new CDL holders being paired with an experienced driver, but on many occasions the experienced driver was resting in the sleeper-berth rather than training/mentoring the new driver. They believe that new CDL drivers should receive a minimum of 6 months of on-the-job, behind the wheel training, with the trainer required to ride in the passenger seat and provide coaching and mentoring rather than resting in the sleeper berth. In addition, commenters stated that trainers should meet minimum experience and knowledge requirements before being eligible to train CDL applicants.

MAP–21 Requirements

The Moving Ahead for Progress in the 21st Century Act (MAP–21) Section 32304, ''Commercial motor vehicle operator training,'' amends 49 U.S.C. 31305 to require the Agency to issue regulations to establish minimum entry-level training requirements for all prospective CDL holders. Section 32304 specifically mandates that the training regulations (1) Address the knowledge and skills needed for safe operation of a CMV, (2) address the specific training needs of those seeking hazardous materials and passenger endorsements, (3) create a means of certifying that an applicant for a CDL meets Federal requirements, and (4) require training providers to demonstrate that their training meets uniform Federal standards. The 2007 NPRM did not address endorsement-related training or the entry-level training of new intrastate CDL applicants that is now mandated by MAP–21; these additions would be a significant change of direction.

After Congress enacted MAP–21, FMCSA requested that its Motor Carrier Safety Advisory Committee (MCSAC) consider the history of the ELDT issue, including legislative, regulatory and research background, and identify ideas the Agency should consider in moving forward with a rulemaking to implement the MAP–21 requirements. MCSAC issued its letter report in June 2013, which is available on the MCSAC Web site: *http://mcsac.fmcsa.dot.gov*.

Other Actions

Currently, FMCSA is conducting two research projects to gather supporting information on the effectiveness of ELDT. Study 1 will randomly sample CDL holders who received their license in the last three years and were identified as recently employed as a CMV driver. This will be done using information from the Motor Carrier Management Information System and the Commercial Driver License Information System. The drivers' safety performance data from these two systems will be analyzed against the type and amount of training they received. Study 2 will gather information from various sources to identify the relationship of training to safety performance. The sources include: Carriers; CDL training schools; and State Driver's License Agency records for recently issued CDLs. This study will also examine the safety performance of drivers in two States that have regulations dealing with different aspects of CDL driver training.

FMCSA Decision To Withdraw the NPRM

After reviewing the MAP–21 requirements, comments to the 2007 NPRM, participants' statements during the Agency's public listening sessions held earlier this year, and the MCSAC's June 2013 letter report, FMCSA has determined that it would be inappropriate to continue with the rulemaking initiated in 2007. The Agency believes a new rulemaking would provide the most effective starting point for implementing the MAP–21 requirements. A new rulemaking would provide the Agency and all interested parties the opportunity to move forward with a proposal that focuses on the MAP–21 mandate and makes the best use of the wealth of information provided by stakeholders since the publication of the 2007 NPRM.

In consideration of the above, the Agency withdraws the December 26, 2007, NPRM. However, the rulemaking to carry out the MAP–21 entry-level training requirement will solicit comments from all interested parties, including those who may wish to reiterate their previous remarks. That new rulemaking will be based on the results of the studies referenced above, public comments responsive to the statutory mandate, and the specific requirements of § 32304 of MAP–21.

Issued under the authority of delegation in 49 CFR 1.87.

Dated: August 27, 2013.

Anne S. Ferro,

Administrator.

[FR Doc. 2013–22772 Filed 9–18–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA–2013–0049]

FHWA RIN 2125–AF59; FTA RIN 2132–AB14

Environmental Impact and Related Procedures—Programmatic Agreements and Additional Categorical Exclusions

AGENCY: Federal Highway Administration, Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) provides interested parties with the opportunity to comment on proposed changes to the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) joint procedures that implement the National Environmental Policy Act (NEPA). The revisions are prompted by enactment of the Moving Ahead for Progress in the 21st Century Act (MAP–21). This NPRM proposes to: add new categorical exclusions (CE) for FHWA and FTA, allow a State department of transportation (State DOT) to process certain CEs without FHWA's detailed project-by-project review and approval (as long as the action meets specified constraints), and allow Programmatic Agreements between FHWA and States that would permit States to apply FHWA CEs on FHWA's behalf. The FHWA and FTA seek comments on the proposals contained in this notice.

DATES: Comments must be received on or before November 18, 2013.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building Ground Floor Room W12–140, Washington, DC 20590–0001;
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329;

• *Instructions:* You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For the Federal Highway Administration: Owen Lindauer, Ph.D., Office of Project Delivery and Environmental Review (HEPE), (202) 366–2655, or Jomar Maldonado, Office of the Chief Counsel (HCC), (202) 366–1373, Federal Highway Administration, 1200 New Jersey Ave. SE., Washington, DC 20590–0001. For the Federal Transit Administration: Megan Blum, Office of Planning and Environment (TPE), (202) 366–0463, or Dana Nifosi, Office of Chief Counsel (TCC), (202) 366–4011. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

General Background

On July 6, 2012, President Obama signed into law MAP–21 (Pub. L. 112–141, 126 Stat. 405). The MAP–21 contains new requirements that the Secretary of Transportation must meet in complying with NEPA (42 U.S.C. 4321 *et seq.*), as well as several requirements for rulemaking to change 23 CFR part 771, which contains the regulations that implement NEPA for FHWA and FTA. Part 771 includes authority to categorically exclude certain categories of actions from the NEPA requirements to prepare an environmental assessment (EA) or environmental impact statement (EIS).

Sections 771.117(c) and 771.118(c) establish specific lists of categories of actions that FHWA and FTA have determined are normally categorically excluded from further NEPA review. Sections 771.117(d) and 771.118(d) provide FHWA and FTA with the authority to categorically exclude any action that meets the criteria of a CE in the Council on Environmental Quality (CEQ) regulations (40 CFR 1508.4) and provides examples of categories of actions that can be approved under that authority. The FHWA or FTA approval of a CE under section 771.117(d) or 771.118(d) is based on a review of the project's documentation demonstrating that the specific conditions or criteria for the CE are satisfied and that there will not be significant environmental effects.

Section 1318 of MAP–21 requires the Secretary to: (1) Survey and publish the results of the use of CEs for transportation projects since 2005 and solicit requests for new CEs; (2) publish an NPRM to propose new CEs received by the Secretary to the extent that the CEs meet the criteria for a CE under 40 CFR 1508.4 and 23 CFR part 771; and (3) issue an NPRM to move three actions found in 23 CFR 771.117(d)(1)–(3) to paragraph (c) to the extent that such movement complies with the criteria for a CE under 40 CFR 1508.4. In addition, section 1318(d) directs the Secretary to seek opportunities to enter into programmatic agreements, including agreements that would allow a State to determine, on behalf of FHWA, whether a project is categorically excluded.

Since MAP–21's enactment, FTA has established 23 CFR 771.118, a new section that contains FTA's CEs. Due to the timing of the publication of the final rule and MAP–21's enactment, FTA is applying section 1318 to 23 CFR 771.118. The FHWA and FTA, hereafter referred to as ''the Agencies,'' are carrying out this rulemaking on behalf of the Secretary.

I. The Agencies' NEPA Procedures

The CEQ regulations, 40 CFR parts 1500–1508, establish procedural requirements for complying with NEPA and instruct Federal agencies to establish CEs in their NEPA implementing procedures for those categories of actions that do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or an EIS. The Federal agency procedures must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect (40 CFR 1508.4).

Joint procedures at 23 CFR part 771 (Agencies' NEPA Procedures) describe how the Agencies comply with NEPA and the CEQ regulations. Specifically, sections 771.117 and 771.118 contain the CEs that the Agencies have established, including the requirement for considering unusual circumstances, which is how the Agencies consider extraordinary circumstances in accordance with the CEQ NEPA regulations. Examples of the Agencies' unusual circumstances include: substantial controversy on environmental grounds, significant impacts on properties protected by section 4(f) of the U.S. Department of Transportation (DOT) Act (23 U.S.C. 138/49 U.S.C. 303) or section 106 of the National Historic Preservation Act (NHPA), or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action (23 CFR 771.117(b); 23 CFR 771.118(b)).

The Agencies first issued their NEPA Procedures in 1980 (45 FR 71968, Oct. 30, 1980). Although the rules have been the subject of subsequent revisions, the Agencies issued the 1987 revisions (52 FR 3264, Aug. 28, 1987) as part of a departmentwide effort to streamline rules within the Department. The 1987 revisions are important to this NPRM because they resulted in the split of the Agencies' CEs into two groups.

The first group, referred to as ''(c)-list CEs,'' lists those actions that almost never involve significant impacts and, therefore, do not require detailed review by the Agencies. The project description typically contains all of the information necessary to determine if the action fits the description of the CE and that no unusual circumstances exist that would require further environmental studies.

The second group, referred to as ''(d)-list CEs,'' includes any action that meets the criteria for CEs in 40 CFR 1508.4 and sections 771.117(a) for FHWA actions or 771.118(a) for FTA actions. The Agencies' criteria are actions that do not normally: induce significant impacts to planned growth or land use for the area; require the relocation of significant numbers of people; have a significant impact on any natural, cultural, recreational, historic, or other resource; involve significant air, noise, or water quality impacts; have significant impacts on travel patterns; or otherwise, either individually or cumulatively, have any significant environmental impacts. Applicants for FHWA or FTA assistance must submit documentation for approval that demonstrates that the specific conditions or criteria for the CE are satisfied and that the action will not result in significant environmental effects (23 CFR 771.117(d); 23 CFR 771.118(d)). The Agencies use a list of examples to illustrate the types of actions covered by the (d)-list criteria. The Agencies take into account context and site location to determine if an action meets the CE criteria or would warrant further NEPA analyses. The Agencies took this approach instead of developing a comprehensive list ''so that specific actions not previously listed by an agency could be considered for CE status on a case-by-case basis'' (52 FR 32651, Aug. 28, 1987). In the Agencies' experience, the availability of the (d)-list CE authority expedites administrative and NEPA processing by encouraging grant applicants to design proposed projects so that significant impacts will not normally occur.

