document. The grant applicant can then work directly with the contractor to reflect the agreed upon scope of the document. Finally, one comment requested FTA consider allowing grant applicants to hire a NEPA contractor using a two-part SOW. The first part would be limited to work necessary for scoping; the second would be to prepare the environmental document, subject to the conditions set forth in sections 771.119 and 771.123.

Response: Due to the number of comments received and their overwhelming opposition to, or problem identification for, the proposed language in the NPRM, FTA will not include contracting language in 23 CFR Part 771 at this time. FTA will provide guidance to highlight best practices on contracting, including recommendations on the procurement timing and EA/EIS development (e.g., two-part statements of work, task orders), and what grant applicants should consider when

reviewing statements of work and selecting contractors.

Section-by-Section Analysis

Section 771.101 Purpose

The NPRM contained no proposed changes for section 771.101, but MAP–21 eliminated environmental provisions previously contained in 49 U.S.C. 5324, so FTA is removing reference to that section and changing the reference to 49 U.S.C. 5323 to be consistent with the new statutory structure.

Section 771.105 Policy

The minor, non-substantive revision to the footnote to section 771.105(a) proposed in the NPRM has been included. This revision recognizes the fact that both FTA and the FHWA frequently update guidance relevant to the preparation of environmental documents. The added phrase ''but is not limited to'' clarifies this point, such that the introduction to supplementary guidance now reads: ''FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to * * *'' In addition, the spelling of the word ''Web sites'' has been changed to the more commonly used ''websites.''

Section 771.107 Definitions

Although not mentioned in the NPRM, FTA and the FHWA have made revisions to the definition of ''Administration'' in paragraph (d) of this section to clarify that any reference in Part 771 to ''the Administration'' means the FHWA, FTA, or a State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State under 23 U.S.C 325, 326, or 327, or other applicable law. The clarification was made due to changes to sections 771.117 and 771.118 where it is now specifically noted that section 771.117 applies to FHWA actions and section 771.118 applies to FTA actions. If the final rule did not make this change, then technically, the CE lists would not apply in any instance in which a State has been delegated or assigned the authority of the FHWA or FTA. This is a technical/administrative change only. In addition, clarifying text was added to the end of the definition to clarify that this definition is not intended to affect the scope of any delegation or assignment.

Section 771.109 Applicability and responsibilities

The minor, non-substantive revision proposed for this section to correct the spelling of the word ''construction'' has been completed.

Section 771.111 Early coordination, public involvement, and project development

FTA is adopting the proposed procedures in section 771.111(i) that provide grant applicants with flexibility and efficiency in the public involvement aspects of the environmental process. Section 771.111(i)(1) encourages grant applicants to announce project milestones using either electronic or paper media. Currently, the use of electronic means is already practiced by some grant applicants, but FTA is making clear that the use of the option is available for all grant applicants. FTA is taking advantage of its experience that seeking public input in the environmental process by various means, such as increasing the use of project websites, adds value and flexibility that broadens public access and input and, thereby, ultimately expedites project review. Additionally, FTA deleted ''pursuant to 49 U.S.C. 5323(b)'' from the end of section 771.111(i) to reflect changes to FTA law made by MAP–21. There is no longer a statutory requirement for public involvement in transit law at Chapter 53 of Title 49, U.S. Code, but public involvement is required by NEPA and remains fixed in FTA's environmental regulation (i.e., 23 CFR part 771) and thereby part of the environmental review process for transit projects. Section 771.111(i)(2) formally presents the option of doing ''early scoping,'' which can be used to link the metropolitan and statewide transportation planning processes, mandated by 49 U.S.C. 5303–5304, with the environmental review process to provide a seamless transition from transportation planning to project-specific environmental evaluation. Early scoping provides a logical connection between planning-level corridor studies and environmental review required by NEPA to produce a proposed action to be studied during the NEPA process. Steps for following the early scoping process are included in section 771.111(i)(2), which FTA is adopting. To increase the transparency of FTA environmental documents and process, section 771.111(i)(3) encourages posting and distributing environmental process-related materials through publicly-accessible electronic means, including project websites. FTA is adopting section 771.111(i)(4) to encourage the posting of all EISs (draft and final) and environmental records of decision (RODs) on a grant applicant's project website and maintaining it there until the project is constructed and operating. Additionally, the Environmental Protection Agency (EPA) has developed an electronic filing system for EIS documents (e-NEPA), which allows for posting of EISs on the EPA website (*http://www.epa.gov/oecaerth/nepa/submiteis/index.html*). FTA provides a link on its website to direct the public to EPA's comprehensive EIS database at *http://www.fta.dot.gov/12347_documents.html.* This final rule does not change the procedure for distribution of hard copies of FTA environmental documents upon request or the placement of such documents in public libraries and local government buildings within the project area.

