

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Parts 771 and 774****Federal Railroad Administration****49 CFR Part 264****Federal Transit Administration****49 CFR Part 622**

[Docket No. FHWA–2015–0011]

RIN 2125–AF60; 2130–AC64; 2132–AB26

**Environmental Impacts and Related Procedures**

**AGENCY:** Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends FHWA and FTA regulations implementing the National Environmental Policy Act (NEPA) and Section 4(f) requirements. In addition, through this final rule, FRA is joining those regulations, making them FRA's NEPA and Section 4(f) implementing regulations. The FHWA, FRA and FTA (hereafter collectively referred to as "the Agencies") modified the NEPA and Section 4(f) regulations to reflect various provisions of the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the Fixing America's Surface Transportation (FAST) Act. The Agencies have also revised the Environmental Impact and Related Procedures regulations to reflect various procedural changes, such as including a new section on combined final environmental impact statement/record of decision documents, and to improve readability and reflect current practice. This final rule also amends the Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites regulations to reflect new exceptions created by the FAST Act.

**DATES:** Effective on November 28, 2018.

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[Christopher.Vannostrand@dot.gov](mailto:Christopher.Vannostrand@dot.gov). For FTA: Megan Blum, Office of Planning and Environment, (202) 366–0463, [Megan.Blum@dot.gov](mailto:Megan.Blum@dot.gov), or Nancy-Ellen Zusman, Office of Chief Counsel, (312) 353–2577, [NancyEllen.Zusman@dot.gov](mailto:NancyEllen.Zusman@dot.gov). The Agencies are located at 1200 New Jersey Ave. SE, Washington, DC 20590–0001. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Background**

The MAP–21 (Pub. L. 112–141, 126 Stat. 405) and the FAST Act (Pub. L. 114–94, 129 Stat. 1312) contained new requirements that the Agencies must meet in complying with NEPA (42 U.S.C. 4321 *et seq.*) and Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303). Through this final rule, the Agencies are revising the regulations that implement NEPA at 23 CFR part 771—Environmental Impact and Related Procedures, and Section 4(f) at 23 CFR part 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites. The final rule modifies 23 CFR part 771 to implement MAP–21 (sections 1302, 1305, 1315, 1319, 1320(d), 20003, 20016, and 20017) and the FAST Act (sections 1304 and 11503). This final rule also modifies 23 CFR part 774 to reflect MAP–21 (sections 1119(c)(2) and 1122) and the FAST Act (section 1303 and 11502).

In addition, the final rule establishes 23 CFR parts 771 and 774 as FRA's NEPA implementing procedures and FRA's Section 4(f) implementing regulations, respectively. As described in the supplemental notice of proposed rulemaking, discussed later in this document, the procedures outlined in these regulations will apply to all environmental reviews where FRA is the lead agency and initiated after the effective date of the final rule. The FRA will continue to apply its FRA's Procedures for Considering Environmental Impacts<sup>1</sup> (FRA Procedures) to projects initiated before the effective date of this final rule.

As appropriate, FRA intends to issue further direction for its practitioners and project sponsors clarifying what information should be included in FRA's environmental documents. However, until that time, FRA will rely on certain sections of FRA Procedures as guidance. In particular, FRA will continue to look to Section 10, Environmental Assessment Process, Section 11, Finding of No Significant

Impact, and Section 14, Contents of an Environmental Impact Statement of the FRA Procedures. Project sponsors should contact FRA headquarters with any questions about FRA's expectations for the content of environmental documents.

Once FRA has completed the environmental review of projects initiated before the date of this final rule, FRA plans to rescind the FRA Procedures.

Lastly, the Agencies are modifying the NEPA implementing procedures through this final rule to reflect current Agency practice, as well as to improve readability consistent with Executive Order 13563, "Improving Regulation and Regulatory Review" (2011).

**Notices of Proposed Rulemaking (MAP–21 and FAST Act)**

On November 20, 2015, at 80 FR 72624, FHWA and FTA published a notice of proposed rulemaking (NPRM) proposing amendments to 23 CFR parts 771 and 774 to account for the changes made by MAP–21 and to reflect various readability changes (MAP–21 NPRM). The FAST Act was signed on December 4, 2015. Certain FAST Act provisions affected portions of the regulatory provisions addressed in the MAP–21 NPRM, and other FAST Act provisions required rulemaking. On September 29, 2017, at 82 FR 45530, the Agencies proposed additional amendments to reflect FAST Act provisions in a supplemental notice of proposed rulemaking (FAST Act SNPRM). The FAST Act SNPRM also proposed to add FRA to parts 771 and 774.

All substantive comments received on the MAP–21 NPRM and the FAST Act SNPRM were considered when developing this final rule. The docket contains a redline of parts 771 and 774 showing all changes.

**Summary of Comments and Responses**

The Agencies received 14 comment letters in response to the MAP–21 NPRM. Comment letters were submitted by six State departments of transportation (State DOTs); three transit agencies; three surface transportation interest groups (trade associations); one regional transportation agency; and three citizens.

In response to the FAST Act SNPRM, the Agencies received 12 comment letters from the following groups: 1 citizen; 4 trade associations; 1 public transportation agency; 3 resource/regulatory agencies; 2 State DOTs; and 1 Indian Tribe. The Agencies received 33 other comment letters that were deemed to be outside of scope of this

<sup>1</sup> FRA's Procedures for Considering Environmental Impacts, 64 FR 28545 (May 26, 1999), as modified by 78 FR 2713 (Jan. 14, 2013).

rulemaking and therefore are not addressed further.

The following comment summaries reflect the significant comments received on both the MAP-21 NPRM and FAST Act SNPRM, the Agencies' responses to those comments, and any additional minor clarifications made by the Agencies after further consideration. The summaries are organized by regulatory section number. Any MAP-21 NPRM or FAST Act SNPRM proposals not specifically addressed below are being finalized as previously proposed.

#### General

The Agencies made various nonsubstantive changes to their NEPA implementing regulations. The Agencies changed many instances of "will" or "shall" to "must" unless it did not make sense to do so. The Agencies also changed all document references to lowercase (e.g., "notice of intent," "record of decision," "environmental impact statement").

#### MAP-21 NPRM—General Comments

Two transit agencies supported the Agencies' efforts to improve and streamline environmental review regulations. One trade association supported the Agencies' efforts to ensure the joint environmental regulations provide guidance to project sponsors without imposing rigid requirements. One State DOT provided a general statement of support for the proposed revisions to the NEPA and Section 4(f) regulations. The Agencies appreciate the support and input provided by all commenters regarding the MAP-21-related proposals.

One transit agency sought clarification on how joint lead agencies are applied to the NEPA process. The transit agency asked if it would become a joint lead agency when it prepares an environmental assessment on behalf of FTA and when and how determinations would be made on which entity would serve as the joint lead agency. They also inquired if there would be instances when a non-Federal agency applicant would serve as a joint lead agency. Typically, the applicant (e.g., State DOTs, public transportation agencies, and local governments) serves as a joint lead agency with the Federal lead agency. Lead agency determinations are made early in the environmental review process. Generally, the applicant will inform the Federal lead agency of its intent to conduct an environmental review for a proposed project that it anticipates will require an approval from that Federal lead agency (i.e., is requesting financial assistance for

construction). The applicant should contact the Federal lead agency prior to making any project decisions, such as finalizing the project's purpose and need. The Agencies plan to provide more information regarding joint lead agencies in a forthcoming update to the "SAFETEA-LU Environmental Review Process Final Guidance."

One trade association encouraged FHWA and FTA to expedite review of projects in finalizing the proposed rule. A regional transportation agency similarly encouraged the Agencies to use the rulemaking in a way that seeks to maximize opportunities for environmental streamlining. Five State DOTs also provided a general statement of support for efforts to streamline the project delivery and environmental review process. One trade association provided a letter of support for the proposed MAP-21 updates, specifically stating that "all of the revisions . . . will have a positive impact on the project review and approval process" and noting support for the combined final environmental impact statement/record of decision (FEIS/ROD) and errata sheet approaches and identification of a single lead modal agency. The Agencies appreciate the commenters' support as we continue to focus on expedited review of projects.

#### FAST Act SNPRM—General Comments

Three trade associations provided comments that generally supported the proposed rulemaking, and noted that the proposed changes to part 771 are consistent with the FAST Act and MAP-21, and will improve the efficiency of the NEPA process. The Agencies appreciate the commenters' support as we continue to focus on expedited review of projects.

Two trade associations generally supported the proposal to add FRA to 23 CFR parts 771 and 774. These commenters noted that one common set of procedures, modified, as appropriate, to reflect the differences in each Agency's program, will result in a more efficient and timely review process. One trade association suggested applying part 771 to railroad projects will facilitate preparing single documents to support decisions from the operating administrations (OAs). Another trade association supported FRA's proposal to apply part 771 to its actions, stating that it will be especially helpful for multimodal projects that require preparation of a single NEPA document to support multiple decisions. The Agencies appreciate the commenter's support of FRA's proposal to join part 771. As described in the FAST Act SNPRM, FRA is joining the FHWA and

FTA NEPA implementing regulations to comply with section 11503 of the FAST Act (49 U.S.C. 24201). In addition, applying the same procedures as the two other OAs responsible for surface transportation will result in a more efficient and predictable review for project sponsors.

However, to clarify the timing of this final rule's applicability to FRA's actions, the Agencies are adding a new § 771.109(a)(4), which, consistent with the SNPRM preamble, states that FRA will apply the procedures described in this final rule to actions initiated after its effective date. The Agencies have also modified § 771.109(a)(3) to add a reference to FHWA and FTA.