Regardless of classification as a (c)-list or (d)-list CE, actions qualifying for CEs

must also comply with NEPA requirements relating to connected actions and segmentation (*see, e.g.,* 40 CFR 1508.25, and 23 CFR 771.111(f)). The action must have independent utility and connect logical termini when applicable (*i.e.,* linear facilities). In addition, even though an action may qualify for a CE, thereby satisfying NEPA requirements, all other requirements applicable to the activity under other Federal and State laws and regulations still apply, such as the CWA, CAA, NHPA, General Bridge Act of 1946, and ESA. Some of these requirements may require the collection and analysis of information, or coordination and consultation efforts that are independent of the Agencies' NEPA CE determination. Also, some of these requirements may involve actions by other Federal agencies (*e.g.,* approvals or issuance of permits) that could trigger a different level of NEPA analysis for those Federal agencies. These requirements must be met before the action begins, regardless of the availability of a CE for the transportation project under 23 CFR part 771.

The CEQ regulations direct Federal agencies to update their NEPA implementing procedures as necessary, including amending lists of CEs from time to time to reflect changes in their missions and programs, and to reflect experience that has been gained since the adoption of their lists (40 CFR 1507.3(a)). The CEQ's guidance, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* (75 FR 75628, Dec. 6, 2010) (CEQ CE Guidance), makes recommendations on reviewing existing lists and establishing new CEs. Prior to the enactment of MAP–21, the Agencies initiated a rulemaking to revise the CE list in 23 CFR part 771 in accordance with the CEQ guidance. The new rule became final on February 7, 2013 (78 FR 8964) and, among other improvements, established 10 new CEs in section 771.118(c) that specifically apply to actions by FTA. The CE provisions in section 771.117 now specifically apply to actions by FHWA.

II. The Agencies' Joint Rulemaking Approach

The Agencies are issuing this NPRM jointly to facilitate public and agency comment and to remain consistent with the joint rulemaking approach taken for previous proposed changes to the list of actions categorically excluded under 23 CFR part 771 (*see, e.g.,* 78 FR 11593, Feb. 19, 2013, implementing section 1315 of MAP–21; and 78 FR 13609, Feb. 28, 2013, proposing a rule to implement sections 1316 and 1317 of MAP–21). The Agencies collaborated in the preparation of a survey on CE use in transportation projects pursuant to section 1318(a) of MAP–21. The survey included a questionnaire that asked State DOTs, transit authorities, metropolitan planning organizations (MPOs), and other government agencies to provide information on their use of CEs for transportation projects and to solicit requests for new CEs.

The Secretary issued the survey on September 5, 2012, and received 117 responses that proposed 269 actions as new CEs. The Agencies collaboratively reviewed the survey results and made those results public in the *U.S. Department of Transportation National Environmental Policy Act Categorical Exclusion Survey Review* (*http://www.fhwa.dot.gov/map21/reports/sec1318report.cfm*). The Agencies coordinated to take advantage of their collective experience, to promote consistency, and to clarify differences between the Agencies with the development of the proposed CEs contained in this NPRM.

Although this is a joint NPRM, the Agencies note that the development of the proposed CEs for each Agency and the approach taken to implement section 1318 of MAP–21 is based on each Agency's particular mission and programs, unique experiences, and lists of CEs. The FTA recently completed a retrospective review of its CEs, and the result is already reflected in section 771.118. In contrast, the CE list in section 771.117 has not undergone a complete retrospective analysis since its last major revision in 1987. (The Agencies published an NPRM proposing major revisions to this regulation on May 25, 2000, but never issued a final rule.) Therefore, FHWA is taking the opportunity presented by MAP–21 to engage in a retrospective review of its list of CEs as required by 40 CFR 1507.3(a) (''Agencies shall continue to review their policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA]''), and re-emphasized by the recent CEQ CE Guidance.

The FHWA's development and implementation of programmatic agreements for the use of CEs (also known as PCE agreements) is also distinct from FTA's program, which lacks the statutory authority to allow for PCE agreements. The PCE agreements enable FHWA Division Offices and State DOTs to develop protocols that allow State DOTs to certify to FHWA whether a project qualifies for a CE. (*FHWA Memorandum—Categorical Exclusion (CE) Documentation and Approval,* Mar. 30, 1989, *http://environment.fhwa.dot.gov/projdev/docuceda.asp*) (hereinafter ''FHWA's 1989 PCE Memorandum''). Section 1318(d) of MAP–21 encourages the use of PCE agreements. The FHWA has drawn from its experience with these agreements to comply with section 1318 of MAP–21.

III. FHWA's Approach to MAP–21's Section 1318 Requirements

The FHWA is issuing this proposal to meet the rulemaking requirements in section 1318(b) and 1318(c). The FHWA is also utilizing this NPRM as an opportunity to propose general criteria for all PCE agreements in furtherance of section 1318(d). As a result, this NPRM contains the following proposed changes with respect to 23 CFR 771.117: (1) The addition of four new CEs derived from the survey and requests for new CEs as mandated by section 1318(a); (2) moving three FHWA (d)-list CE examples to FHWA's (c)-list (to the extent that such movement complies with the criteria for a CE under 40 CFR 1508.4) as required under section 1318(b); and (3) the addition of general criteria that would apply to all FHWA PCE agreements. Sections III.A., III.B., and III.C. provide background for each of these changes, while the *FHWA Section-by-Section Discussion of the Proposal* provides a more detailed discussion of the proposals.

A. CE Survey and New CEs

The FHWA evaluated the results of the CE survey to determine which requested actions would be appropriate as CEs according to the criteria for a CE under 40 CFR 1508.4 and 23 CFR 771.117(a). The FHWA did not pursue requests for new CEs for actions that would duplicate already existing CEs, requests for new CEs that would not involve a FHWA action (*e.g.,* projects ineligible for FHWA funding assistance), requests that would not meet the criteria for a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), or requests for new CEs for actions that would not have independent utility. The FHWA also eliminated proposed new CEs that would be covered by a statutorily mandated CE rulemaking under other MAP–21 provisions (*e.g.,* emergency actions (section 1315), operational right-of-way actions (section 1316), limited Federal assistance actions (section 1317), and the revision mandated by section 1318(c) for moving modernization of highways actions, highway safety actions, and bridge

rehabilitation, reconstruction, or replacement actions from the (d)-list to the (c)-list)). The FHWA evaluated the remaining actions proposed as CEs to eliminate those that did not meet the 40 CFR 1508.4 definition and those that were so broad that they could include actions with significant environmental effects.

The FHWA categorized the actions proposed as CEs into 22 groups. The groups identified were: (1) Safety and operations; (2) maintenance and preservation actions; (3) bridges; (4) activities within existing right-of-way or urban areas; (5) railroads; (6) transit; (7) rehabilitation and reconstruction; (8) environmental mitigation; (9) bicycle and pedestrian facilities; (10) utilities, lighting, and signage; (11) actions consistent with existing plans or land use and those approved by other agencies; (12) culverts and waterways; (13) acquisitions; (14) excess right-of-way; (15) activities with limited Federal involvement/funding; (16) activities under a certain size/cost threshold; (17) alternative energy; (18) parking; (19) geotechnical work; (20) aesthetic treatments; (21) ferries; and (22) other.

The FHWA determined that most of the requests for new CEs were for actions either already covered by the existing list of CEs (81 requests) or for actions that would qualify for CEs associated with other statutorily mandated MAP–21 CE rulemakings (102 requests). For example, FHWA received requests to include roundabouts and traffic circle projects as a new CE. The FHWA considers roundabouts and traffic circle projects to be a highway safety or traffic operations improvement projects and would process this type of action as a CE under paragraph 771.117(d)(2) when the action does not add capacity and requires only minor amounts of new right-of-way. As discussed below, FHWA proposes to move this category to paragraph (c).

The FHWA did not pursue 86 requests for the following reasons: 38 requests were for overly broad actions that would include elements that may result in significant impacts; 16 requests were for actions that are not subject to NEPA because there is no Federal action; 13 requests were for actions already covered by the (d)-list which FHWA determined did not warrant a move to the (c)-list; and 6 requests were for actions that were inappropriately segmented from a larger action. The FHWA determined that the remaining 13 requests were appropriate for consideration. These 13 requests were grouped into 5 CEs. Four of the CEs are proposed in this NPRM as new CEs for the list in 23 CFR 771.117(c).

The fifth CE, not pursued in this NPRM, would have covered early acquisition actions (*e.g.,* advanced acquisitions for minor amounts of abandoned railroad right-of-way and minimal right-of-way). Section 1302 of MAP–21 amended 23 U.S.C. 108 to allow for FHWA-funded early acquisitions of real property interests prior to completion of the NEPA review process for the transportation project that could use the real property interests. The FHWA elected not to propose the requested CE in this NPRM because FHWA has not completed procedures to implement section 108. The FHWA notes, however, that similar to acquisition projects for hardship and protective purposes, early acquisition projects using Federal funds that meet the statutory conditions in section 108(d) may be processed as a (d)-listed CE, so long as unusual circumstances do not exist that would lead FHWA to require the preparation of an EA or EIS.

B. Moving FHWA (d)-List CEs to the (c)-List

The FHWA also considered MAP–21's requirement to move particular (d)-list CEs to the (c)-list to the extent that such movement complies with the criteria for CE under 40 CFR 1508.4. The (d)-list CEs are those for (1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing); (2) highway safety or traffic operations improvement projects, including installation of ramp metering control devices and lighting; and (3) bridge rehabilitation, reconstruction, or replacement or construction of grade separation to replace existing at-grade railroad crossings.