Section 771.113 Timing of Administration activities

Prior to this final rule, section 771.113 contained references to the CEs in section 771.117 that applied to both FTA and the FHWA. With this final rule, FTA's use of section 771.118 for its CEs and the designation of section 771.117 for FHWA CEs required updates to the CE references in section 771.113. Therefore, section 771.113(d)(1) has been revised to refer to section 771.117(d)(12) for FHWA, and to add a reference to the new sections 771.118(c)(6) and (d)(3) for FTA. Section 771.113(d)(2) has been revised to reference section 771.118(d)(4), as this CE applies only to transit actions. Additionally, section 771.113(d)(2) was revised to delete ''pre-existing railroad'' from the acquisition exception and to update the statutory authority to ''49 U.S.C. 5323(q)'' as a result of changes mandated by MAP–21. By deleting ''pre-existing railroad,'' right-of-way not associated with railroad corridors may be purchased under section 771.118(d)(4) when the conditions in sections 771.118(a) and (b) are met, though no work can take place on the right-of-way until the completion of NEPA for the project.

Section 771.115 Classes of actions

Section 771.115(a)(3) has been revised to clarify that construction or extension of a fixed-guideway transit facility not located within an existing transportation right-of-way normally requires the preparation of an EIS. In addition, bus rapid transit (BRT), as defined in the *National Transit Database—Glossary* was added to the list of examples of such transit facilities. The former regulation was sometimes interpreted to expect an EIS for a proposed transit project located within an existing transportation right-of-way if the project would add a new transit

mode to that right-of-way. This final rule reflects FTA's experience that transit projects constructed within existing transportation rights-of-way often do not have significant impacts on the environment and do not require an EIS. In fact, it is FTA's experience that certain transit facilities qualify for a CE when constructed predominantly within a transportation right-of-way. In any instance where unusual circumstances would cause such a project, which would normally be an excluded action, to have the potential for significant environmental effects that would require further analysis,, FTA would review it with an EA or an EIS.

Section 771.115(b) has been revised to state that the CE lists in section 771.117 apply to FHWA actions, and the CE lists in section 771.118 apply to FTA actions.

Section 771.117 FHWA categorical exclusions

The header for section 771.117 has been changed to ''FHWA categorical exclusions,'' because the CEs listed in section 771.117 now apply to FHWA actions. Conforming amendments to clarify the list applies to the FHWA were performed by changing ''the Administration'' to ''the FHWA'' in sections 771.117(b), (c), and (d). In addition, although not proposed in the NPRM, this final rule deletes section 771.117(d)(13) as unnecessary because the CE does not apply to the FHWA and the list in section 771.117(d) is for FHWA actions. The CE will continue to apply to FTA actions through section 771.118(d)(4). This is a technical/administrative correction only.

Section 771.118 FTA categorical exclusions

FTA is adopting the new section 771.118 that contains CEs applicable to FTA actions. The section contains: section 771.118(a) that describes and defines CE actions; section 771.118(b) that defines unusual circumstances; and section 771.118(e) that addresses the consideration for adding new CEs in the future. These three paragraphs mimic sections 771.117(a), (b), and (e) that formerly applied to both the FHWA and FTA, but now apply only to FHWA actions.