One trade association commented that the Agencies failed to respond to the comments it submitted on FRA's June 9, 2016, **Federal Register** notice (81 FR 37237) in which FRA requested the public's views on applying part 771 to railroad projects. The commenter repeated its suggestion that FRA develop its own regulations, rather than join part 771, because of the unique needs of railroads. The Agencies addressed the trade association's comment in the "Applicability of 23 CFR part 771 to FRA Actions" section of the FAST Act SNPRM. As described in that section, FRA determined that applying 23 CFR part 771 to railroad projects is the most efficient way to comply with section 11503 of the FAST Act. In addition, aligning FRA's procedures with FHWA and FTA will provide a more consistent and predictable process for potential project sponsors, especially those that engage in environmental reviews for more than one mode of surface transportation. As noted in the FAST Act SNPRM, the Agencies modified part 771 where necessary to reflect the differences among the three modes of transportation.

#### FAST Act SNPRM—Cross-Agency CE

One trade association suggested that DOT OAs should be able to use another OA's categorical exclusions (CEs). In addition, one State DOT and one trade association requested that the Agencies issue guidance regarding the application of CEs for multimodal projects referenced in title 49 U.S.C. 304. The U.S. Department of Transportation previously issued guidance on the application of 49 U.S.C. 304;<sup>2</sup> the Agencies have not supplemented this guidance. After considering the public

<sup>2</sup> Guidance on the Application of Categorical Exclusions for Multimodal Projects under 49 U.S.C. 304, available at: <https://www.transportation.gov/transportation-policy/permittingcenter/section-1310-guidance-application-categorical-exclusions>.

comments regarding the use of another mode's CEs, the Agencies decided to include a new paragraph at §§ 771.116(d), 771.117(h), and 771.118(e) that allows FHWA, FTA, and FRA to use each other's CEs. The Agencies currently share environmental review process regulations and their actions are, in many cases, very similar (e.g., approving construction of new surface transportation projects). As such, the Agencies have determined it is appropriate to have the option to use each other's CE lists where the CE approved for an OA is applicable to the proposed action. This approach would allow for increased efficiencies while not functionally expanding the type of projects for which the CE was originally established. This option includes the opportunity for consultation as necessary to ensure the appropriate application of the CE. It should be noted that the analysis of unusual circumstances would still be considered in the application of the CE as defined in § 771.116(b), § 771.117(b), and § 771.118(b). To accommodate the new language, § 771.118(e) is now redesignated § 771.118(f). The FHWA and FRA language is the same as the FTA language, modified only by changing FTA to FHWA or FRA, as applicable.

#### 771.105 Policy

One regional transportation agency suggested revising § 771.105(f) to include a reference to all of the other laws considered during the NEPA review by adding the phrase "or required by law." The Agencies decline to include the proposed language because it is the Agencies' policy, which is consistent with the Council on Environmental Quality's (CEQ) NEPA implementing regulations, that compliance with all of the Federal environmental requirements (e.g., laws, regulations, and Executive Orders) be included in the NEPA review and documentation. *See* 40 CFR 1500.2(c). As a result, costs incurred by an applicant preparing an environmental document requested by the Administration would be eligible for financial assistance.

#### 771.107 Definitions

##### Administration Action

One citizen commented that the definition for Administration Action is too narrow because it does not include acquisition of rolling stock, and requested that the word construction be replaced with final design activities, property acquisition, purchase of construction materials or rolling stock,

or project construction. This commenter also stated the exceptions in § 771.113(d) do not need to be mentioned in this definition because allowing one of the excepted activities is an Administration action that is permitted prior to completion of the NEPA process. In addition, one regional transportation agency proposed inserting a statement regarding NEPA compliance at the end of the definition. The Agencies do not intend for the definition of Administration Action to be read so narrowly as to preclude additional activities. However, the Agencies do not believe it is necessary to add the proposed expansive list to the definition itself; those activities could be Administration actions but the Agencies are opting to present a non-exclusive list in order to maintain flexibility. The Agencies also decline to include the recommendation to refer to NEPA compliance because the activities listed in the paragraph require compliance with NEPA, and the paragraph would become circular in rationale. The only substantive changes to this definition that the Agencies are including are those proposed in the FAST Act SNPRM.

##### Programmatic Approaches

Five State DOTs and a trade association suggested revisions to the programmatic approaches definition that they assert would more closely match the language in 23 U.S.C. 139(b)(3)(A)(iii), which refers to programmatic approaches being consistent with NEPA. The Agencies agree that the definition of programmatic approaches should reflect the statutory language and have modified the definition accordingly.

##### Project Sponsor

A regional transportation agency commented that the project sponsor definition is vague and requested the Agencies clarify the activities the project sponsor is authorized to undertake on behalf of the applicant. The Agencies agree that the definition of project sponsor should be further clarified to acknowledge that the project sponsor may undertake some activities for the applicant and are therefore modifying the definition. However, the Agencies also note that when the project sponsor is a private institution or firm, § 771.109(c)(6) limits those activities to providing technical studies and commenting on environmental review documents.

#### 771.109 Applicability and Responsibilities

Regarding § 771.109(b)(1), one public commenter asked whether FHWA/FTA staff can realistically ensure mitigation commitments are implemented. The FHWA and FTA, in collaboration with project sponsors, strive to have sufficient staff to ensure mitigation commitments are implemented and to effectively administer the Federal-aid highway program and the environmental review process for federally funded transit projects.

The Agencies are modifying § 771.109(b)(1) by changing "applicant" in the first sentence to "project sponsor." The Agencies are engaging more frequently on projects advanced by private entities so it is appropriate to use the broader "project sponsor" to clarify that a private entity seeking funding or another approval from one of the Agencies may be required to carry out mitigation commitments identified during the environmental review process.

One transit agency requested that a timeframe be specified for participating agencies to provide their comments in § 771.109(c)(7). The commenter suggested that the Agencies specify that the coordination plan contain timeframes that participating agencies are obligated to follow, and that failure to adhere to those timeframes would result in an agency's concurrence. One State DOT similarly commented that the language in this section does not address assumption of concurrence for participating agencies that do not concur on the schedule as part of the coordination plan. This commenter recommended that the final rule include clarification regarding how the lead agencies will satisfy their responsibilities under 23 U.S.C. 139(g) when the circumstance arises that one or more participating agencies do not concur or respond to the request for concurrence on a schedule for completion of the environmental review process. Two trade associations also expressed concern for a lead agency's responsibility in this scenario and provided recommendations to remedy this concern.

In response to the requests for clarifications regarding comment periods and timeframes, the Agencies note that 23 U.S.C. 139(g)(2)(B) clearly states the lead agency will provide no more than a 60-day comment period for the draft EIS review and no more than a 30-day comment period for all other comment periods in the environmental review process. Lead agencies can rely on the statutory reference to support

their comment deadlines in their requests for comments and in the development of the timeframes contained in the coordination plan.

The Agencies appreciate the comments regarding participating agency concurrence and how to proceed when there is no response or concurrence from the participating agency. The Agencies previously determined that these scenarios should be addressed in guidance.<sup>3</sup> The Agencies' existing guidance specifically addresses this, providing that the Agencies will assume a participating agency's concurrence if the participating agency fails to provide a written response on the proposed project schedule within the deadline established by the lead agency. In the absence of specific statutory authority for the Agencies to mandate concurrence from a participating agency, the Agencies will continue to address participating agency concurrence/non-concurrence in guidance.

Also within § 771.109(c)(7), one citizen suggested replacing the phrase "as appropriate" because this language may cause agencies to expect a prompt from a lead agency when feedback is necessary. The commenter suggested language for rewording that would alert agencies as to what is available to them for comment. A trade association stated that language in the section should be stronger because the clear intent of the amendments to section 139 in the FAST Act was to direct, or at least encourage, participating agencies to focus their comments on the areas within the expertise and that language, in some form, should be included in the actual text of the section. The Agencies removed "as appropriate" to strengthen the paragraph so that it is clear that participating agencies are expected to comment within their area of special expertise or jurisdiction. The Agencies are also deleting "if any" from the second sentence to make the sentence more concise. The Agencies decline to insert the citizen's proposed language in order to preserve the flexibility in the section. The lead agencies will specifically identify what input they are seeking (e.g., comment responses, methodology feedback) from participating agencies.

<sup>3</sup> Question 12 of the Fixing America's Surface Transportation Act (FAST): Questions and Answers on the procedural changes to 23 U.S.C. 139 as they relate to Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), & Federal Transit Administration (FTA) projects guidance, issued June 2017, available at: [https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/qa\\_23USC\\_changes\\_1304.aspx](https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/qa_23USC_changes_1304.aspx).

Regarding § 771.109(e), specifically FRA's use of a qualified third-party contractor to prepare an EIS in certain circumstances (i.e., when FRA is the lead Federal agency, there is no applicant acting as a joint-lead agency, and the project sponsor is a private entity), one transit agency sought additional assurance that this paragraph would not limit a public applicant's choice to prepare an EA or EIS using its in-house resources because of a precedent set for a private entity under this paragraph. The third-party contracting arrangement described in § 771.109(e) would not prohibit a public agency from preparing environmental documents using in-house expertise instead of consultant support. As described in the FAST Act SNPRM, third-party contracting is intended to address situations where a project sponsor is a private entity, and there is no other applicant acting as a lead agency. Consistent with FRA practice and the 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act memorandum,<sup>4</sup> third-party contracting is a mechanism allowing FRA to satisfy its obligations under 40 CFR 1506.5(c). To address the commenter's concerns, the Agencies are making minor edits to this section to clarify the third-party contracting process.