Section 1508.4 of title 40, Code of Federal Regulations, provides that a ''categorical exclusion means 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 such effect in procedures adopted by a [F]ederal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.'' This CEQ regulatory definition of a CE does not acknowledge the distinction in part 771 between two types of CEs (*i.e.,* the (c)-list and (d)-list). Therefore, the particular agency's NEPA procedures are the appropriate place for establishing any distinctions for the agency's CEs. *See* CEQ CE Guidance, 75 FR 75635–75636 (establishing that each Federal agency should decide—and update its NEPA implementing procedures and guidance to indicate—whether any of its CEs warrant preparation of additional documentation).

The FHWA has determined that, for its programs, moving the CE language from section 771.117(d)(1)–(3) to 771.117(c) is appropriate and consistent with 40 CFR 1508.4, if: (1) The action normally would not have significant impacts, and (2) FHWA's experience supports eliminating FHWA's detailed review process for this select group of categorical exclusions. In FHWA's experience, actions in section 771.117(c) represent actions that normally do not have significant impacts. This interpretation is consistent with FHWA's experience with PCE agreements. Some FHWA PCE agreements eliminate the need for FHWA's detailed project-by-project review for actions that qualify for a (d)-list CE, and meet certain conditions that reduce their potential to cause significant impacts. The intent of this approach is to identify those actions that currently qualify for (d)-list CEs, but would not normally have significant impacts and therefore could be placed on the (c)-list. The interpretation is also consistent with FHWA's practice since the creation of the (c)-list, as evidenced in the preamble for the 1987 final rule (52 FR 32651, Aug. 28, 1987). In applying this test to the particular (d)-list actions identified in MAP–21 section 1318, FHWA considered recommendations in the CEQ CE Guidance to consider ''limiting or removing activities included in the categorical exclusion'' and ''placing additional constraints on the categorical exclusion's applicability'' when appropriate (75 FR 75632, Dec. 6, 2010).

After reviewing its experience with these actions, FHWA has decided not to propose an unconditional move of the identified (d)-list CEs to the (c)-list. Many actions that qualify for these (d)-list CEs require consideration of the surrounding environment in which the action will occur (such as their setting, site location, and surrounding land use) and their particular context (*e.g.,* no effect, or minor to moderate environmental effects). This is typically accomplished through FHWA's review of project documentation, and the movement from the (d)-list to the (c)-list is not supported without any limitations. However, FHWA's experience with PCE agreements indicates that FHWA could move a subset of these actions—those that meet a proposed a set of constraints similar to those used in PCE agreements—because the constraints would limit the

actions to those that normally would not have significant impacts.

C. The FHWA PCE Agreements

This rulemaking also is intended to address section 1318(d) of MAP–21, which authorizes FHWA to enter into programmatic agreements. The FHWA proposes changes to 23 CFR 771 to codify PCE agreements in regulation and to establish general criteria for all PCE agreements. Existing PCE agreements will need to be reviewed and amended to conform to the new criteria proposed in this NPRM. Existing PCE agreements would continue to operate until revised, but would need to be revised no later than 5 years after publication of the rule if it becomes final.

The FHWA established PCE agreements in 1989 as a tool to expedite the NEPA review processes (*see* FHWA's 1989 PCE Memorandum). Under these PCE agreements, FHWA and the State DOT enter into an agreement that identifies classes of (d)-list CEs that the State DOT may process without FHWA's detailed project-by-project review and approval as long as the action meets specified conditions that limit their potential environmental impacts. These agreements also provide for the processing of (c)-list CEs by the State DOT. Typically, PCE agreements allow a State DOT to certify to FHWA that a particular action (or group of actions) meet the conditions established in the agreement and provide FHWA an opportunity to agree or reclassify the action before the State DOT begins the project. The FHWA has promoted these instruments through its Every Day Counts initiative. See *http://www.fhwa.dot.gov/everydaycounts/* for more information about this initiative.

The PCE agreements increase efficiency in the processing of CE actions under FHWA's existing regulatory framework. The PCE agreements provide a process where State DOTs can certify to FHWA that a project qualifies for a CE based on conditions that take into account each State's unique resources, context, and considerations. The FHWA legally remains responsible for the final CE determination and remains responsible for compliance with other environmental review requirements, such as compliance with section 106 of NHPA, section 7 of ESA, CAA conformity, and section 4(f) of the DOT Act.

Section 1318(d)(2) of MAP–21 introduces a new authority that allows State DOTs to make CE determinations on FHWA's behalf. The FHWA interprets the provision in section 1318(d)(2) to allow a State DOT to make determinations on FHWA's behalf without the need for certification and FHWA's NEPA approval as required under 23 CFR 771.117. The FHWA interprets section 1318(d)(3) as limiting this expanded authority to actions listed in regulation (*i.e.,* all (c)-list CEs and the examples provided in the (d)-list) and any other CE that is added through a process consistent with the requirements of 40 CFR 1508.4. This new opportunity would avoid the need for State DOT certification and FHWA review before the start of a project for those CEs identified in the agreement. This NPRM proposes criteria to standardize all PCE agreements, including those authorized under section 1318(d)(2).

The FHWA does not provide detailed project-by-project review for the State DOT's use of a CE if the action is provided for in the PCE agreement, the action meets stipulated conditions for avoiding adverse environmental impacts, and the State DOT follows the stipulated processing and documentation requirements. However, the PCE agreements recognize that some actions qualifying for (d)-list CEs deserve detailed project-by-project review by FHWA due to their context and project scope, while others may not require such detailed project-by-project review if specific environmentally adverse impact considerations are avoided, and the State DOT agrees and provides appropriate administrative controls (*i.e.,* resources and oversight).

The FHWA's oversight would ensure that CE determinations are appropriate and that State DOTs comply with all environmental requirements. The result of oversight is the identification of best practices and the implementation of corrective actions. The FHWA Division Offices undertake periodic monitoring as well as informal reviews of the State DOTs' procedures and documentation to ensure that all potential environmental impacts are considered and compliance with all other environmental requirements is properly documented.

The FHWA's 1989 PCE Memorandum originally recommended 14 base conditions that, if met, would eliminate the need for FHWA's detailed project-by-project review for those actions. Over time, experience in applying these conditions has led to State-by-State PCE agreement revisions to account for each State's unique environmental context.

The PCE agreements developed from the 1989 PCE Memorandum vary from State to State in a number of respects due to the absence of standards for national consistency. Agreements differ in how FHWA accomplishes oversight and monitoring, how States process and document CEs, and how States report CE certifications to FHWA. Some agreements have specific stipulations regarding quality control and quality assurance, the term of the agreement and provisions for termination, and public availability of the PCE agreement itself. This rulemaking proposes to rectify this consistency issue.

The FHWA has two additional programs that allow for State assumption of certain NEPA responsibilities. The PCE agreements are different than the arrangements established by 23 U.S.C. 326 (State Assumption of Responsibility for Categorical Exclusion actions) and 23 U.S.C. 327 (Surface Transportation Project Delivery Program). First, as mentioned above, the PCE agreements relate to the processing of the CE under NEPA and do not extend to compliance with other environmental requirements. In contrast, sections 326 and 327 specifically authorize the assignment of other environmental review, consultation, and decisionmaking responsibilities to States (except responsibilities for government-to-government consultation with federally recognized Indian tribes under section 327, responsibility for planning pursuant to 23 U.S.C. 134 and 135 or 49 U.S.C. 5303 and 5304, and any conformity determination required under section 176 of the CAA) that will assume the NEPA responsibilities. Second, PCE agreements do not remove FHWA's legal responsibility for individual CE determinations. As a result, FHWA retains the authority to overturn any CE determination made by the State DOT under the PCE agreement at any time. The FHWA may also decide to terminate or invalidate the PCE agreement at-will without prior notice and with immediate effect. In contrast, under sections 326 and 327, the State becomes solely responsible and liable for complying with and carrying out NEPA, and FHWA has no such responsibility or liability. The FHWA does not retain veto authority over NEPA decisions for individual projects after the CE assignment through a Memoranda of Understanding (MOU) has been made. In addition, sections 326 and 327 provide for notice and an opportunity to cure where the FHWA proposes to terminate a State's participation in the programs. Finally, FHWA retains legal responsibility, including primary responsibility for defending litigation, for CE determinations under PCE agreements. Under sections 326 and 327, the State has primary responsibility for defending determinations made under the

assignments if they are challenged in court.

IV. FTA's Approach to MAP–21's Section 1318 Requirements

A. CE Survey and New CEs

After the public comment period closed for the section 1318 CE Survey Review, FTA considered all CE proposals received (269), whether they were proposed by State DOTs, transit authorities, MPOs, or other government agencies. The FTA determined that the majority of the actions proposed as CEs (120) were covered by the CEs created under section 771.118 and published as a final rule on February 7, 2013. Further analysis revealed that 86 of the actions proposed as CEs would fall under CEs that either have been or may be created pursuant to other MAP–21 provisions, or through a combination of existing CEs at section 771.118 and through other MAP–21 provisions. As those actions are categorically excluded through existing CEs or through CEs otherwise created, they were not considered further for this rulemaking.

The FTA also removed 50 proposed actions from further consideration as CEs for the following reasons: the action was not applicable to FTA (*e.g.,* control and removal of outdoor advertising), the action was too broad or lacked sufficient detail to allow it to qualify as a CE under the CEQ and FTA regulations (*e.g.,* all projects in an urbanized area on the theory that most of the areas are already disturbed), the action would lack independent utility (*e.g.,* project staging and storage areas), or FTA lacks the basis for substantiation to show that the activity qualifies as a CE under the CEQ and FTA regulations (*e.g.,* stimulus or fast track projects).