New sections 771.118(c) and (d) have been added to describe the FTA CEs. The list in section 771.118(c) is more expansive than the former list in section 771.117(c). It focuses on the actions most applicable to FTA and generalizes the descriptions of those actions to be as inclusive as appropriate for a CE. As described above in the Comments and Responses section, this final rule makes minor revisions to the NPRM wording of these CEs in response to comments on the NPRM and for clarity. FTA will determine whether the action described by the grant applicant falls within the CE category. FTA expects that a description of the project in the grant application will normally be sufficient for FTA to determine that the CE applies and that no unusual circumstances would result for projects falling under section 771.118(c), but projects could require documentation for other environmental requirements, such as Section 106 of the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, or the Clean Air Act. The section also includes section 771.118(d), which lists CEs that require documentation to verify that the application of a CE is appropriate. Section 771.118(d) lists fewer examples of CEs than the former section 771.117(d) because the FHWA and FTA lists have been separated and the CEs listed in section 771.118(c) were generalized to include many of the transit actions formerly covered by section 771.117(d). Multimodal projects containing both FHWA and FTA actions (such as the reconstruction of a highway lane within existing right-of-way for express bus service funded by FTA but requiring an FHWA approval) may be processed as CEs under section 771.117 for FHWA *and* under section 771.118 for FTA provided there are no cumulative significant effects of the FHWA and FTA actions.

Per CEQ guidance, the CEs in section 771.118 are presented as general categories that include appropriate limitations and provide an informative (but not exhaustive) list of examples. The CEs adopted in this final rule are listed in the amendatory language of the regulation itself. Substantiation of the CEs, in accordance with CEQ guidance, was provided as part of the NPRM and remains available in the NPRM docket on Regulations.gov. Three of the revisions to the NPRM wording of the CEs included in this final rule are substantive and are described below.

Section 771.118(c)(3) was expanded to allow the maintenance and rehabilitation of historic transportation facilities that may be adversely affected by the project. None of the CEs except this one originally involved compliance with both NEPA and Section 106. Such reference to Section 106 would suggest that Section 106 is an issue only for this CE and would lessen the attention paid to Section 106 for other CEs in which Section 106 compliance is not mentioned in the CE language. Section 106 applies to all CEs that may affect a property on or eligible for the National Register of Historic Places. Furthermore, FTA and its grant applicants have in the past had Section 106 programmatic agreements covering the adverse effects of the maintenance and rehabilitation of historic rapid rail stations eligible for FTA state-of-good-repair grants. Such programmatic agreements should be encouraged by FTA, not discouraged by eliminating the applicability of this CE when a programmatic agreement is signed.

Section 771.118(c)(4) was revised to include transit operating assistance. Operating assistance is typically used by the grant applicant to pay bus drivers their wages and for other similar operating costs that do not involve any construction. Operating assistance has been one of FTA's long-standing CEs without challenge or question, and was inadvertently omitted from the NPRM.

Section 771.118(d)(2) was reworded to distinguish between bridge projects requiring in-water activities and those that do not. Whereas the NPRM worded section 771.118(d)(2) to cover all bridge-related projects, in this final rule that section now requires environmental documentation only for bridge projects involving new construction or reconstruction of a bridge. Bridge rehabilitation and maintenance, which would have no significant environmental impacts, are covered by section 771.118(c)(8) and do not require additional NEPA documentation.