#### *771.111 Early Coordination, Public Involvement, and Project Development*

In § 771.111(a)(1), five State DOTs and one trade association recommended revising the second sentence to reflect that there are multiple ways that early coordination reduces delays and conflicts. In this same section, one regional transportation agency suggested adding "reducing costs" as one of the activities that contribute to minimizing or eliminating delay. The Agencies accept the proposed recommendation to the second sentence to recognize the multiple avenues available to reduce delay and conflict. The Agencies decline to add "reducing costs" as a way to minimize or eliminate delay because it is more an indirect factor.

For § 771.111(a)(2), five State DOTs and a trade association requested that § 771.111(a)(2) be clearer regarding the ability to adopt or rely on planning process products in the environmental review process. Specifically, the commenters suggested that deleting the reference to 23 CFR part 450, Appendix A would be contrary to FHWA and FTA's intent to be more encompassing. One trade association commented on § 771.111(a)(2)(i), expressing support for

the characterization of the new statutory authority for adopting planning-level decisions in the NEPA process and agreed with the text of the proposed rule in this section. That trade association also noted that FRA could, in some circumstances, rely on planning-level decisions as the basis for eliminating alternatives. The Agencies accept the suggestion to clarify and are including the citation to 23 CFR part 450 Appendix A. The Agencies agree with the need to call attention to Appendix A. With respect to FRA's use of planning-level decisions in its alternatives analysis, FRA will rely on such decisions when defining the reasonable range of alternatives for analysis under NEPA where appropriate and allowed by law. Applicants seeking to eliminate alternatives based on past planning processes should contact FRA headquarters for further direction.

In § 771.111(a)(3), one regional transportation agency proposed revising the language to add a reference to other approvals. One State agency expressed support for the proposed addition of the environmental checklist to § 771.111(a)(3) as a means to promote consistency among FHWA, FRA, and FTA and identify potential issues early in the environmental review process. The Agencies appreciate the support and accept the regional transportation agency's recommendation with modifications. It is important that the applicant notify the Administration as early as possible when a Federal action may be undertaken so the Administration can inform the applicant of likely requirements early in the environmental review process, as well as the class of action.

One regional transportation agency proposed revising § 771.111(b) to add a requirement to inform the project sponsor or applicant of the probable class of action to maximize early coordination. The Agencies decline the recommendation because a project's class of action is identified in consultation with the project sponsor, though the Agencies are responsible for the final decision regarding the class of action. The project initiation process will be discussed in further detail in the Agencies' forthcoming update to the "SAFETEA-LU Environmental Review Process Final Guidance."

One State agency commented on § 771.111(d), stating that State wildlife agencies should be identified as cooperating agencies because of their regulatory authority and special expertise on wildlife and wildlife resources. The commenter further noted that a State DOT authorized to act as a lead agency for NEPA should similarly

<sup>4</sup> 46 FR 18026 (March 23, 1981).

recognize wildlife agencies as cooperating agencies during the environmental review process. The Agencies decline to specifically identify State wildlife agencies in paragraph (d) as such a reference would be too narrow and would not capture all the agencies that might be a cooperating agency. The Agencies revisited the paragraph, however, and made non-substantive clarification revisions; the changes do not affect the content or intent of the previously proposed language.

One trade association expressed concerns with the proposal that FRA apply the factors listed in § 771.111(f) to its railroad projects. The commenter is concerned that these factors were developed to apply to public transportation projects and are ill-suited to projects on private railroad infrastructure. The commenter further stated that freight railroad projects are governed by the individual priorities and needs of each railroad, and are not subject to the State and local planning provisions that apply to transit and highway projects. With respect to the commenter's concerns with FRA's application of the factors described in § 771.111(f) to railroad projects, the Agencies disagree that these factors cannot be applied to projects on private railroad infrastructure. While these factors are specific to part 771, the obligation to appropriately define the scope of an environmental review is a general NEPA principle. For past projects, FRA has considered factors similar to § 771.111(f) when defining the scope of its environmental reviews and has determined that the § 771.111(f) factors are appropriate for future railroad projects, regardless of who owns the railroad infrastructure. Although freight railroad projects are not governed by State and local planning processes, in most cases, such a railroad project requiring an FRA action may still be subject to NEPA, and therefore part 771 would apply (e.g., there is an FRA action where FRA is providing Federal financial assistance for improvements to the freight railroad infrastructure).

To improve readability, the Agencies removed the statutory reference and footnote in § 771.111(h)(2)(viii) and replaced it with a direct citation to the Agencies Section 4(f) implementing regulations that specifically address the requirements for public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding. This change does not affect the content or intent of the previous language; however, it does reduce the number of footnotes within the current regulation while also linking

the Agencies implementing regulations more clearly. One Federal agency recommended acknowledging in this footnote that FRA intends to use FHWA and FTA Section 4(f) policy guidance, as stated in the preamble, to provide further clarity to its applicants and projects sponsors and highlight current practice. The Agencies proposed deleting this outdated footnote in the MAP-21 NPRM because the *de minimis* guidance is now included in the Section 4(f) Policy Paper.<sup>5</sup> The FHWA developed the Section 4(f) Policy Paper. The FTA applies the Section 4(f) Policy Paper to public transportation projects<sup>6</sup> and FRA intends to continue using the Section 4(f) Policy Paper for its railroad projects. In addition, FRA is evaluating whether to adopt, in whole or in part, any of the existing FHWA Programmatic 4(f) Evaluations, described in footnote 1 to 23 CFR 774.3.

One trade association expressed concerns with the proposal that FRA apply the public involvement procedures in § 771.111(i) that apply to FTA's capital projects. The commenter distinguished between public transportation systems (i.e., highway and transit projects) and projects on infrastructure owned by freight railroads. The commenter stated that railroads would be constrained in their ability to solicit full public participation because the reason a railroad proposes a project often involves confidential business information about customers. The commenter proposed striking the reference to "FRA programs" from this section. The Agencies decline to make the proposed change. Section 771.111(i) describes the activities Applicants should engage in as part of the NEPA process. Because Applicants are limited to Federal, State, local or federally recognized Indian Tribal governmental units in the definition of Applicant under § 771.107, a privately owned freight railroad would not be subject to these requirements. The FRA is always responsible for ensuring the appropriate level of public involvement during the NEPA process. Where a freight railroad is a project sponsor, as defined by in § 771.107, FRA will coordinate with the railroad as appropriate, including on the railroad's participation in the public involvement process.

<sup>5</sup> Section 4(f) Policy Paper (Policy Paper), available at: <http://www.environment.fhwa.dot.gov/4f/4fpolicy.pdf>

<sup>6</sup> FTA Use of the FHWA Section 4(f) Policy Paper memorandum, Nov. 9, 2012, available at: <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/november-9-2012-memorandum>.

### 771.113 Timing of Administration Activities

One trade association supported the proposed language with the understanding that the environmental review process definition is broad enough to capture early planning activities and activities that could be covered under a CE. The Agencies interpret this comment as pertaining to language changes made in § 771.113(a). The Agencies confirm that the environmental review process covers early scoping activities and CEs. The environmental review process does not include early planning activities, but the Agencies encourage such activities to support future NEPA reviews.

One regional transportation agency suggested adding identification of mitigation required by law to the second sentence of § 771.113(a) to recognize mitigation that may be required under other environmental laws such as the Clean Water Act or the Endangered Species Act. The Agencies partially accept the commenter's suggestion and revised the language to include the identification of mitigation measures. However, the Agencies determined referencing only mitigation required by law is too narrow.

For § 771.113(d), one citizen requested another exception to meet changes to FTA's small capital project grants (i.e., section 5307 and 5309 grant programs) under MAP-21 because projects receiving those grants may include final design activities that would be conducted concurrently with the environmental review process. MAP-21 eliminated the former distinction between preliminary engineering and final design for these projects. This commenter proposed new exception language to reflect those grants, but FTA declines to accept the suggestion. How a particular discretionary funding program is structured is irrelevant to FTA's prohibition of final design-like activities because they tend to prejudice the consideration of alternatives. There is an exception to that rule in 23 U.S.C. 139(f)(4)(D) for taking the preferred alternative to a higher level of design for purposes of mitigation when the proper circumstances exist.

One citizen provided support for the FRA-specific exception added in § 771.113(d)(4) because of the explanation that it will be not be applied broadly, but rather, on a case-by-case basis to be efficient with the resources acquired by FRA. One trade association also commented on this section, and recommended adding a similar exception for FHWA and FTA to

make case-by-case determinations allowing activities (including purchases) that would not improperly influence the outcome of the NEPA process, such as the acquisition of long-lead time construction materials or equipment. The FHWA and FTA decline to extend the § 771.113(d)(4) exemption covering limited advanced purchases of railroad components or materials to their programs. Such purchases are not allowed under FHWA procurement practices. In certain circumstances, FTA may allow limited advance purchase of railroad components or materials where the acquisitions would have independent utility from the overall action. Because FTA can already allow the action, FTA determined it does not need to revise regulation text to reflect the practice. The FRA is making a minor modification to this paragraph for clarity, however.

#### 771.115 *Classes of Actions*

One regional transportation agency noted that programmatic approaches provide significant cost and time savings, and as such, the Agencies should encourage and, where appropriate, require them. Accordingly, the commenter recommended revising § 771.115 to state that programmatic approaches “shall be used where practicable for any class of action.” The Agencies decline to make the recommended edit because there is no statutory language that authorizes the mandatory language. The Agencies encourage the use of programmatic actions, where appropriate.