Of the 13 remaining proposed CEs, FTA refined and combined the language suggested by survey respondents, resulting in 5 CE proposals (3 for section 771.118(c) and 2 proposed examples for section 771.118(d)). Per CEQ's CE Guidance and as alluded to above, FTA based its proposal on a determination of ''whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review'' (75 FR 75631, Dec. 6, 2010). To do this, FTA surveyed its records for documented CEs and Findings of No Significant Impact (FONSIs), as well as the CEs for other Federal agencies of similar nature, scope, and intensity. The FTA was able to support the three section 771.118(c) CEs through substantiation. The CEQ's CE guidance qualifies substantiation by stating that the ''amount of information required to substantiate a CE depends on the type of activities included in the proposed category of actions'' (75 FR at 75633). Given the direction that documentation should match the nature of the CE and the proposed CEs for section 771.118(c), FTA anticipates little environmental impact—and normally no significant impact—associated with the proposed CEs; therefore, FTA is proposing the CEs despite not having extensive documentation for some of the proposals. Through this rulemaking, FTA specifically seeks public comment and requests any supporting information to substantiate the potential environmental impacts of its CE proposals.

The FTA also proposes two new examples under section 771.118(d). The additions to section 771.118(d) would be examples of actions that may be categorically excluded only with the required site specific documentation. When a project sponsor submits documentation to support an action under section 771.118(d), the grantee is substantiating the appropriate use of the CE at that time. All five CE proposals are presented in this NPRM for public review and comment.

B. Moving FTA (d)-List CEs to the (c)-List

Regarding the MAP–21 Section 1318(c) mandate to move the actions at section 771.117(d)(1)–(3) to section 771.117(c) ''to the extent that such movement complies with the criteria for a categorical exclusion'' in the CEQ regulation, FTA complied with section 1318(c) through the final rule published on February 7, 2013 (78 FR 8964). When FTA created the new list of CEs at section 771.118, it considered the actions found in section 771.117(d) and moved those activities applicable to FTA's program and for which FTA had supporting documentation to section 771.118(c), which corresponds with FHWA's section 771.117(c). Although FTA complied with section 1318(c) through the final rule issued on February 7, 2013, FTA will consider comments on this proposal and will examine any supporting substantiation/data/documentation submitted by members of the public. The FTA is particularly interested in hearing from past sponsors of transit projects and members of the public affected by those projects. Details regarding FTA's proposal regarding section 1318(c) are found in the ''FTA Section-by-Section Analysis'' section.

General Discussion of the Proposals

This NPRM proposes to add four new CEs to FHWA's list of CEs in section 771.117(c); move FHWA CEs in section 771.117(d)(1)–(3) to paragraph (c) subject to a list of constraints; establish the constraints for the moved (d)-list CEs in section 771.117(e); renumber existing paragraph (e) in section 771.117 to (f); add new section 771.117(g) on PCE agreements; make conforming amendments to section 771.117(d); add three new CEs to FTA's list of CEs in section 771.118(c); and provide two new CE examples in FTA's list of CE examples in section 771.118(d).

The CE lists in part 771 are the subject of current rulemaking proceedings (*see, e.g.,* 78 FR 13609, Feb. 28, 2013, implementing sections 1316 and 1317 of MAP–21). Any final rule resulting from this NPRM will adopt revised references as appropriate to reflect the final results of the other MAP–21 rulemaking proceedings.

FHWA Section-by-Section Discussion of the Proposals

Section 771.117(c)

The FHWA proposes to amend section 771.117(c) by adding four new CEs based on the CE Survey Review and moving the first three FHWA CEs in paragraph (d) to paragraph (c). In FHWA's experience, actions that meet the criteria of these proposed CEs do not normally have significant environmental impacts. The FHWA has developed a substantiation record summary to support the inclusion of the CEs, which is provided in the docket for this rulemaking.

The FHWA proposes to amend section 771.117(c) by adding a new paragraph (c)(24) for ''[l]localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.'' This proposed addition is in direct response to requests for new CEs received through the CE Survey Review. The CE would include a variety of investigations that inform preliminary engineering for highway projects. Geotechnical or other subsurface investigation, including drilling of test bores/soil sampling, provides information for preliminary design and for environmental analyses and permitting purposes and is found normally not to have the potential to significantly impact the environment. The CE also would cover other site characterization actions such as archeological surveying and testing to determine eligibility for the National Register of Historic Places, and wetland

surveys for purposes of delineation and/or jurisdictional determinations. The California Department of Transportation (Caltrans) has provided substantiation for including these types of preliminary engineering actions in Appendix A of the MOU that assigns CE responsibilities to the State of California (*http://www.dot.ca.gov/ser/downloads/MOUs/23usc326_ce_assignment_mou.pdf*).

The FHWA proposes adding paragraph (c)(25) to create a new (c)-list CE for ''[e]nvironmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.'' This CE includes a range of environmental mitigations that became eligible for FHWA funding as a project with independent utility in the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (Pub. L. 109–59). Section 328 of title 23, United States Code, makes certain stand-alone environmental mitigation projects eligible for title 23 assistance. ''Environmental restoration,'' as defined by FHWA in guidance (*Guidance on 23 U.S.C. 328 Environmental Restoration and Pollution Abatement,* Aug. 17, 2006, *http://www.fhwa.dot.gov/hep/guidance/envrestore.cfm*), is a process involving returning the habitat, ecosystem, or landscape to a productive condition that supports natural ecological functions. Since these natural systems are diverse and dynamic, the process of recreating or duplicating their natural, or pre-settlement state is virtually impossible, but the goal of the restoration should be to re-establish the basic structure and function associated with natural, productive conditions. Wetlands are part of the hydrological cycle and are associated with the environmental restoration process. The FHWA has existing guidance for wetland and natural habitat restoration and mitigation measures, such as wetland and habitat banks or statewide and regional conservation measures.

In the *Guidance on 23 U.S.C. 328 Environmental Restoration and Pollution Abatement,* ''pollution abatement project'' is defined as ''practices or control measures designed to retrofit existing facilities or minimize stormwater quality impacts from highway projects.'' Examples of projects for environmental restoration and pollution abatement actions include:

- Establishing buffers or areas to protect riparian habitat along drainage ways and stream corridors;
- Installing stormwater quality retrofit and mitigation measures (creation of detention, infiltration, and pervious pavements, and establishment of native plant species for abatement of storm water runoff); and
- Restoring wetlands and natural habitat (*e.g.,* revegetation of disturbed areas with native plant species, stream or river bank vegetation, and restoration or creation of wetlands, including creation of wetland mitigation banks).

The FHWA's experience with environmental restoration and pollution abatement projects is most extensive in California, where these actions were added in Appendix A to the MOU that assigned Federal responsibilities for CEs to Caltrans pursuant to 23 U.S.C. 326. Additional substantiation for these actions includes projects from Washington State, Texas, Alabama, and Alaska. As noted in the FHWA CE substantiation summary included in the docket for this NPRM, projects involving environmental restoration and pollution abatement have not resulted in significant impacts in FHWA's experience. It is important to note, however, that the decision to apply the CE must still take into account unusual circumstances. This means, for example, that a pollution abatement project that involves clear cutting a forest to build a detention pond may involve unusual circumstances that would potentially require the preparation of an environmental assessment or environmental impact statement.

The FHWA proposes a new paragraph (c)(29) to create a new (c)-list CE for the ''[p]urchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.'' This is one of two CEs FHWA proposes related to ferry transportation projects. The Agencies did not identify ferry boats in the Agencies' NEPA Procedures when they finalized the Procedures in 1980 and revised them in 1987, but ferry boats became a recognized vehicle in both transit and highway projects beginning with the *Ferry Boat Discretionary Program* in the *Intermodal Surface Transportation Efficiency Act of 1991* (Pub. L. 102–240). Under MAP–21, this program is now titled the *Construction of Ferry Boats and Ferry Terminal Facilities* and is no longer a discretionary program. The FHWA proposes two new CEs to recognize ferry transportation actions. The purchase, replacement, construction, or rehabilitation of ferry boats with Federal-aid highway funds is similar to the acquisition, installation, rehabilitation, replacement, and maintenance of ferry boats with funds under chapter 53 of title 49, United States Code. The environmental impacts of these actions are comparable. For these reasons, FHWA used language from FTA's CE in 23 CFR 771.118(c)(7) to inform this proposed CE.

The FHWA is proposing two constraints for this proposed CE that are modeled after constraints in FTA's CE: (1) No change in function of the ferry terminals; and (2) that the ferries be accommodated by existing facilities. The FHWA has modified the second constraint to allow for situations where a new facility is needed and its construction would qualify for an existing CE. This proposed modification is modeled after FHWA's CE for the purchase of vehicles in section 771.117(c)(17), which allows for the purchase of vehicles where the use of the vehicles can be accommodated by new facilities which themselves are within a CE.

The FHWA proposes paragraph (c)(30) to create a new (c)-listed CE for ''[r]ehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in users. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.'' The environmental impacts of rehabilitation or reconstruction actions of existing ferry facilities are similar to the environmental impacts of rehabilitation or reconstruction actions of rail and bus buildings and ancillary facilities. Rehabilitation and reconstruction of bus and rail buildings qualify for an existing FHWA CE under section 771.117(d)(9). Additionally, the environmental impacts of rehabilitation or reconstruction actions of existing ferry facilities using Federal-aid highway funds are similar to the environmental impacts of actions to rehabilitate and reconstruct ferry facilities using funds under chapter 53 of title 49, United States Code, which qualify for a FTA CE under section 771.118(c)(8).