FTA's rationale for having the acquisition of certain real property interests covered in sections 771.118(c)(6), (d)(3), and (d)(4) requires explanation. Sections 771.118(d)(3), and (d)(4) cover the traditional early acquisitions available in the former version of this regulation, namely hardship and protective acquisitions in section 771.118(d)(3) and the acquisition of existing railroad right-of-way (ROW) in section 771.118(d)(4). FTA indicates in section 771.118(c)(6) that under certain conditions, an early property acquisition is appropriate and categorically excluded even when the acquisition is not a protective, hardship, or railroad ROW acquisition. The early acquisitions covered by section 771.118(c)(6) do have some constraints, however, regarding the environmental context of the property. FTA chose to add the environmentally constrained acquisitions to the CE list in section 771.118(c), while retaining the protective and hardship acquisitions in section 771.118(d). In addition, FTA is retaining but modifying the CE proposed for section 771.118(d) that would cover railroad ROW acquisition. FTA is modifying that CE by deleting the word ''railroad'' to reflect the change made to the statute by MAP–21 Section

20016. FTA recognizes the categories of property acquisition in sections 771.118(c) and (d) overlap in their coverage, but neither absorbs the other category of CE in its entirety. Therefore, FTA is adopting all of the CE categories regarding property acquisition to maximize coverage.

Further, for reasons described more fully in the background information, FTA is further expanding section 771.118(d) through the adoption of the following examples of actions that can be categorically excluded through the use of documentation:

(5) Construction of bicycle facilities within existing transportation right-of-way.

(6) Facility modernization through construction or replacement of existing components.

These examples may be eligible as categorical exclusions as long as they meet the requirements set forth in sections 771.118(a) and (b).

Section 771.119 Environmental assessments

FTA is adopting no change to section 771.119.

Section 771.123 Draft environmental impact statements

FTA is adopting no change to section 771.123(d). Section 771.123(j) is deleted as unnecessary, as proposed in the NPRM.

Section 771.133 Compliance with other requirements

No changes are made to this paragraph. FTA had proposed to add a sentence to this paragraph that stated that its approval of an environmental document constitutes its finding of compliance with Sections 5323(b) and 5324(b) of Title 49, U.S. Code. Since issuance of that NPRM, however, MAP–21 deleted the substantive requires in those sections. So FTA will not make changes to the regulatory text at this time.

Regulatory Analysis and Notices

All comments received on or before the close of business on the comment closing date indicated above were considered and are available for examination in the docket (FTA–2011–0056) at Regulations.gov. Comments received after the comment closing date were filed in the docket and were considered to the extent practicable.

Immediate Effective Date

FTA has determined that this rule be made effective immediately upon publication. The Administrative Procedure Act (5 U.S.C. 553(d)) requires that a rule be published 30 days prior to its effective date unless one of three exceptions applies. One of these exceptions is when the agency finds good cause for a shorter period. Here, FTA has determined that ''good cause'' exists for immediate effectiveness of this rule because this rule is expected to apply in many cases that address the immediate need to repair the transit system facilities and equipment damaged by Hurricane Sandy. Hurricane Sandy affected mid-Atlantic and northeastern states in October 2012, and particularly devastated transit operations in New Jersey and New York. These operations serve about 40% of all transit riders in the country. Through immediate promulgation of the categorical exclusions in section 771.118, many of the much needed Hurricane Sandy recovery efforts can occur in a more expeditious manner, while still ensuring that the environment is protected. Thus, it is in the public interest for this final rule to have an immediate effective date. FTA acknowledges the revisions contained within this final rule are applicable to a broader suite of FTA-funded and approved projects, but the good cause for making the rule effective immediately is specifically the support of Hurricane Sandy recovery efforts.

Executive Orders 13563 and 12866 and DOT Regulatory Policies and Procedures

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, of promoting flexibility, and of reviewing existing rules to determine if they can be made more effective or less burdensome in achieving their objectives. FTA and the FHWA determined this action is 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). Therefore, this final rule was submitted to the Office of Management and Budget (OMB) for interagency review.

This final rule clarifies the existing regulatory requirements for categorical exclusions, and the provisions of this rule would not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. FTA anticipates that the changes included in this final rule will enable certain projects to move more expeditiously through the Federal NEPA review process and will reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA or for ensuring that projects are built in an environmentally responsible manner. Under the previous regulations, approximately 90 percent of FTA's actions were CEs (specifically, under former sections 771.117(c) and (d)). FTA anticipates the percentage will increase under this final rule, especially where new categorically excluded actions are included.