The Agencies are modifying § 771.115(c)(4) by deleting “FHWA action,” § 771.115(c)(5) by deleting “FTA action,” and § 771.115(c)(6) by deleting “FRA action” because the actions listed in those sections are appropriately analyzed in an environmental impact statement regardless of which of the Agencies is conducting the environmental review.

For § 771.115(c), one citizen noted that the need for public involvement remains on certain transit projects that are known upfront to have no significant environmental impacts but may affect the lives of people who use transit in ways they need to know. Although a CE does not include any formal public involvement requirements, in certain situations, public involvement can accompany a CE, if appropriate. Alternatively, when public involvement seems prudent due to potential impacts or environmental controversy, FTA may choose to consider an EA, particularly if those impacts affect an environmental justice

community. The FTA’s Standard Operating Procedure No. 2, Project Initiation and Determining NEPA Class of Action, further explains FTA’s approach to this topic.<sup>7</sup>

One regional transportation agency suggested striking the phrase “the appropriate environmental document” and adding a reference to FONSI and EISs in § 771.115(c). The regional transportation agency suggested this substituted language because the EA is an environmental document. The Agencies decline the proposed revision based on the definition of an EA. The Agencies do not want to preclude the use of a CE in scenarios where there is a change in project scope.

#### 771.116 *FRA Categorical Exclusions*

One State DOT and three trade associations expressed general support for the proposed addition of FRA’s newly expanded CE list into this part as § 771.116. One trade association also supported the proposed FRA CEs, specifically identifying the proposed CEs covering geotechnical investigations and property acquisitions as being useful. The commenter noted that consistency among FHWA, FRA, and FTA will help streamline the environmental review process.

The Agencies are proposing a minor modification to § 771.116(c) to prevent any appearance of a conflict with the limitations on a project sponsor’s participation described in § 771.109(c)(6).

One trade association opposed the proposed elimination of FRA’s CE (previously in section 4(c)(6) of the FRA Procedures) covering, “Changes in plans for an FRA action for which an environmental document has been prepared, where the changes would not alter the environmental impacts of the action.” The commenter disagreed that § 771.129(c) addresses the types of activities previously covered by the FRA CE and requested that the Agencies add the original CE to the final rule. The CE at section 4(c)(6) of the FRA Procedures served much the same function as the re-evaluation process outlined in § 771.129. The underlying purpose is to determine whether project changes or new information require FRA to undertake additional environmental review. By joining part 771, FRA is aligning its NEPA practice with FHWA and FTA, including the process for re-evaluating environmental documents consistent with § 771.129.

<sup>7</sup> Project Initiation and Determining NEPA Class of Action, issued Aug. 2016, available at: <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/environmental-standard-operating-procedures>.

This consistency should help streamline environmental reviews and provide certainty for FRA’s project sponsors and applicants. Keeping the CE at section 4(c)(6) of the FRA Procedures and applying § 771.129 could create unnecessary confusion, undermining FRA’s goal of creating consistency with FHWA and FTA practice.

One Tribal historic preservation office objected to FRA’s CEs covering activities within railroad rights-of-way. The commenter stated that the CEs will lead to “abuse or misuse” and expressed concerns that they could result in adverse effects to archaeological sites and properties of religious and cultural significance. The FRA has significant experience applying CEs to proposed actions within railroad rights-of-way and believes that the CEs are appropriately limited to avoid misapplication. In addition, the decision to apply a CE is one FRA makes on a project-by-project basis. In making that project-specific decision, FRA will consider the unusual circumstances listed in § 771.116(b), which includes § 771.116(b)(3) covering significant impact to properties protected by Section 4(f) requirements or Section 106 of the National Historic Preservation Act (Section 106). This would include a consideration of potential effects to archaeological sites and properties of religious and cultural significance to Tribes.

The Tribal historic preservation office requested that the Agencies define the terms improvements and upgrade because the terms may include different types of activities, some of which might result in adverse effects under the National Historic Preservation Act or significant impacts under NEPA. The FRA declines to add definitions of the terms improvements and upgrades in the final rule. In the CE in § 771.116(c)(22), the term improvements is already described. When developing this CE in 2013, FRA drafted the proposed CEs to clearly describe each eligible category of action, including necessary spatial, temporal, or geographic limitations, and provided demonstrative examples of the types of actions that would typically be covered under the text of the CE. With respect to the term upgrades, FRA intended for it to read as part of the repair or replacement activity. In some cases, the railroad infrastructure damaged by a natural disaster or catastrophic failure was constructed before the development of modern safety and design standards. Therefore, FRA determined that allowing applicants to use new codes and standards when repairing or replacing damaged infrastructure would

result in no or minimal environmental impacts, and therefore the activities are appropriate for categorical exclusion. The same is true for upgrades necessary to address existing conditions. It is reasonable for an applicant to modify or upgrade infrastructure, as necessary, to accommodate the circumstances at the time of the repair or replacement activity occurs and not be constrained to the conditions that existed when the railroad infrastructure was originally constructed.

The Tribal historic preservation office noted that five of the CEs listed in FRA's July 5, 2016, notice identified as "most frequently used" cover activities within existing rights-of-way and existing railroad facilities, and those that are consistent with existing land use. Those CEs are found in §§ 771.116(c)(9) (covering maintenance or repair of existing railroad facilities), (c)(12) (covering minor rail line additions), (c)(17) (covering the rehabilitation, reconstruction, or replacement of bridges), (c)(21) (covering the assembly or construction of certain facilities or stations), and (c)(22) (covering track and track structure maintenance and improvements). The commenter assumed that these types of activities were appropriate because they occurred in areas that are previously disturbed or covered in fill. The commenter indicated that even where right-of-way is in use, there may still be archaeological or cultural resources present and identified the CE in § 771.116(c)(21) as presenting a "significant threat" to such resources. The commenter asked how FRA would identify and document what areas have been previously disturbed, indicating that in its experience, Federal agencies are unable or unwilling to document the extent of previous disturbance. The commenter also requested that FRA consider ground disturbance in terms of both vertical and horizontal dimensions. The commenter suggested that vertical disturbance is not always considered, and that categorically excluded projects involving ground disturbance should not affect undisturbed areas.

The FRA establishes CEs based on its past experience with railroad project construction and operation, and after determining the category of actions do not individually or cumulatively have a significant effect on a human environment and an opportunity for public review and comment. The FRA has a long history applying the CEs identified by the commenter and have not found them to pose a significant threat to cultural resources. As discussed above, FRA decides whether to apply a CE on a project-by-project

basis and will do so after considering the factors listed in § 771.116(b). The FRA makes this decision after reviewing necessary technical information, which may include results of site visits or archaeological surveys, or documentation that illustrates past ground disturbance such as photographs, maps, or construction or engineering plans from previous construction activities. In doing so, FRA typically considers the extent of existing ground disturbance in terms of both vertical and horizontal dimensions. In addition, as the commenter notes in its comment letter, even where an action is appropriate for a CE, FRA must still demonstrate compliance with Section 106, which includes a consideration of potential impacts to archaeological resources that may be present beneath railroad rights-of-way.

The Tribal historic preservation office suggested an action would not be eligible for a CE if archaeological sites or property of religious or cultural significance to federally recognized Tribes or Native Hawaiian organizations was present and as such, agencies would therefore need to know the exact location of such resources before determining whether a CE was appropriate. The commenter reminded the Agencies of the importance of consultation with Native American Tribes and noted that the failure to do so would risk failing to identify natural, cultural, and historic resource and underestimating the significance of those sites. The commenter expressed concerns that the CEs would diminish Native American Tribes' ability to consult and requested that FRA continue to consult with Tribes for each action to determine whether a CE is appropriate. The commenter supported FRA's practice of evaluating projects on a case-by-case when determining whether to apply a CE. The commenter also reminded the Agencies that complying with NEPA does not satisfy obligations under Section 106. The FRA appreciates the commenter's support of FRA's standard practice. The FRA agrees that complying with NEPA does not automatically satisfy its Section 106 responsibilities. Where possible and appropriate, FRA completes the required Section 106 review, including consultation with appropriate consulting parties, including Tribes, concurrently with its review of the proposed action under NEPA. The FRA does not approve the use of a CE until the Section 106 process is complete.

The Tribal historic preservation office requested that the final rule or any future guidance address post-review discoveries, require project sponsors

stop construction work if a potential historic property is discovered, and notify the lead agency, which would then notify other appropriate parties (e.g., State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO)). The FRA does not believe it is appropriate to address the process for post-review discoveries as part of this rulemaking. The Advisory Council for Historic Preservation addresses post-review discoveries in its regulations at 36 CFR 800.13, which FRA follows. However, the steps the commenter identifies in its comment letter are consistent with FRA expectations and practice. For example, for construction projects in areas of known archaeological sensitivity, it is common for FRA to require the project sponsor to develop and implement an Unanticipated Discoveries Plan, which includes stop-work and notification protocols, and measures to secure the discovery. Such plans are developed in consultation with the relevant SHPO or THPO and other Section 106 consulting parties, including Tribes.

The Agencies are modifying § 771.116(c)(7) by changing the term "action" to "activity" in order to correct an oversight in the SNPRM. This change makes the CE consistent with the FRA's September, 2017 Categorical Exclusion Substantiation, which the Agencies provided for public review in the SNPRM docket.

The Agencies are modifying § 771.116(c)(9) by moving the limitation on the use of the CE (*i.e.*, "where the maintenance or repair activities do not change the existing character of the facility") to the beginning of the CE for clarity.