The FHWA proposes to include constraints on paragraph (c)(30) modeled after FTA's section 771.118(c)(8) constraints (*i.e.,* that the

projects occupy substantially the same geographic footprint and do not result in a change in their functional use). The FHWA is proposing the additional constraint—that the project does not result in a substantial increase in users—to be consistent with the existing constraint in FHWA's CE for the rehabilitation or reconstruction of rail and bus buildings. Example actions that this CE would cover include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

The FHWA considered the addition of two new CEs for bridge removal projects and preventive maintenance modeled after the proposed FTA CEs for sections 771.118(c)(14) and (15) (*see FTA Section-by-Section Analysis* for *Section 771.118(c)*). The FHWA decided not to propose these CEs at this time. The FHWA does not have sufficient experience with projects involving only bridge removal to warrant the creation of a new CE. Typically, for FHWA, a bridge removal action is associated with a bridge replacement project that is already listed as a CE. For preventive maintenance actions, FHWA found that the majority of actions that would be eligible as preventive maintenance under title 23 would qualify for other CEs in section 771.117 and therefore, no new FHWA CE was needed at this time.

The FHWA proposes to move the first three listed examples in section 771.117(d)(1)–(3) to section 771.117(c)(26)–(28). The proposal is to move paragraph (d)(1) ''[m]odernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing)'' to paragraph (c)(26); paragraph (d)(2) ''[h]ighway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting'' to paragraph (c)(27); and paragraph (d)(3) ''[b]ridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings'') to paragraph (c)(28). Each of the moved paragraphs will contain a reference to constraints developed to support the move. The proposed constraints are discussed below in the *Section-by-Section* discussion of new paragraph (e).

The FHWA proposes paragraph (c)(26) to create a new (c)-list CE for actions involving the ''[m]odernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing) if the action meets the conditions in paragraph (e).'' A version of this CE has existed since the initial publication of the Agencies' NEPA Procedures in 1980. The 1980 version, which did not divide the CEs into two groups, as is the case in the current regulations, included ''widening less than a single lane width'' and ''correcting substandard curves and intersections'' as additional examples of what actions the CE covered. The 1980 version contained constraints that prohibited the application of the CE if the proposed project required ''acquisition of more than minor amounts of right-of-way or substantial changes in access control.'' The FHWA removed these constraints as part of the 1987 amendments that placed this action in the (d)-list CE. This restriction was not needed for the processing of these actions as (d)-list CEs. In FHWA's experience, actions that did not meet the prescriptive limitations (*e.g.,* minor amounts of right-of-way, substantial change in access control) could still meet FHWA's criteria for CE classification after FHWA's project-by-project evaluation of their context under paragraph (d)(1). The FHWA proposes to restore these constraints as part of the list of constraints in paragraph (e) to ensure that these actions, when processed as (c)-list CEs, would normally not cause significant effects.

The FHWA proposes paragraph (c)(27) to create a new (c)-list CE for actions associated with ''[h]ighway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting if the project meets the conditions in paragraph (e).'' A version of this CE has existed since the initial publication of the Agencies' NEPA Procedures in 1980. The 1980 version of this CE included examples such as ''correction or improvement of high hazard locations; elimination of roadside obstacles; highway signing; pavement markings; traffic control devices; railroad warning devices; and lighting.'' The 1980 version also contained constraints that prohibited the application of the CE if the proposed project required ''acquisition of more than minor amounts of right-of-way or substantial changes in access control.''

In 1983, FHWA proposed that CE language for safety and traffic operation projects be added to the (d)-list examples requiring FHWA detailed review. The FHWA received public comments objecting to the inclusion of ''traffic control devices'' in the (d)-list. In response, FHWA decided to split those activities into two CEs: ''traffic signals'' was added to the (c)-list, whereas ''ramp metering controls'' was placed in the (d)-list. The FHWA also removed the constraints against ''acquisition of more than minor amounts of right-of-way or substantial changes in access control'' in the 1987 amendments because the Agency moved the CE text to the (d)-list and the detailed review would assist in determining the context of these impacts. The FHWA proposes to restore these constraints as part of the list of constraints in paragraph (e) to ensure that these actions, when processed as (c)-list CEs, would have no effects or almost never cause significant effects.

As discussed in the *General Background* section of this NPRM, paragraph (c)(27) would cover roundabouts and traffic circle projects because these are considered highway safety or traffic operations improvement projects as long as they meet the constraints provided in paragraph (e). Roundabouts and traffic circle projects that do not meet the constraints provided in paragraph (e) may continue to be processed as (d)-list CE if they meet the conditions for the CE use.

The FHWA proposes paragraph (c)(28) to create a new (c)-list CE for actions involving ''[b]ridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings if the actions meet the conditions of paragraph (e).'' A version of this CE has existed since the initial publication of the Agencies' NEPA Procedures in 1980 before the split of the CEs into two groups. The original CE language provided for the ''[r]econstruction or modification of an existing bridge structure on essentially the same alignment or location (*e.g.,* widening less than a single travel lane, adding shoulders or safety lanes, walkways, bikeways, or pipelines) except for bridges on or eligible for inclusion in the National Register or bridges providing access to barrier islands. Reconstruction or modifications of an existing one lane bridge structure, presently serviced by a two lane road and used for two lane traffic, to a two lane bridge on essentially the same alignment or location, except bridges on or eligible for inclusion in the National Register or bridges providing access to barrier islands.'' In addition to placing the CE in the (d)-list examples, the 1987 amendments removed the restrictions prohibiting the use of the CE for modifications of bridges that are on or eligible for inclusion in the National Register of Historic Places or bridges that provide access to barrier islands. The FHWA reasoned that the evaluation of unusual circumstances, coupled with the detailed review and documentation

expectations for the (d)-list CE, assisted in identifying those situations where modifications of historic or barrier island bridges might need a higher level of NEPA analysis (*i.e.,* an EA or EIS). As discussed below, the FHWA is proposing to include a version of these conditions in paragraph (e). This CE would cover all actions associated with the bridge rehabilitation or replacement project, including the creation of temporary roads and bridges. It is important to note that temporary work that raises unusual circumstances (*e.g.,* taking place in endangered species habitat) may trigger the need for a higher level of NEPA review for the entire project. Some temporary work such as the construction of a detour road or bridge may require a higher level of scrutiny to ensure adequate consideration of unusual circumstances.

Section 771.117(d)

The FHWA proposes to make several amendments to section 771.117(d) to account for the proposed move of the (d)-list CEs in paragraphs (1), (2), and (3). First, FHWA proposes to remove and reserve paragraphs (d)(1), (d)(2), and (d)(3). Second, FHWA proposes to add a new paragraph (d)(13) for ''[a]ctions described in paragraphs (c)(26), (c)(27), and (c)(28) that do not meet the constraints in paragraph (e) of this section.'' The purpose of this language is to preserve the use of the (d)-list CE for those projects that could be covered by the moved language but do not meet the constraints proposed. The FHWA would make a CE determination based on documentation that demonstrates no significant environmental impacts would result.

In addition, FHWA proposes minor changes to the introductory sentence in paragraph (d) to account for the authority provided in section 1318(d) of MAP–21 and the proposed new paragraph (g). The FHWA proposes to change the first sentence to ''[a]dditional 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 Administration approval *unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section''* (emphasis added). This amendment makes it clear that FHWA NEPA approval is not expected on a case-by-case basis in situations where a PCE agreement covers the action and the State is processing the CE on behalf of FHWA.

Section 771.117(e)

The FHWA proposes to renumber current paragraph (e) as paragraph (f). The FHWA proposes new language for paragraph (e) describing the constraints applicable to the proposed CEs under paragraphs (c)(26), (c)(27), and (c)(28). These constraints are needed to ensure the actions falling under paragraphs (c)(26), (c)(27), or (c)(28) do not significantly affect the environment and, therefore, can be processed under the (c)-list without FHWA detailed project-by-project review. The FHWA believes that listing these proposed constraints in new paragraph (e) will encourage project proponents to design their projects in a way that avoids the need for FHWA detailed project-by-project review. Projects that cannot meet these constraints would still be eligible for a (d)-listed CE, if the projects meet CE criteria established in paragraph (d).

The FHWA relied on its experience in the implementation of PCE agreements for the development of the constraints. The FHWA has promoted PCE agreements since 1989 recognizing that some actions qualifying for (d)-list CEs deserve careful consideration and approval by FHWA due to their context, while others may not require such a detailed individual project-by-project review as long as specific environmental adverse impact constraints are followed, and the State DOT agrees and provides appropriate administrative controls (*i.e.,* resources and oversight). The FHWA's 1989 PCE Memorandum recommended 14 nationwide conditions that, if met, could allow the processing of (d)-list CEs without the need for FHWA detailed project-by-project review. The FHWA's use of conditions in PCE agreements has the same effect as the proposal for moving the (d)-list CEs to the (c)-list while applying conditions—to define a subset of actions that would otherwise fit under paragraphs (d)(1), (d)(2), and (d)(3) CEs but do not merit FHWA detailed project-by-project review based on a project's impacts. The FHWA notes that establishing such constraints is supported by the CEQ CE Guidance, which expands on 40 CFR 1508.4 (75 FR 75632, Dec. 6, 2010). After an evaluation of the original 14 conditions in the 1989 memorandum and consideration of its field staff experience, FHWA is proposing 6 constraints be listed in paragraph (e).