FTA has estimated generally that, in the past, the duration of FTA's environmental review process for various NEPA actions has been within the following ranges: EISs from 1.5 years to 4 years; EAs from 6 months to 22 months; and documented CEs from 1 to 6 months. Where a particular action falls within that range depends on a number of factors, including the complexity of the action, the extent of environmental impacts, the local financial resources available for the project, and the source of Federal funds (along with any project development or evaluation processes involved in securing a Federal funding commitment). Actions processed as CEs under the old section 771.117(c) (now under this final rule at section 771.118(c)) have tended to take from a few days up to a month, depending primarily on whether there are other environmental requirements that must be met and whether the project description in the grant application is sufficiently thorough.

The greatest percentage of actions that will be processed under the new section 771.118(c) that were not previously processed under the old section 771.117(c) were likely processed before as documented CEs under section 771.117(d). The time saved from processing those actions under the new list would be due primarily to the need for less documentation, and thus would depend greatly on whether there are other environmental requirements (such as Section 106 consultation under the National Historic Preservation Act or compliance with Executive Order 12898 on Environmental Justice) that still must be met regardless of the CE type used. Some projects that will qualify as CEs

under the new section 771.118(c) might otherwise have been processed as EAs in the past. For those projects, greater time savings are anticipated given that there no longer will be a need to prepare an EA and a Finding of No Significant Impact for publication, in addition to reduced need to produce environmental documentation demonstrating a lack of impacts. As for projects previously evaluated with EISs, it is unlikely that any such actions would qualify as CEs under the new section 771.118(c) because most actions evaluated as EISs result in significant environmental impacts.

FTA is not able to quantify the economic effects of these changes because the types of projects that will be proposed for FTA funding and their potential impacts are unknown at this time. FTA received no comment on the likely effects of the changes proposed by the NPRM, but FTA anticipates this final rule will result in substantial benefits associated with the quicker delivery of transit projects with no associated increase in costs or decrease in environmental protection.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), FTA and the FHWA must consider whether this final 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. FTA does not believe that this final rule will have a significant economic impact on entities of any size, and FTA received no comment in response to our request for any such information in the NPRM. Thus, FTA and the FHWA determine that this final rule will not have a significant economic impact on a substantial number of small entities.

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 final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FTA and the FHWA have determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications. We received no comments from State and local governments in response to our request in the NPRM for information on the effect that specific proposals would 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. FTA analyzed this final rule under Executive Order 13175 and believes that the proposed action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal impact statement is not required. FTA received no comment in response to our request in the NPRM for comments from Indian tribal governments on the effect that adoption of specific proposals might have on Indian communities.

National Environmental Policy Act

This action would not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (NEPA). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. Agencies are required to adopt NEPA procedures that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). CEs are one part of those agency procedures, and therefore establishing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd,* 230 F.3d 947, 954–55 (7th Cir. 2000).

Statutory/Legal Authority for This Rulemaking

The FHWA and FTA derive explicit authority for this rulemaking action from 49 U.S.C. 322, which provides authority to ''[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.'' That authority is delegated to the FHWA and FTA through 49 CFR 1.81(a)(3), which provides that the authority to prescribe regulations contained in 49 U.S.C. 322 is delegated to each Administrator ''with respect to statutory provisions for which authority is delegated by other sections in [49 CFR Part 1].'' Included in 49 CFR part 1, specifically 49 CFR 1.81(a)(5), is the delegation of authority with respect to NEPA, the statute implemented by this final rule. Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1500.6 that ''[a]gencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of [NEPA].''

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no Federal agency shall conduct or sponsor a collection of information unless in advance the agency has obtained approval by and a control number from OMB, and no person is required to respond to a collection of information unless it displays a valid OMB control number. This rule does not include any new or revise any existing information collection.

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).

Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This final 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).

Executive Order 12630 (Taking of Private Property)

FTA analyzed this final rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. This rule will not affect 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)

FTA analyzed this action under Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' dated May 18, 2001. FTA 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)

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

List of Subjects

23 CFR Part 771

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

49 CFR Part 622

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

For the reasons set forth in the preamble, amend Chapter I of Title 23 and Chapter VI of Title 49, of the Code of Federal Regulations as set forth below:

Federal Highway Administration

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 1. The authority citation for part 771 continues 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; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 23 U.S.C. 322; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405.

■ 2. Amend § 771.101 by revising the last sentence to read as follows:

§ 771.101 Purpose.

* * * 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, and 5323.

■ 3. Amend § 771.105 by revising footnote 1 of paragraph (a) to read as follows:

§ 771.105 Policy.

* * * * *

(a) * * * [1]

[1] FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to: FHWA Technical Advisory T6640.8A, October 30, 1987; ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006; Appendix A of 23 CFR part 450, titled ''Linking the Transportation Planning and NEPA Processes''; and ''Transit Noise and Vibration Impact Assessment,'' May 2006. The FHWA and 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.

■ 4. Amend § 771.107 by revising paragraph (d) to read as follows:

§ 771.107 Definitions.

* * * * *

(d) *Administration.* The FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the FHWA, or FTA, or a State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. A reference herein to the FHWA or FTA means the State when the State is functioning as the FHWA or FTA respectively in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law. Nothing in this definition alters the scope of any delegation or assignment made by FHWA or FTA.

* * * * *

§ 771.109 [Amended]

■ 5. Amend § 771.109 in paragraph (b) by removing the misspelled word ''contruction'' and adding in its place the word ''construction''.

■ 6. Amend § 771.111 by revising paragraph (i) to read as follows:

§ 771.111 Early coordination, public involvement, and project development.

* * * * *

(i) Applicants for capital assistance in the FTA program:

(1) Achieve public participation on proposed projects through activities that engage the public, including public hearings, town meetings, and charettes, and seeking input from the public through the scoping process for environmental review documents. Project milestones may be announced to the public using electronic or paper media (e.g., newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. 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.

(2) May participate in early scoping as long as enough project information is known so the public and other agencies can participate effectively. Early scoping constitutes initiation of NEPA scoping while local planning efforts to aid in establishing the purpose and need and

in evaluating alternatives and impacts are underway. Notice of early scoping must be made to the public and other agencies. If early scoping is the start of the NEPA process, the early scoping notice must include language to that effect. After development of the proposed action at the conclusion of early scoping, FTA will publish the Notice of Intent if it is determined at that time that the proposed action requires an EIS. The Notice of Intent will establish a 30-day period for comments on the purpose and need and the alternatives.

(3) Are encouraged to post and distribute materials related to the environmental review process, including but not limited to, NEPA documents, public meeting announcements, and minutes, through publicly-accessible electronic means, including project Web sites. Applicants are encouraged to keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Are encouraged to post all environmental impact statements and records of decision on a project Web site until the project is constructed and open for operation.

* * * * *

■ 7. Amend § 771.113 by revising paragraphs (d)(1) and (2) to read as follows:

§ 771.113 Timing of Administration activities.

* * * * *

(d) * * *

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of § 771.117 for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of § 771.118 for FTA.

(2) Paragraph (d)(4) of § 771.118 contains an exception for the acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q).

* * * * *

■ 8. Amend § 771.115 by revising paragraph (a)(3) and paragraph (b) to read as follows:

§ 771.115 Classes of actions.

* * * * *

(a) * * *

(3) Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way.

* * * * *

(b) Class II (CEs). Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c) for FHWA actions or pursuant to § 771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d) for FHWA actions or pursuant to § 771.118(d) for FTA actions.

* * * * *

■ 9. Amend § 771.117 by:

■ a. Revising the heading of the section.

■ b. Removing paragraph (d)(13).