#### *771.117 FHWA Categorical Exclusions and 771.118 FTA Categorical Exclusions*

One State DOT recommended reorganizing § 771.117, noting that it has become fragmented and increasingly difficult to implement. In particular, the commenter highlighted difficulty with projects requiring if-then analyses of the CEs at § 771.118(c)(26), (27), and (28), which are conditioned on meeting the requirements in § 771.118(e), but would otherwise fall under § 771.118(d)(13). Finally, the commenter noted that the CE at § 771.118(c)(23) could overlap with a number of other § 771.118(c) and (d) CEs. The FHWA appreciates the comments regarding the organization of § 771.117. The FHWA determined it will consider this change in future rulemaking efforts, where appropriate.

One transit agency, three trade associations, and two State DOTs suggested the current definition of

“operational right-of-way” in §§ 771.17(c)(22) and 771.118(c)(12) should be more broadly construed. The trade associations highlighted MAP-21 language stating that the CE should apply to any project within an existing right-of-way. One trade association opined that as long as a right-of-way was properly obtained for any purpose, the CE should apply because the environmental review had already been conducted on existing right-of-way. The transit agency noted that the final sentence of the existing definition may at times be unclear. The transit agency opined that though “disturbance” or “maintenance” of certain rights-of-way has not occurred for many years, those rights-of-way should fall within the operational right-of-way definition. One State DOT noted that the addition of these terms created an additional burden to make distinctions for land within a transportation right-of-way in order to be able to apply the CE.

Two trade associations recommended the Agencies redraft §§ 771.117(c)(22) and 771.118(c)(12) to conform with the definition in Section 1316 of MAP-21 and noted that the addition of the terms *previously disturbed* and *maintained for* have restricted the availability of the CE. Several commenters proposed text for the CE designating all rights-of-way acquired for construction, operation, or mitigation of an existing transportation facility, including the features associated with the physical footprint of the transportation facility, such as the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities.

The Agencies agree with the concern in the comments that the definition of operational right-of-way in the regulation is narrower than the definition provided in the statute. As a result, this final rule revises the definition, in both §§ 771.117(c)(22) and 771.118(c)(12), to return to the broad statutory language. The revised definition continues to include examples of features of the right-of-way, which the Agencies edited slightly to be mode-neutral and to recognize that there may be other features that are not enumerated in the regulation. While the revised regulatory text includes a number of illustrative examples of features in the operational right-of-way,

the Agencies emphasize the defining sentence of the statute, which is now incorporated in the regulatory text verbatim: Existing operational right-of-way “means *all* real property interests acquired for the construction, operation, or mitigation of a project” (emphasis added). The Agencies specially underscore the word “all.” As a clarifying example, if title 23 (or certain title 49) funds were authorized for the acquisition of the real property, then that property was acquired for an eligible purpose, which was construction, operation, or mitigation, and thus is part of the operational right-of-way. Real property interests acquired with title 23 funds, or otherwise conveyed for title 23 purposes, are eligible for this categorical exclusion as long as those interests continue to be used in accordance with § 710.403(b). This change expands the applicability of the operational right-of-way CE from the existing regulation and ensures that the Agencies interpret it consistent with the statute.

#### 771.119 Environmental Assessments

One trade association and one public transit agency provided comments in response to FTA’s contractor scope of work language in §§ 771.119(a)(2) and 771.123(d). The trade association noted that the Agencies’ proposed approach in ensuring a contractor’s scope of work not be finalized until the early coordination activities or scoping is completed is well-intended but is likely to be difficult to implement for many agencies due to contracting process. According to the commenter, a transportation agency typically enters into a scope of work for the overall project, including activities supporting early coordination, and to separate these stages into separate and consecutive approvals would require contract amendments or change orders to contracts that may conflict with professional service contract standards. The public transit agency provided similar comments regarding the contractor scope of work proposal. The public transportation agency interprets the provision to mean that transit authorities would not be able to finalize a statement of work for NEPA consultants until FTA has concurred. If FTA does not concur, a transit authority may have to restart its procurement process, which could cause significant delay. The FTA acknowledges the comments, and that the timing of this review could be challenging. The FTA will change “will” to “should” and otherwise maintain the language as previously proposed. The purpose of adding language regarding finalizing a

contractor’s scope of work once early coordination or scoping is completed was to place a renewed focus on the accuracy and efficiency of those activities. This will help ensure the scope of the project accurately reflects the scope of work required. The Agencies do not intend or envision this language as a hindrance to contracting practices. Rather, the timing of this approval will improve decision making during the EA’s environmental review process, resulting in a sounder environmental document.

For § 771.119(a)(2), one public transit agency sought clarification on how to determine whether the scope of work is finalized. The commenter thought this section of the NPRM would result in multi-stage procurement for consultant services or more difficult and less specific consultant scope, which would potentially require multiple change orders. The Agencies clarify what finalized would typically mean by providing an example. In an ideal scenario for an FTA funded project, the project sponsor would contact FTA during the planning process or prior to project initiation in the environmental review process. The FTA would then work with the project sponsor to determine the appropriate project scope. Once the project scope is determined, a project sponsor would contract with a consultant, if it chooses, to complete activities required for the EA. The FTA would expect that the contractor would be procured, and the scope of activities necessary for the EA would be finalized in a scope of work by the conclusion of early coordination or scoping for the EA.

One trade association requested the Agencies affirmatively state that they do not envision reviewing or approving any consultant’s scope of work. The FTA does not envision approving a contractor’s scope of work but may review the contractor’s proposed scope of work for the EA for compliance with NEPA requirements, consistent with their respective responsibilities for the environmental review process on federally funded projects.

One transit agency sought clarification on § 771.119(a)(3) regarding FRA’s conflict of interest disclosure statement requirement. Specifically, the commenter inquired as to whether there will be a template for that disclosure statement provided to applicants, or if the applicants can use a statement they choose. The commenter also noted that this requirement could exacerbate what it views as a trend where contractors focus on engineering work rather than responding to solicitations for planning work. The FRA plans to develop a



template conflict of interest form, which it would make available to applicants on a project-by-project basis. While the Agencies understand that contractors may decide to choose engineering over planning work, the Agencies cannot control the business decisions of private companies. In addition, the conflict of interest disclosure requirement does not necessarily prohibit all post-environmental review work on a project. Applicants with questions about what activities a contractor can engage in after executing a NEPA conflict of interest disclosure should contact FRA or FTA headquarters, as applicable.

One Federal agency submitted an informal comment regarding § 771.119(b). This commenter noted that while § 771.119(d) requires the applicant to send notices of availability for EAs to affected parts of Federal, State, and local governments, § 771.119(b) only requires applicants to complete early consultation with interested agencies. The commenter cited examples of projects where the first opportunity for review was when it received a notice of availability for an EA, which can create permitting complications in certain instances. The commenters recommended modifying § 771.119(b) to mirror § 771.119(d). The Agencies decline to make the recommended change because § 771.119(b) pertains only to the scope of an EA. Scope of work for an EA is addressed in § 771.119(a)(2).

One citizen expressed support for requiring consultation prior to finalizing any EA scope of work in § 771.119(b) and asked whether the proposed revision allows the consultant, acting on behalf of the applicant, to complete the consultation. Consistent with this part, a consultant may act on behalf of an applicant, but the applicant retains full responsibility for the consultant's action.

One regional transportation agency described programmatic approaches as an important streamlining tool. For that reason, the commenter suggested revising § 771.119(b), regarding actions that require an EA, by adding a clear reference to programmatic approaches. The Agencies decline to make the recommended revision. An EA encompasses an evaluation on whether significant impacts may result from the project. As each project may involve different potential impacts, an EA does not readily lend itself to a programmatic approach.

One public transit agency provided a comment expressing concern about the timing of making a document publicly available but did not provide a citation. The Agencies believe this comment was

made in regard to the proposed changes in § 771.119(c). The commenter expressed concern that the requirement could convert a parallel document approval process into a sequential one, which could delay projects for those agencies that need authorization from FTA as well as the transit agency board. In the commenter's case, the board approval process is a public process. The commenter requested (1) the final regulatory language acknowledge that the board approval process simultaneously satisfies the prerequisite for public release, and (2) assurance that the public board approval process can be conducted at the same time that the FTA approval process is completed. The Agencies acknowledge that where local approval of an EA is required (*e.g.*, a board action), the local approval process can occur concurrently with the Federal agency review and approval (*e.g.*, FTA's review and approval of an EA before it is posted for public comment). However, consistent with this section, the EA may not be made available to the public until after the Federal agency has approved the EA. Because the proposed changes in § 771.119(c) do not affect that practice, the Agencies will not further revise the language.

One citizen proposed that the encouragement in § 771.111(i)(3) that EAs be posted on the web should be repeated in § 771.119(d). The Agencies appreciate the comment, and accepted the commenter's proposed revisions with modifications.

One citizen proposed clarifying § 771.119(g). The Agencies acknowledge the comment, but because some of the proposed changes may affect the text's meaning, they decline the suggested changes. Additionally, the section is existing regulatory language not affected by MAP-21 or the FAST Act.

#### *771.121 Findings of No Significant Impact*

For § 771.121(b), a citizen suggested that the encouragement in § 771.111(i)(4) that FONSI be posted on the web should be repeated here. The Agencies added a reference to this section. The language is consistent with other paragraphs within 23 CFR part 771.

#### *771.123 Draft Environmental Impact Statements*

Regarding § 771.123(b), five State DOTs and a trade association recommended this section expressly recognize Appendix A to 23 CFR part 450 as a means by which planning process products can be adopted or relied upon in the environmental review process and add a reference to

Appendix A in this section. The Agencies are accepting the recommended additions. Similar to the accepted revision in § 771.111(a)(2), the revised § 771.123(b) will cite to 23 CFR part 450 Appendix A.