First Proposed Constraint

The first proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''an acquisition of more than a minor amount of right-of-way or that would result in any commercial or residential displacements.'' This constraint is similar to the condition that appeared in the 1980 version of the CEs for modernization of highways and for highway safety or traffic operation improvement projects. The proposed constraint is based on a condition described in FHWA's 1989 PCE Memorandum indicating that the action must not involve ''[t]he acquisition of more than minor amounts of temporary or permanent strips of right-of-way for construction of such items as clear vision corner and grading. Such acquisitions will not require any commercial or residential displacements.'' The FHWA proposes to simplify the language. Typical examples of ''minor amounts of . . . right-of-way'' include low cost, strip acquisitions, and corner acquisitions. The intent of the limitation is to distinguish between projects involving minor use of additional land (*e.g.,* rehabilitation, renovation) from projects involving substantial land use changes and the associated potential for adverse impacts. The FHWA reviewed existing PCE agreements and found that FHWA Divisions and State DOTs limit the amount of new land that triggers FHWA NEPA approval using acres (with ranges between zero and up to 10 acres depending on the State) or percentages (*e.g.,* more than 10 percent of parcels under 10 acres in size). The FHWA proposes to leave the definition of ''minor'' up to the discretion of FHWA and each State DOT to account for each State's unique characteristics and considerations.

Second Proposed Constraint

The second proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''[a]n action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899.'' This proposal is an updated version of the condition in FHWA's 1989 PCE Memorandum that excluded actions involving ''any U.S. Coast Guard construction permits or any U.S. Army Corps of Engineers section 404 permits.'' Section 144(h) of title 23, United States Code, and 23 CFR 650—subpart H establish procedures for determining which bridge actions need a bridge permit from the U.S. Coast Guard. These include bridges that cross waters that are (1) tidal and used by recreational boating, fishing, and other small vessels 21 feet or greater in length; or (2) used or susceptible to use in their natural condition or by reasonable

improvement as a means to transport interstate or foreign commerce. Construction of these types of bridges require coordination with the U.S. Coast Guard and detailed information to determine their environmental impacts, including impacts on navigation. For wetlands, the proposal establishes as a threshold the terms and condtions for U.S. Army Corps of Engineers (USACE) nationwide or general permits. Actions requiring USACE nationwide or general permits may be processed as (c)-list CEs. The FHWA's experience with PCE agreements is that actions having minor impacts on ''waters of the United States'' (such as wetlands), which only require nationwide or other general permits under section 404 of the CWA or section 10 of the Rivers and Harbors Act, do not warrant a detailed FHWA project-by-project review because they normally do not have the potential for significant impacts. An initial finding that the action could meet the terms and conditions of a nationwide or general permit may be made by FHWA or a State DOT using the project information available at the time of the proposal. An official determination from USACE is not required for the CE determination. The FHWA notes, however, that this initial finding does not bind the USACE in making its official determination, and a USACE determination that the project does not qualify for a nationwide or general permit and requires an individual permit under either section 404 of the CWA or section 10 of the Rivers and Harbor Act would constitute new information that could trigger a re-evaluation of the CE determination under 23 CFR 771.129.

Third Proposed Constraint

The third proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''[a] finding of adverse effect to historic properties under the National Historic Preservation Act, use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or likely to adversely affect threatened or endangered species or critical habitat under the Endangered Species Act.''

This proposal consolidates three conditions discussed in FHWA's 1989 PCE Memorandum. The first excluded actions that involved ''[a] determination of adverse effect by the State Historic Preservation Officer.'' The Advisory Council on Historic Preservation's (ACHP) regulations implementing section 106 of NHPA establish that an ''adverse effect'' occurs when the Federal agency finds, in consultation with the State Historic Preservation Officer or Tribal Historic Preservation (and when applicable the ACHP), that ''an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association'' (36 CFR 800.5(a)(1)). Not all actions, labeled ''undertakings'' under section 106 procedures, affecting historic properties result in an adverse effect finding. The FHWA's experience with PCE agreements is that the ''adverse effect'' threshold appropriately delineates when FHWA should engage in detailed FHWA project-by-project review.

The second condition excluded actions that involved the ''use of properties protected by Section 4(f) of the Department of Transportation Act.'' Section 138 of title 23, United States Code, and 49 U.S.C. 303 (originally section ''4(f)'' of the DOT Act) prohibit the approval of any program or project that requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or any land from an historic site of national, State, or local significance, unless there is no feasible and prudent alternative to the use of such land and all possible planning to minimize the harm is included. These sections were amended by SAFETEA–LU to provide for the use of such resources without the need for this finding if the use would result in *de minimis* impacts. The Agencies developed regulations to implement the procedures of section 4(f) and its *de minimis* impact allowance in 23 CFR part 774. The FHWA has determined that actions that result in the use of resources protected by section 4(f) but result in *de minimis* impacts do not warrant detailed FHWA project-by-project review because the impacts to these resources are considered to be minor and not potentially significant.

Finally, the third condition excluded actions that ''occur in an area where there are no federally listed endangered or threatened species or critical habitat.'' This proposal revises the language from this 1989 condition by focusing on the impact of the project on these protected resources instead of the location of the project. This constraint recognizes that projects may be located in an area with listed species or within critical habitat areas, but would result in minor impacts to these resources such that FHWA would issue a ''no effect'' finding or a ''not likely to adversely affect'' finding with concurrence from the applicable Federal resource agency (*i.e.,* U.S. Fish and Wildlife Service or National Marine Fisheries Service). This constraint would require some level of consideration or analysis to identify potential effects to listed species or critical habitat and might require coordination with the applicable Federal resource agency. However, the coordination could be applied to a program of projects. For example, the FHWA Division or the State DOT may agree with the Federal resource agency on conditions, terms, or pre-approved mitigation that would avoid or reduce impacts that a project could have on the protected resources, in a manner that would result in streamlined ''no effect'' or ''not likely to adversely affect'' determinations. Thus, projects meeting, or designed to meet, these measures could meet this constraint and avoid the need for detailed FHWA project-by-project review.

Fourth Proposed Constraint

The fourth proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''[c]onstruction of temporary access, or the closure of an existing road, bridge, or ramps, that would result in major traffic disruptions or substantial environmental impacts.'' The FHWA 1989 PCE Memorandum provided a condition for ''[t]he use of a temporary road, detour, or ramp closure unless the use of such facilities satisfy the following conditions:

- Provisions are made for access by local traffic and so posted.
- Through-traffic dependent business will not be adversely affected.
- The detour or ramp closure, to the extent possible, will not interfere with any local special event or festival.
- The temporary road, detour or ramp closure does not substantially change the environmental consequences of the action.
- There is no substantial controversy associated with the temporary road, detour, or ramp closure.''

The FHWA recognized that some temporary road, bridge, detour, or ramp closures deserved a higher level of scrutiny and detailed FHWA project-by-project review. The proposed constraint simplifies the 1989 condition, focusing on the elements that are of particular concern for these temporary detours—mainly traffic and other adverse environmental impacts. Consideration of the impacts on local users' transportation patterns, including businesses and community members, as

well as the impacts on special events would be taken into account in evaluating whether the temporary measure would have major traffic disruptions in a manner that would warrant a detailed FHWA project-by-project review. Consideration of adverse environmental impacts would include consideration of the temporary, but acute, environmental impacts on natural and cultural resources, as well as other human environment considerations (*e.g.,* community cohesion, and emergency response times).

Fifth Proposed Constraint

The fifth proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''[c]hanges in access control.'' This constraint is similar to the constraint that appeared in the 1980 version of the CEs for modernization of highways and for highway safety or traffic operation improvement projects, and is similar to a condition on access control changes in the FHWA 1989 PCE Memorandum. Such changes normally require consideration of local traffic patterns and possible indirect impacts from development. However, not all changes in access are alike. Some changes may raise minor concerns regarding their environmental effects and safety and operational performance, while others may raise concerns regarding their environmental effects and safety and operational performance that deserve further evaluation. After taking into account these considerations and the original language, FHWA has determined that the constraint should retain the original language of the 1989 condition but acknowledges that State DOTs and FHWA Division Offices may establish programmatic approaches to process access control changes based on their impacts.

Sixth Proposed Constraint

The sixth and last proposed constraint would establish that a proposed action fitting the language under paragraphs (c)(26), (c)(27), or (c)(28) may not involve ''[a] floodplain encroachment other than for functionally dependent uses (*e.g.,* bridges, wetlands) or actions that facilitate open space use (*e.g.,* recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.'' This proposed constraint consolidates two conditions in the FHWA 1989 PCE Memorandum. The first excluded actions that involved ''any work encroaching on a regulatory floodway or any work affecting the base floodplain (100-year flood) elevations of a water course or lake.'' It is FHWA's policy to prevent uneconomic, hazardous, or incompatible use and development of the Nation's floodplains (23 CFR 650.103). An action taking place within the base floodplain would trigger the decisionmaking process required by Executive Order 11988, *Floodplain Management,* and established in 23 CFR part 650 subpart A, which requires evaluation of practicable alternatives and assessment of impacts.

The FHWA is proposing changes to the 1989 condition by simplifying the language and adding some clarifications. Section 650.105(e) of 23, Code of Federal Regulations, defines encroachment as ''an action within the limits of the base floodplain.'' Regulatory floodways are located within base floodplains. Retaining both the phrase ''encroaching on a regulatory floodway'' and the phrase ''any work affecting the base floodplain'' would be redundant under current regulatory definitions. Retaining the scope of the condition for all work affecting floodplains would have eliminated most if not all bridge rehabilitation, reconstruction, and replacement projects. To avoid this unintended result, FHWA is proposing to allow the use of the proposed CEs for work in floodplains if the action is for a functionally dependent use or an action that facilitates open space use. In developing this language, FHWA considered the Federal Emergency Management Agency's (FEMA) regulations since that agency regularly works with surface transportation actions within the floodplain and provides advice to other Federal agencies on floodplain management issues (*see* 44 CFR 9.11(d)(1) (establishing that the only FEMA-funded construction actions permissible within regulatory floodways are functionally dependent uses or actions that facilitate open space use); 44 CFR 60.6(a)(7) (allowing communities to consider variances in their local floodplain management ordinances for functionally dependent uses)). The term ''functionally dependent use'' is intended to follow FEMA's definition in 44 CFR 59.1, which is ''a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water.'' Examples provided in the proposal for clarity include bridges and wetland mitigation projects. These are just two examples of actions that have to be located close to water to serve their purpose. The term ''facilitate open space use'' is intended to capture projects that do not lead to additional base floodplain development and are compatible with the restoration and preservation of natural and beneficial floodplain values. Examples include recreational trails, and bicycle and pedestrian paths.