■ c., Revising the first sentence of paragraph (b) introductory text.

■ d. Revising paragraph (c) introductory text.

■ e. Revising the first sentence of paragraph (d) introductory text.

■ f. Revising paragraph (e).

The revisions read as follows:

§ 771.117 FHWA categorical exclusions.

* * * * *

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. * * *

* * * * *

(c) The following actions meet the criteria for CEs in the CEQ regulations (40 CFR 1508.4) and § 771.117(a) and normally do not require any further NEPA approvals by the FHWA:

* * * * *

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after the FHWA approval. * * *

* * * * *

(e) Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

■ 10. Add § 771.118 to read as follows:

§ 771.118 FTA categorical exclusions

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require FTA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) Actions that FTA determines fall within the following categories of FTA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section normally do not require any further NEPA approvals by FTA.

(1) Acquisition, installation, operation, evaluation, replacement, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: utility poles, underground wiring, cables, and information systems; and power substations and utility transfer stations.

(2) Acquisition, construction, maintenance, rehabilitation, and improvement or limited expansion of stand-alone recreation, pedestrian, or bicycle facilities, such as: a multiuse pathway, lane, trail, or pedestrian bridge; and transit plaza amenities.

(3) Activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities; retrofitting for energy or other resource conservation; and landscaping or re-vegetation.

(4) Planning and administrative activities which do not involve or lead directly to construction, such as: training, technical assistance and research; promulgation of rules, regulations, directives, or program

guidance; approval of project concepts; engineering; and operating assistance to transit authorities to continue existing service or increase service to meet routine demand.

(5) Activities, including repairs, replacements, and rehabilitations, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: the deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation; installation of passenger amenities and traffic signals; and retrofitting existing transportation vehicles, facilities or structures, or upgrading to current standards.

(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as: acquisition for scenic easements or historic sites for the purpose of preserving the site. This CE extends only to acquisitions and transfers that will not limit the evaluation of alternatives for future FTA-assisted projects that make use of the acquired or transferred property.

(7) Acquisition, installation, rehabilitation, replacement, and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats and people movers that can be accommodated by existing facilities or by new facilities that qualify for a categorical exclusion.

(8) Maintenance, rehabilitation, and reconstruction of facilities that occupy substantially the same geographic footprint and do not result in a change in functional use, such as: improvements to bridges, tunnels, storage yards, buildings, stations, and terminals; construction of platform extensions, passing track, and retaining walls; and improvements to tracks and railbeds.

(9) Assembly or construction of facilities that is consistent with existing land use and zoning requirements (including floodplain regulations) and uses primarily land disturbed for transportation use, such as: buildings and associated structures; bus transfer stations or intermodal centers; busways and streetcar lines or other transit investments within areas of the right-of-way occupied by the physical footprint of the existing facility or otherwise maintained or used for transportation operations; and parking facilities.

(10) Development of facilities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: police facilities, daycare facilities, public service facilities, amenities, and commercial, retail, and residential development.

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FTA approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoring, rehabilitating, or reconstructing shoulders or auxiliary lanes (e.g., lanes for parking, weaving, turning, climbing).

(2) Bridge replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(3) 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 may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the 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.

(4) Acquisition of right-of-way. No project development on the acquired right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

(5) Construction of bicycle facilities within existing transportation right-of-way.

(6) Facility modernization through construction or replacement of existing components.

(e) Where a pattern emerges of granting CE status for a particular type of action, FTA will initiate rulemaking proposing to add this type of action to the appropriate list of categorical exclusions in this section.

§ 771.123 [Amended]

■ 11. Amend § 771.123 by removing paragraph (j).

Federal Transit Administration

Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

■ 12. The authority citation for subpart A to 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; and 49 CFR 1.81.

Peter Rogoff,

Administrator, Federal Transit Administration.

Victor M. Mendez,

Administrator, Federal Highway Administration.

[FR Doc. 2013–02345 Filed 2–6–13; 8:45 am]

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