A regional transportation agency proposed a revision to the language in the final sentence of § 771.123(b), to add the feasibility of using a programmatic approach as part of the list of things the scoping process will be used to identify. The Agencies decline to accept the suggested edit because programmatic approaches are not identified in statute as a mandatory requirement.

A Federal agency commenter suggested adding cooperating and participating agency(s) to the end of the first sentence of § 771.123(c) because it believes the intent of 23 U.S.C. 139(c)(6)(C) is that the lead agency consider and respond to comments within a participating or a cooperating agency's special expertise or jurisdiction. The commenter concluded that this is best achieved by ensuring EIS preparation describes participating agency involvement. The Agencies recognize the important role that cooperating and participating agencies have in developing a draft EIS, but decline to make the proposed change, as the draft EIS itself is usually drafted by the lead agency and/or the applicant. Participating and cooperating agency roles, including providing comments on draft documents, are described in § 771.109(c)(7).

A regional transportation agency commented on §§ 771.123(c) and (d) and expressed concern that, when read together, these sections could prevent environmental consultant procurement by a project sponsor or applicant to prepare an EIS. The commenters recommended the Agencies clarify that applicants or project sponsors, aside from the lead agency, can directly contract with environmental consultants to prepare a draft EIS. The Agencies agree that applicants and certain project sponsors can directly contract with environmental consultants to prepare a draft EIS. However, the Agencies disagree that the language should be revised. The sections do not prevent applicants who choose to contract with environmental consultants to prepare a draft EIS from being considered joint lead agencies. However, it is important to note that project sponsors that are private institutions or firms cannot be lead agencies or contract directly with consultants to prepare a draft EIS.

A transit agency sought clarification in § 771.123(d) on whether there will be a uniform conflict of interest statement or a template of such a statement

provided to applicants. There is not a uniform conflict of interest statement that applies to all the Agencies. For FTA projects, there is a conflict of interest statement template for projects requiring an EIS or an EA. The project sponsor should work with the FTA Regional Office to execute the appropriate conflict of interest statement for the project at issue. As discussed in response to the transit agency's comments on § 771.119(a)(3), FRA plans to develop a conflict of interest template. The FHWA does not use a template conflict of interest form. The Agencies are modifying § 771.123(d) to address FRA's conflict of interest disclosure statements for a contractor preparing an EIS. This requirement will mirror FRA's requirements for an EA in § 771.119.

A Federal agency supported the language in § 771.123(e) that provides a comment opportunity on a preferred alternative before issuing a record of decision (ROD) or a combined FEIS/ROD. To provide additional clarity, the commenter suggested adding the phrase "of the preferred alternative" to the end of this paragraph. The Agencies agree with the suggestion and accept the proposal.

A transit agency expressed concern with the language in proposed § 771.123(e) that recommends agencies provide the public with an opportunity after issuance of the DEIS to review the impacts, if a preferred alternative is not identified in the DEIS. The commenter stated the proposal creates additional procedural and circulation requirements, and noted the reason for such additional procedural requirements is unclear because impacts for all alternatives, including the preferred alternative, are identified in the DEIS. The commenter suggested keeping the language encouraging identification of a preferred alternative in the DEIS without reference to additional public review and circulation periods beyond what is already required. The Agencies decline to make the suggested change. While the Agencies encourage identifying the preferred alternative in the DEIS, sometimes this is not possible. Regardless, the public should have an opportunity to review an alternative's impacts after its selection as the preferred alternative and before the lead agency makes its decision. This does not create additional requirements as the public review must still occur; consistent with DOT guidance on combined FEIS/ROD documents,<sup>8</sup> the

public review can occur as part of the DEIS review (preferred) or as a separate step between the DEIS and FEIS.

A regional transportation agency commented on § 771.123(e) and suggested clarifying that the opportunity to review impacts of a preferred alternative, where the DEIS did not identify any preferred alternative, does not constitute a second comment period on the entire DEIS. Rather, this comment period should be solely for evaluating the impacts of the preferred alternative. In addition, the commenter requested the Agencies limit any comment period to 30 days. Similarly, in regard to § 771.123(e), a citizen asserted that the second sentence is wrong and should be deleted. The commenter noted that other agencies and the public must be given an opportunity to review the impacts presented in the DEIS without regard to whether the DEIS identifies the preferred alternative.

The Agencies are revising § 771.123(e) by adding "of the preferred alternative" to the end of the paragraph to clarify that the review pertains to the preferred alternative's impacts. In addition, the Agencies highlight that the statutory default comment period for a preferred alternative issued post-DEIS is 30 days per 23 U.S.C. 139(g)(2)(B). The Agencies agree that other agencies and the public may comment on a DEIS regardless of whether it identifies a preferred alternative, but decline the suggested deletion. To clarify, as drafted, the paragraph's intent is not to describe the DEIS public comment period, but rather, the process for commenting on a preferred alternative identified after publication of the DEIS.

Regarding § 771.123(f), a transit agency sought clarification on whether there would be a specified level of detail that corresponds to some progression beyond 30 percent design and preliminary engineering, and how that specificity should be determined on a project. In addition, a regional transportation agency suggested revising § 771.123(f) to allow for developing a preferred alternative to a higher level of detail to comply with other legal requirements including permitting. The Agencies accept the changes to include the phrase "with other legal requirements, including permitting" into the regulation as recommended by the commenters. To address concerns regarding developing a preferred alternative to a higher level of detail, the Agencies will revise § 771.123(f) by

adding a footnote referencing the FHWA preliminary design order (FHWA Order 6640.1A).

One citizen commenter suggested that the encouragement to post draft EISs on the web in § 771.111(i)(3) should be repeated at the end of § 771.123(h). A regional transportation agency also recommended that the final regulations recognize opportunities for electronic document transmission and posting documents on a project website, particularly when a statute does not expressly require paper copies. The Agencies accept this recommendation.

A regional transportation agency recommended revising § 771.123(j) by replacing the descriptor of an action as "proposed for FHWA funding" and instead suggested referring to this as an Administration action to encompass approvals by the Agencies that are not federally funded. The Agencies decline the recommended change. Under 23 U.S.C. 128, FHWA is required to conduct public hearings, and this specifically applies to State DOTs.

#### *771.124 Final Environmental Impact Statement/Record of Decision Document*

A regional transportation agency expressed support for the use of combined FEIS/RODs. It also requested the Agencies provide clarification regarding the circumstances where it is not practicable to use a combined FEIS/ROD, including confirmation that lead agencies can use a combined FEIS/ROD for controversial projects and projects where an EIS evaluates more than one alternative. The Agencies decline any change to regulatory text. Previous guidance has been issued on the use of a combined FEIS/ROD.<sup>9</sup> Forthcoming, updated "SAFETEA-LU Environmental Review Process Final Guidance" incorporating the FAST Act changes to 23 U.S.C. 139 will also provide additional guidance on this matter.

In keeping with its comment on § 771.123(c), a Federal agency commenter similarly recommended revising § 771.124(a)(1) to read "in cooperation with the applicant (if not a lead agency), cooperating and participating agency(s)." The Agencies decline the suggested change consistent with their response to the same comment under § 771.123(c).

<sup>9</sup> Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews, January 14, 2013, available at: <https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm>. Question 17 of the FAST Act: Questions and Answers on the procedural changes to 23 U.S.C. 139 as they relate to FHWA, FRA & FTA projects guidance, issued June 2017, available at: <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/environmental-programs/61226/fasts1304qsas.pdf>.

<sup>8</sup> Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental

Reviews, January 14, 2013, available at: <https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm>.

A citizen noted the combined FEIS/ROD process makes no provision for pre-decision referrals to CEQ as envisioned by 40 CFR 1504.3 and proposed language to explicitly direct this. The Agencies decline to make the proposed change. Referrals to CEQ would be made at the DEIS stage when the lead agencies anticipate issuing a combined FEIS/ROD. Any additional wait times are not consistent with statutory language.

The Agencies are modifying § 771.124(b) to capture the requirement included in § 771.125(f), but with modifications. The Agencies are requiring that the combined FEIS/ROD be publicly available after filing the document with EPA, but unlike the FEIS section, are not referring to a formal public review because there is no pre-decision waiting period associated with a combined FEIS/ROD.

#### 771.125 Final Environmental Impact Statements

For § 771.125(e) and (f), a citizen asserted that the proposed language regarding publication and public availability of final EISs retains its pre-internet tone and requirements, and ignores the current widespread use of the internet and electronic devices for reading documents. The commenter noted that revisions should encourage use of the internet and electronic devices to facilitate public and interagency availability of the document, but should also acknowledge the need for hardcopy distribution for those without access to the internet and electronic devices or who prefer hard copies. The same comment applies to § 771.124 on combined FEIS/RODs and to § 771.127 on RODs. The Agencies agree with the citizen's suggestion and have included this in §§ 771.125(f) and 771.127(a).

#### 771.127 Record of Decision

A regional transportation agency suggested revising § 771.127(b) to recognize that the Agencies can issue a revised or amended ROD to approve an alternative that was not identified as the preferred alternative when it was fully evaluated in the draft EIS or final EIS. The Agencies recognize that under a combined FEIS/ROD process, the draft EIS will have identified the preferred alternative and other alternatives, allowing for adequate public comment. The Agencies have revised the language in § 771.127(b) to allow for the selection of an alternative fully evaluated in a draft EIS or combined FEIS/ROD in addition to the other conditions described in regulation. A revised or amended ROD can now include the

selection of an alternative fully evaluated in the draft EIS or combined FEIS/ROD circumstances.