A second condition from the FHWA 1989 PCE Memorandum consolidated into this proposal would exclude actions involving ''[c]onstruction in, across or adjacent to a river designated as a component or proposed for inclusion in the National System of Wild and Scenic Rivers published by the U.S. Department of the Interior/U.S. Department of Agriculture.'' Such projects require consultation and documentation of any possible impacts, although may still be processed as a CE. The original condition language has been simplified in this proposal.

Finally, there were several conditions discussed in the FHWA 1989 PCE Memorandum that FHWA considered, but did not pursue in this proposal. These included conditions related to work in wetlands, actions involving any known hazardous materials sites, conformity with the Air Quality Implementation Plan, and consistency with a State's Coastal Zone Management Plan. The FHWA believes that the proposed constraint related to individual permits under section 404 of the CWA, together with FHWA's regulations at 23 CFR part 777 (implementing Executive Order 11990, *Protection of Wetlands,* and authorizing expenditure of Federal-aid highway funds for wetland impact mitigation) would address concerns regarding potential impacts to wetlands. The FHWA believes that the existing statutory and regulatory framework for appropriate environmental liability inquiries, including the U.S. Environmental Protection Agency's ''all appropriate inquiries'' rule at 40 CFR part 312, reduce the potential for acquiring unwanted clean-up liability. In addition, FHWA believes that conditions related to air quality conformity under the section 176 of the CAA and consistency determinations with State coastal uses under the Coastal Zone Management Act are unnecessary since the actions must meet these requirements regardless of whether the project qualifies for the (c)- or (d)-list CE. Although these conditions have not been included as constraints in this proposal, FHWA notes that these considerations would continue to be taken into account in the evaluation of unusual circumstances.

Section 771.117(g)

The FHWA proposes to add paragraph (g) to 23 CFR 771.117 to establish requirements for developing PCE agreements, including agreements that would allow State DOTs to make CE determinations on FHWA's behalf. The proposed language in this NPRM would require that the PCE agreements include the process for making CE determinations. The process includes defining roles and responsibilities, appropriate quality control, and expected documentation for each determination. The FHWA proposes that the PCE agreements provide for a monitoring and oversight process by FHWA and for State DOTs to take any corrective action that is identified and needed as a result of this oversight. The proposal would direct the State DOT to establish in the PCE agreements how the agreement can be renewed and improved based on performance by the State DOT. The proposal would require PCE agreements to provide for voluntary and involuntary termination of the agreement. The proposal would require public availability of the PCE agreements, which could be met through publication on the State DOT Web site and making the document available in hard copy when requested. The proposal would establish a five-year renewal process to ensure FHWA retains appropriate oversight of processing outcomes by the State DOT. This timeframe is consistent with recently issued PCE agreements. Finally, the proposal would require FHWA legal sufficiency and Headquarters review of the draft programmatic agreement prior to FHWA approval to ensure consistency of the agreements nationwide. This is critical given FHWA's retention of legal liability for individual CE determinations by State DOTs.

If the proposal becomes final, then FHWA would review all existing PCE agreements as part of the implementation of section 1318(d) and ensure consistency with the new criteria specified in the proposed paragraph (g). Existing PCE agreements would continue to operate until revised, but would need to be revised no later than 5 years after publication of the rule.

FTA Section-by-Section Analysis

Section 771.118

The FTA proposes to add three new CEs to section 771.118(c) and two new CE examples to section 771.118(d). The proposed CEs are based on responses to the CE Survey Review, as well as FTA's substantiation efforts described above. The CEs proposed in this NPRM are listed and explained below along with a substantiation summary for the CEs proposed for section 771.118(c). A summary of the documentation used for substantiation of these CEs (''FTA Section 1318 Substantiation'') is available in the NPRM docket on Regulations.gov.

Section 771.118(c)

''(14) Bridge removal and related activities, such as in-channel work, disposal of materials and debris in accordance with applicable regulations, and transportation facility realignment.'' This proposed CE expands the example at section 771.118(d)(2)(bridge replacement or rail grade separation) to include bridge removal, specifically, and would be located on the c-list at 23 CFR 771.118(c). Although a bridge is removed or taken out of service during a bridge replacement project, this CE expands the activity to include those actions that remove a bridge permanently, which would affect the associated transportation network, and allows the approval through the c-list at 23 CFR 771.118(c). In addition to the bridge removal action itself, it is likely that the transportation facility to and from the bridge would need to be realigned, materials and debris would need to be disposed of in an approved manner per applicable regulations, and in-channel work performed to remove piers or reduce pier height for safer in-water navigation when conducting a complete bridge removal. The additional activity (*i.e.,* bridge removal and related activities) is not inconsistent with other activities categorically excluded under existing FTA regulations, and is a logical extension of those activities currently categorically excluded (*see* ''FTA Section 1318 Substantiation'').

''(15) Preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way to prevent damage to the transportation facility and adjoining property, plus any necessary channel work, such as restoring, replacing, reconstructing, and rehabilitating culverts and drainage pipes; and, expanding existing culverts.'' This CE expands the exclusion found at section 771.118(c)(3) (environmental mitigation or stewardship activity) and section 771.118(c)(8) (maintenance, rehab, and reconstruction of facilities) to include preventative maintenance activities for culverts and channels, specifically. The proposed CE is limited to culvert and channel maintenance within or adjacent to the transportation right-of-way in order to preserve the functionality of the culverts and channels, and to prevent damage to the transportation facility and adjoining property. Actions falling under this CE would be performed on an on-going, but as-needed basis to maintain the continued operation of the structure. The additional activity (*i.e.,* preventative maintenance activities for culverts and channels) is not inconsistent with other activities categorically excluded under existing FTA regulations, and is a logical extension of those activities currently categorically excluded (*see* ''FTA Section 1318 Substantiation'').

''(16) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.'' This CE focuses on geotechnical and other subsurface investigations that inform preliminary engineering, environmental analyses, and permitting. The CE expands the CEs found at section 771.118(c)(3) (environmental mitigation or stewardship activity) and section 771.118(c)(4) (planning and administrative activity) to include geotechnical and other investigation activities. The additional activity (*i.e.,* geotechnical and other investigation activities) is not inconsistent with other activities categorically excluded under existing FTA regulations, and is a logical extension of those activities currently categorically excluded (*see* ''FTA Section 1318 Substantiation''). In fact, FTA received several requests to include geotechnical activities in section 771.118(c)(4) in response to the March 2012 NPRM (77 FR 15310, Mar. 15, 2012), but FTA made a distinction between geotechnical activities in that final rule based on its substantiation work completed at that time. Limited geotechnical work (such as the use of ground penetrating radar) could be approved under section 771.118(c)(4) as long as it did not involve construction or lead directly to construction. The CE proposed in this NPRM, however, would allow for more substantial geotechnical work based on further substantiation work done since the issuance of the final rule on February 7, 2013.

The MAP–21 Section 1318(c) requires the Secretary to move the actions at section 771.117(d)(1)–(3) to section 771.117(c) ''to the extent that such movement complies with the criteria for a categorical exclusion'' in the CEQ regulation. The FTA met this requirement through the NEPA

rulemaking published in February 2013 (*see* 78 FR 8964, Feb. 7, 2013).

When FTA issued the NEPA rulemaking noted above, it presented section 771.118(d)(1) (which corresponds with FHWA section 771.117(d)(1)), and section 771.118(d)(2) (which is a modified version of FHWA section 771.117(d)(3)), in the list of examples under section 771.118(d). The FTA retained the section 771.117(d)(1) language as is when FTA created section 771.118(d)(1) due to its limited applicability to transit actions and FTA's need to review documentation associated with actions falling under this example in order to verify the action would not have significant impact on the environment. Section 771.117(d)(2) was covered, as the example applies to FTA, in section 771.118(c)(4). The FTA moved part of the actions covered under section 771.117(d)(3) to section 771.118(c)(8), and kept the larger aspects of section 771.117(d)(3) in FTA's d-list at section 771.118(d)(2). The modifications to the language for the examples in sections 771.118(d)(1)–(3) were based on FTA's substantiation effort and applicability to FTA's program.

Pursuant to MAP–21 section 1318(c), FTA revisited sections 771.118(d)(1) and (2), but did not locate additional supporting data or documentation that would enable FTA to move those examples to section 771.118(c). Without supporting data or documentation, FTA cannot move the examples located at section 771.118(d)(1) and (2) to section 771.118(c) and be consistent with CEQ's regulations, which require a showing that categorical exclusions ''do not individually or cumulatively have significant effect on the human environment'' (40 CFR 1508.4). Through this NPRM, however, FTA requests public comment on FTA's proposal to retain paragraphs (1) and (2) in section 771.118(d). Additionally, FTA requests the public, such as past sponsors for transit projects, provide supporting data or documentation when possible. The FTA will consider any substantiation or supporting data/documentation submitted to the docket for this NPRM for the types of projects found at section 771.118(d)(1) and (2) that resulted in documented CEs or FONSIs. After the close of the public comment period, FTA will review the proposals and supporting data/documentation in determining whether it is possible to move further portions of paragraphs (1) and (2) under section 771.118(d) to section 771.118(c) in a final rule.

Section 771.118(d)

''(7) Minor transportation facility realignment for rail safety reasons, such as improving vertical and horizontal alignment of railroad crossings, and improving sight distance at railroad crossings.'' This CE example would focus on those transportation facility realignments needed in order to improve rail safety for the grantee and the public. This action is proposed for inclusion in Section 771.118(d) because FTA would require documentation regarding the action in order to ensure no significant impacts would be incurred as part of the proposed action.