#### 771.139 Limitations on Actions

One State DOT supported the proposal to amend § 771.139 to reflect the 2-year statute of limitations applicable to railroad projects approved by the FRA, but recommended that it be revised to be tied to project type, as indicated in the statute, rather than by agency alone. A trade association similarly expressed support for amending part 771 to include the statute of limitations period applicable to railroad projects approved by FRA, but recommended editing the rule text to clarify which projects are subject to the 150-day limitations period and which projects are subject to the 2-year limitations period.

Additionally, the trade association opined that the language in 23 U.S.C. 139(l) applies to all Federal agency actions for the highway, transit or railroad projects, and that this is not clear from the proposed rule text. The commenter recommended language changes to clarify the applicability of the limitations on claims and proposed additional definitions. The Agencies are revising the language for clarity, but decline to define the terms highway project, transit project, and railroad project. Section 771.139 implements the limitations on claims language from 23 U.S.C. 139(l) for approvals or decisions for an Administration action, which may include decisions and approvals issued by other agencies relating to the project. These time periods do not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.

#### 23 CFR Part 774

##### General

One trade association supported reducing Section 4(f) requirements for common post-1945 bridge types and historic railroad and rail transit lines. The commenter also acknowledged that steps to preserve portions of historic bridges will be necessary in certain instances, but the majority of bridge improvements in this class will not affect anything of historical significance. The Agencies appreciate the support.

##### 774.11 Applicability

One public transit agency supported expanding § 774.11(i) to provide more direction to applicants regarding adequate documentation, but noted concern that the proposed use of "government document" and

"government map" may invite dispute on what constitutes "government" and the extent to which the property-owning jurisdiction's documents qualify. The commenter noted that even though it is a government agency, its documents and maps are not commonly referred to or understood as government maps or government documents, and that the title "government" would be reserved for city or county governments. The commenter proposed replacing "government document" with "a document of public record" and replacing "government map" with "a map of public record." The Agencies agreed with the proposed edits and have incorporated changes at § 774.11(i)(1), (i)(1)(i), (i)(2), (i)(2)(i), and (i)(2)(ii).

##### Section 774.13 Exceptions

One trade association and one State DOT provided comments on the proposed changes to § 774.13. Regarding § 774.13(a)(1), the trade association supported the language proposed, noting that it appropriately reflects the statute's objective.

For § 774.13(a)(2), the trade association commenter supported the text of the proposed rule regarding improvements. In this same section, the State DOT commenter suggested that the term "railroad or rail transit lines or elements thereof" be defined in the statute, not just this rulemaking. The trade association commenter supported the broad interpretation the Agencies provide in the preamble for this same term (*i.e.*, including all elements related to the historic or current transportation function such as railroad or rail transit track, elevated support structure, rights-of-way, substations, communication devices and maintenance facilities) but requested that this interpretation be included in the regulatory text. In response to these comments, the Agencies have defined the term *railroad or rail transit line elements* in § 774.17 by providing a non-exclusive list of such elements. The Agencies included bridges and tunnels in the definition because Congress, by excluding certain bridges and tunnels from the FAST Act section 11502 (23 U.S.C. 138(f)/49 U.S.C. 303(h)) exemption, clearly intended that other bridges and tunnels should be considered elements of the railroad or transit line and therefore subject to the exemption (the Agencies incorporated this exclusion from the exception in paragraph (a)(2)(ii)). The Agencies also added railway-highway crossings to the railroad or rail transit line elements definition to clarify, as discussed in the FAST Act SNPRM preamble, the Agencies' intent to include projects for the elimination of

hazards at railway-highway crossings—whether at-grade or grade-separated—within this exception. Such safety projects are funded by FHWA under 23 U.S.C. 130.

The State DOT commenter recommended that the stations referred to in § 774.13(a)(2)(i) be further defined to specify whether it means the building itself or can include other associated elements and facilities. The trade association commenter also requested clarification on the definition of stations, recommending that the term be defined to include the station building and not the associated tracks, yards, electrification and communication infrastructure, or other ancillary facilities. The Agencies are including a definition of a station in § 774.17. The new definition only applies to Section 4(f) analyses and not for other purposes.

Both commenters suggested that the Agencies misinterpreted 49 U.S.C. 303(h) in the proposed regulation regarding exceptions detailed in 49 U.S.C. 303(h)(2). These commenters noted that the proposed language excludes bridges or tunnels on railroad lines that have been abandoned or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers. The commenters stated that the statute uses the term “or” rather than “and” in this context—implying that the facility is excluded if either condition is met, whereas the proposed text implies that both conditions need to be met in order for the facility to be excluded. The Agencies have determined that the proposed regulatory text accurately reflects the exceptions language in 49 U.S.C. 303(h)(2). The exceptions in 49 U.S.C. 303(h)(2)(a) applies to stations, or bridges or tunnels located on railroad lines that have been abandoned or transit lines not in use. In addition, 49 U.S.C. 303(h)(2)(B) clarifies that the exception in 49 U.S.C. 303(h)(2)(A)(ii) does not apply to all bridges and tunnels, specifically bridges or tunnels located on railroad or transit lines over which service has been discontinued, or that have been railbanked or otherwise reserved for the transportation of goods or passengers. Therefore, for the exception to apply, the bridge or tunnel must meet the requirements in 49 U.S.C. 303(h)(2)(A)(ii) and not be the type of bridge or tunnel detailed in 49 U.S.C. 303(h)(2)(B). Using “and” in § 774.13(a)(2)(ii) captures the clarification in 49 U.S.C. 303(h)(2)(B) that the exception does not apply to all bridges and tunnels.

In addition, the State DOT supported expanding the list of activities in § 774.13(a)(3) to mirror the activities included in § 774.13(a)(2). For this same section, the public transit commenter suggested expanding this list to include maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement. The trade association commenter also supported changing the list of activities in this exemption to mirror those in § 774.13(a)(2) because it would provide consistency in the application of the exemption to different types of historic transportation facilities and help to avoid confusion. The Agencies agree with the commenters and revised § 774.13(a)(3) to match the activities found in § 774.13(a)(2).

In response to the Agencies’ request in the FAST Act SNPRM, the State DOT commented on whether the two conditions specified in this exemption under § 774.13(a)(3)(i) and (ii) would adequately protect significant historic transportation facilities in the case of projects to operate, modernize, reconstruct or replace the transportation facility. The commenter supported keeping the two existing conditions. The trade association commenter similarly supported these existing conditions and noted that the SHPO concurrence in a no adverse effect finding gives substantial assurance that historic facilities will be protected. Based on that feedback and upon further consideration, the Agencies decided to keep the two conditions and have added new text to allow the Agencies to apply this exemption where an activity is covered by a Section 106 program alternative. Section 774.13(a)(3)(ii) was also revised to accommodate Section 106 program alternatives. These proposed changes create the necessary consistency between § 774.13(a)(3)(i) and (a)(3)(ii) as SHPOs are not always given a role in determining whether an activity is subject to a program alternative. Rather, that determination is appropriately made by the lead agency.

A citizen objected to a phrase used in §§ 774.13(g)(1), 774.15(a), (d) and (f), and 774.17 that the Agencies did not propose changing (*i.e.*, an activity, feature, or attribute that qualifies the property for Section 4(f) protection) on grounds that the phrase is confusing and conflicts with the statute. The commenter did not propose any alternative language. The Agencies reviewed the phrase (as well as substantially similar phrasing found in §§ 774.3(c) and 774.5(b)) and decline to change it in any of the instances because identifying the important activities, features, and attributes of Section 4(f)

properties is central to the procedures the Agencies created to implement the statute’s preservation mandate. The phrase has been in use for many years and, in the Agencies’ experience, it provides clarity, not confusion, to focus on the specific activities, features, and attributes that are to be protected.

#### 49 CFR Part 264

The Agencies are adding an additional citation to the list of authorities and modifying the heading of 49 CFR 264.101. These changes are administrative in nature and address oversights in the FAST Act SNPRM. They do not change the substance of the section.

#### Rulemaking Analyses and Notices

##### *Statutory/Legal Authority for This Rulemaking*

The Agencies derive explicit authority for this rulemaking action from 49 U.S.C. 322(a). The Secretary delegated this authority to prescribe regulations in 49 U.S.C. 322(a) to the Agencies’ Administrators under 49 CFR 1.81(a)(3). The Secretary also delegated authority to the Agencies’ Administrators to implement NEPA and Section 4(f), the statutes implemented by this rule, in 49 CFR 1.81(a)(4) and (a)(5). Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1507.3 that Federal agencies shall continue to review their policies and NEPA implementing procedures and revise them as necessary to ensure full compliance with the purposes and provisions of NEPA.

##### *Rulemaking Analyses and Notices*

The Agencies considered all comments received before the close of business on the comment closing date indicated above. The comments are available for examination in the docket (FHWA–2015–0011) at [www.regulations.gov](http://www.regulations.gov). The Agencies also considered commenters received after the comment closing date to the extent practicable.

*Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), 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 that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of U.S. Department of Transportation Regulatory Policies and Procedures. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation.