''(8) Modernization or minor expansions of transit structures and facilities outside existing right-of-way, such as bridges, stations or rail yards.'' This CE example would focus on modernizing or providing minor expansions of transit structures and facilities outside the existing right-of-way since activities occurring within the existing transportation right-of-way could fall under the CE created pursuant to section 1316 of MAP–21. The FTA would require documentation for actions falling under this example in order to ensure no significant impacts would be incurred as part of the proposed action.

Rulemaking Analyses and Notices

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

Executive Orders 12866 and 13563 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct agencies to assess all 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). The Agencies have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 nor would it be significant within the meaning of DOT regulatory policies and procedures (44 FR 11032).

This NPRM proposes to add new CEs as sections 771.117(c)(24), (c)(25), (c)(26), (c)(27), (c)(28), (c)(29), and (c)(30) and sections 771.118(c)(14), (c)(15), (c)(16), (d)(7), and (d)(8), pursuant to section 1318 of MAP–21. By definition these actions normally do not result in individual or cumulative significant environmental impacts. These actions are subject to the unusual circumstances provision in 23 CFR 771.117(b) and 771.118(b), which screens out those rare cases where the action may result in significant impacts. This NPRM also proposes to establish criteria for Programmatic CE Agreements between State DOTs and FHWA. These agreements further expedite NEPA environmental review for highway projects.

These proposed changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required. The Agencies anticipate that the changes in this proposal would enable projects to move more expeditiously through the Federal review process and would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA and for ensuring that projects are built in an environmentally responsible manner. The vast majority of FHWA actions presently are determined to be CEs. In a recent survey conducted on CE usage, carried out pursuant to MAP–21 section 1318, responding State DOTs reported that 90 percent to 99 percent of their projects qualified for CE determinations. Approximately 90 percent of FTA's actions are within the scope of existing CEs. The Agencies anticipate the percentages may increase with the promulgation of the proposed CEs. The Agencies are not able to quantify the economic effects of these changes, because the types of projects that will be proposed for FHWA and FTA funding and their potential impacts are unknown at this time, particularly given changes to the programs in MAP–21. The Agencies request comment, including data and information on the experiences of project sponsors, on the

likely effects of the changes being proposed.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the Agencies have evaluated the effects of this proposed rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. The proposed revision could expedite environmental review and thus would be less than any current impact on small business entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $148.8 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the Agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the Agencies have determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The Agencies invite State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments.

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, and believe that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The Agencies have analyzed this action under Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The Agencies have determined that this action 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 under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

The DOT's regulations implementing Executive Order 12372 (49 CFR part 17) apply to this program. Accordingly, the Agencies solicit comments on this issue.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The Agencies have determined that this proposal does not contain collection of information requirements for the purposes of the PRA.

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 12898 (Environmental Justice)

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and DOT Order 5610.2(a), 91 FR 27534 (May 10, 2012) (available online at *www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, both Agencies have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, the FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*). The FTA also issued an update to its EJ policy, *FTA Policy Guidance for Federal Transit Recipients,* 77 FR 42077 (July 17, 2012) (available online at *www.fta.dot.gov/legislation_law/12349_14740.html*).

The Agencies have evaluated this proposed rule under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies have determined that the proposed new CEs, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. This action proposes to add a provision to the Agencies' NEPA procedures under which they may decide in the future that a project or program does not require the preparation of an EA or EIS. The proposed rule itself has no potential for effects until it is applied to a proposed action requiring approval by the FHWA or FTA.

At the time the Agencies apply a CE proposed by this rulemaking, the Agencies would have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance to determine whether the proposed action has the potential for EJ effects. The rule would not affect the scope or outcome of that EJ evaluation. In any instance where there are potential EJ effects and the Agencies were to consider applying one of the CEs proposed by this rulemaking, public outreach under the applicable EJ orders and guidance would provide affected populations with the opportunity to raise any concerns about those potential EJ effects. *See* DOT Order 5610.2(a), FHWA Order 6640.23A, and FTA Policy Guidance for Transit Recipients (available at links above). Indeed,

outreach to ensure the effective involvement of minority and low income populations where there is potential for EJ effects is a core aspect of the EJ orders and guidance. For these reasons, the Agencies also have determined that no further EJ analysis is needed and no mitigation is required in connection with the designation of the proposed CEs.

Executive Order 13045 (Protection of Children)

The Agencies have analyzed this action under Executive Order 13045, *Protection of Children from Environmental Health Risks and Safety Risks.* The Agencies certify that this action would not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The Agencies do not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights.*

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA 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)). 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. The 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 are generally procedural guidance to 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).

Regulation Identification Number

A RIN is assigned 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 contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

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 record keeping requirements.

In consideration of the foregoing, the Agencies propose to amend title 23, Code of Federal Regulations part 771, and title 49, Code of Federal Regulations part 622, as follows:

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES.

■ 1. The authority citation for part 771 is revised 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; 40 CFR Parts 1500–1508; 49 CFR 1.81, 1.85; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112–141, 126 Stat. 405, sections 1315, 1316, 1317, and 1318.

§ 771.117 [Amended]

■ 2. Amend § 771.117 by:
■ a. Adding new paragraphs (c)(24) thru (c)(30).
■ b. Revising the first sentence in paragraph (d); removing and reserving paragraphs (d)(1), (d)(2), and (d)(3); and adding a new paragraph (d)(13).
■ c. Redesignating paragraph (e) as paragraph (f) and adding new paragraph (e).
■ d. Adding a new paragraph (g).

The additions and revisions read as follows:

§ 771.117 FHWA categorical exclusions.

* * * * *

(c) * * *

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing) if it the action meets the conditions in paragraph (e) of this section.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the conditions in paragraph (e) of this section.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the conditions in paragraph (e) of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in users. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

(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 Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section. * * *

(1) [Reserved]

(2) [Reserved]

(3) [Reserved]

* * * * *

(13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) that do not meet the constraints in paragraph (e) of this section.

(e) Actions described in (c)(26), (c)(27), and (c)(28) may not be processed as CEs under paragraph (c) of this section if they involve:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any commercial or residential displacements;

(2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a USACE nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of ''adverse effect'' to historic properties under the NHPA, use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or likely to adversely affect threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access, or the closure of an existing road, bridge, or ramps, that would result in major traffic disruptions or substantial environmental impacts;

(5) Changes in access control; or

(6) A floodplain encroachment other than functionally dependent uses (*e.g.,* bridges, wetlands) or actions that facilitate open space use (*e.g.,* recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

* * * * *

(g) Notwithstanding paragraph (d) of this section, FHWA may enter into programmatic agreements with a State to allow a State DOT to make a NEPA CE certification or determination and approval on FHWA's behalf. Such agreements must be subject to the following conditions:

(1) The agreement must set forth the State DOT's responsibilities for making CE determinations, documenting the determinations, and achieving acceptable quality control and quality assurance;

(2) The agreement may not have a term of more than five years, but may be renewed;

(3) The agreement must provide for FHWA's monitoring of the State DOT's compliance with the terms of the agreement and for the State DOT's execution of any needed corrective action. The FHWA must take into account the State DOT's performance when considering renewal of the programmatic CE agreement;

(4) The agreement must include stipulations for amendment, termination, and public availability of the agreement once it has been executed; and

(5) Legal sufficiency and FHWA Headquarters review is required prior to FHWA's approval of the agreement.

■ 3. Amend § 771.118 by adding new paragraphs (c)(14) thru (c)(16), (d)(7), and (d)(8) to read as follows:

§ 771.118 FTA categorical exclusions.

* * * * *

(c) * * *

(14) Bridge removal and bridge removal related activities, such as in-channel work, disposal of materials and debris in accordance with applicable regulations, and transportation facility realignment.

(15) Preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way to prevent damage to the transportation facility and adjoining property, plus any necessary channel work, such as restoring, replacing, reconstructing, and rehabilitating culverts and drainage pipes; and, expanding existing culverts.

(16) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(d) * * *

(7) Minor transportation facility realignment for rail safety reasons, such as improving vertical and horizontal alignment of railroad crossings, and improving sight distance at railroad crossings.

(8) Modernization or minor expansions of transit structures and facilities outside existing right-of-way, such as bridges, stations or rail yards.

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Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

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

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303 and 5323; 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; and Pub. L. 112–141, 126 Stat. 405, sections 1315, 1316, 1317, and 1318.

Issued on: September 12, 2013.

Victor M. Mendez,

Administrator, Federal Highway Administration.

Peter Rogoff,

Administrator, Federal Transit Administration.

[FR Doc. 2013–22675 Filed 9–18–13; 8:45 am]

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NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The NTSB proposes amending one of its rules of practice that is applicable to cases proceeding on an emergency timeline. This proposed amendment will require the Federal Aviation Administration (FAA) to provide releasable portions of its enforcement investigative report (EIR) to each respondent in emergency cases.

DATES: Comments must be submitted by October 21, 2013.

ADDRESSES: A copy of this NPRM, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594–2003. Alternatively, a copy is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2011–0001).

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION: Elsewhere in today's **Federal Register**, the NTSB published a Final Rule, finalizing changes to various sections of 49 CFR part 821, as a result of the Pilot's Bill of Rights. In the final rule, the NTSB, among other things, updated language in § 821.19(d), which requires disclosure of the FAA's EIR in non-emergency cases. Because the Pilot's Bill of Rights was immediately effective upon enactment on August 3, 2012, the NTSB published an interim final rule to implement the new legislation's requirements, 77 FR 63242 (Oct. 16, 2012).

In this NPRM, the NTSB proposes incorporating a similar requirement at