The Agencies determined this rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866. This final rule is considered an Executive Order 13771 deregulatory action. The Agencies expect minor cost savings that cannot be quantified. The Agencies do not have specific data to assess the economic impact of this final rule because such data does not exist and would be difficult to develop. This final rule modifies 23 CFR parts 771 and 774 in order to be consistent with changes introduced by MAP-21 and the FAST Act, to make the regulation more consistent with the FHWA and FTA practices, and to add FRA to parts 771 and 774. The Agencies anticipate that the changes in this final rule would enable projects to move more expeditiously through the Federal environmental review process. It would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA or Section 4(f) while still ensuring that projects are built in an environmentally responsible manner and consistent with Federal law.

#### *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 rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The revisions to 23 CFR parts 771 and 774 are expected to expedite environmental review and thus are anticipated to be less burdensome than any current impact on small business entities.

We hereby certify that this regulatory action would not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act of 1995*

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$151 million or more in any one year (2 U.S.C. 1532). In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government.

#### *Executive Order 13132 (Federalism Assessment)*

Executive Order 13132 requires agencies to ensure 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. The Agencies analyzed this action in accordance with the principles and criteria contained in Executive Order 13132 and determined that it would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this final rule would not preempt any State law or State regulation or affect the States’ ability to discharge traditional State governmental functions.

#### *Executive Order 13175 (Tribal Consultation)*

The Agencies have analyzed this action under Executive Order 13175, and determined 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 Executive Order 13211 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 regarding intergovernmental consultation on Federal programs and activities (49 CFR part 17) apply to this program. The Agencies solicited comments on this issue with the proposed rulemakings but did not receive any comments pertaining to Executive Order 12372.

#### *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 final rule 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 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 be an economically significant rule and would not cause 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 changes in this rule are part of those agency procedures, and therefore establishing the proposed changes 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.

#### Regulation Identifier Number

A regulation identifier number (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 review process, Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Programmatic approaches, Public lands, Railroads, Recreation areas, Reporting and recordkeeping requirements.

##### 23 CFR Part 774

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

##### 49 CFR Part 264

Environmental impact statements, Environmental review process, Environmental protection, Grant programs—transportation, Programmatic approaches, Railroads, Reporting and recordkeeping requirements.

##### 49 CFR Part 622

Environmental impact statements, Environmental review process, Grant programs—transportation, Historic preservation, Programmatic approaches, Public lands, Public transportation,

Recreation areas, Reporting and recordkeeping requirements, Transit.

Issued in Washington, DC on October 19, 2018, under authority delegated in 49 CFR 1.85 and 1.91:

**Brandye L. Hendrickson,**

*Deputy Administrator, Federal Highway Administration.*

**Ronald L. Batory,**

*Administrator, Federal Railroad Administration.*

**K. Jane Williams,**

*Acting Administrator, Federal Transit Administration.*

In consideration of the foregoing, the Agencies amend title 23, Code of Federal Regulations parts 771 and 774, and title 49, Code of Federal Regulations parts 264 and 622, as follows:

#### Title 23—Highways

- 1. Revise part 771 to read as follows:

#### PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

- 771.101 Purpose.
- 771.103 [Reserved]
- 771.105 Policy.
- 771.107 Definitions.
- 771.109 Applicability and responsibilities.
- 771.111 Early coordination, public involvement, and project development.
- 771.113 Timing of Administration activities.
- 771.115 Classes of actions.
- 771.116 FRA categorical exclusions.
- 771.117 FHWA categorical exclusions.
- 771.118 FTA categorical exclusions.
- 771.119 Environmental assessments.
- 771.121 Findings of no significant impact.
- 771.123 Draft environmental impact statements.
- 771.124 Final environmental impact statement/record of decision document.
- 771.125 Final environmental impact statements.
- 771.127 Record of decision.
- 771.129 Re-evaluations.
- 771.130 Supplemental environmental impact statements.
- 771.131 Emergency action procedures.
- 771.133 Compliance with other requirements.
- 771.137 International actions.
- 771.139 Limitations on actions.

**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; 49 U.S.C. 24201; 40 CFR parts 1500–1508; 49 CFR 1.81, 1.85, and 1.91; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; Pub. L. 112–141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Public Law 114–94, 129 Stat. 1312, Sections 1304 and 1432.

#### § 771.101 Purpose.

This part prescribes the policies and procedures of the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), and the

Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the NEPA regulations of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulations). Together these regulations set forth all FHWA, FRA, FTA, and U.S. Department of Transportation (DOT) requirements under NEPA for the processing of highway, public transportation, and railroad actions. This part also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, and 327; 49 U.S.C. 303; 49 U.S.C. 24201; and 5323(q); Public Law 112–141, 126 Stat. 405, section 1301 as applicable; and Public Law 114–94, 129 Stat. 1312, section 1304.

#### § 771.103 [Reserved]

#### § 771.105 Policy.

It is the policy of the Administration that:

(a) To the maximum extent practicable and consistent with Federal law, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental review document required by this part.<sup>1</sup>

(b) Programmatic approaches be developed for compliance with environmental requirements (including the requirements found at 23 U.S.C. 139(b)(3)), coordination among agencies and/or the public, or to otherwise enhance and accelerate project development.

(c) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.

(d) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(e) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

<sup>1</sup> FHWA, FRA, and FTA have supplementary guidance on environmental documents and procedures for their programs available on the internet at <http://www.fhwa.dot.gov>, <http://www.fra.dot.gov>, and <http://www.fta.dot.gov>, or in hardcopy by request.

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, executive order, or Administration regulation or policy.

(f) Costs incurred by the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(g) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this part.

#### **§ 771.107 Definitions.**

The definitions contained in the CEQ regulations and in titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply to this part.

**Action.** A highway, transit, or railroad project proposed for U.S. DOT funding. It also can include activities such as joint and multiple use permits, changes in access control, or rulemakings, which may or may not involve a commitment of Federal funds.

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

**Administration action.** FHWA, FRA, or FTA approval of the applicant's request for Federal funds for construction. It also can include approval of activities, such as joint and multiple use permits, changes in access

control, rulemakings, etc., that may or may not involve a commitment of Federal funds.

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

**Environmental studies.** The investigations of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

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

**Participating agency.** A Federal, State, local, or federally recognized Indian Tribal governmental unit that may have an interest in the proposed project and has accepted an invitation to be a participating agency or, in the case of a Federal agency, has not declined the invitation in accordance with 23 U.S.C. 139(d)(3).

**Programmatic approaches.** An approach that reduces the need for project-by-project reviews, eliminates repetitive discussion of the same issue, or focuses on the actual issues ripe for analyses at each level of review, consistent with NEPA and other applicable law.

**Project sponsor.** The Federal, State, local, or federally recognized Indian Tribal governmental unit, or other entity, including any private or public-private entity that seeks Federal funding or an Administration action for a project. Where it is not the applicant, the project sponsor may conduct some of the activities on the applicant's behalf.

**Section 4(f).** Refers to 49 U.S.C. 303 and 23 U.S.C. 138 (as implemented by 23 CFR part 774).

#### **§ 771.109 Applicability and responsibilities.**

(a)(1) The provisions of this part and the CEQ regulations apply to actions where the Administration exercises sufficient control to condition the permit, project, or other approvals.

Steps taken by the applicant that do not require Federal approvals, such as preparation of a regional transportation plan, are not subject to this part.

(2) This part does not apply to or alter approvals by the Administration made prior to November 28, 2018.

(3) For FHWA and FTA, environmental documents accepted or prepared after November 28, 2018 must be developed in accordance with this part.

(4) FRA will apply this part to actions initiated after November 28, 2018.

(b)(1) The project sponsor, in cooperation with the Administration, is responsible for implementing those mitigation measures stated as commitments in the environmental documents prepared pursuant to this part unless the Administration approves of their deletion or modification in writing. The FHWA will ensure that this is accomplished as a part of its stewardship and oversight responsibilities. The FRA and FTA will ensure implementation of committed mitigation measures through incorporation by reference in the grant agreement, followed by reviews of designs and construction inspections.

(2) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 106, FHWA must ensure that the State highway agency constructs the project in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental review documents.

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

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

(2) Any State or local governmental entity applicant that is or is expected to be a direct recipient of funds under title 23, U.S. Code or chapter 53 of title 49, U.S. Code for the action, or is or is expected to be a direct recipient of financial assistance for which FRA is responsible (e.g., Subtitle V of Title 49, U.S. Code) must serve as a joint lead agency with the Administration in accordance with 23 U.S.C. 139, and may prepare environmental review documents if the Administration furnishes guidance and independently evaluates the documents.

(3) The Administration may invite other Federal, State, local, or federally recognized Indian Tribal governmental units to serve as joint lead agencies in accordance with the CEQ regulations. If the applicant is serving as a joint lead

agency under 23 U.S.C. 139(c)(3), then the Administration and the applicant will decide jointly which other agencies to invite to serve as joint lead agencies.

(4) When the applicant seeks an Administration action other than the approval of funds, the Administration will determine the role of the applicant in accordance with the CEQ regulations and 23 U.S.C. 139.

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

(6) Subject to paragraph (e) of this section, the role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents.

(7) A participating agency must provide input during the times specified in the coordination plan under 23 U.S.C. 139(g) and within the agency's special expertise or jurisdiction. Participating agencies provide comments and concurrence on the schedule within the coordination plan.

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

(e) When FRA is the lead Federal agency, the project sponsor is a private entity, and there is no applicant acting as a joint-lead agency, FRA and the project sponsor may agree to use a qualified third-party contractor to prepare an EIS. Under this arrangement, a project sponsor retains a contractor to assist FRA in conducting the environmental review. FRA selects, oversees, and directs the preparation of the EIS and retains ultimate control over the contractor's work. To enter into a third-party contract, FRA, the project sponsor, and the contractor will enter into a memorandum of understanding (MOU) that outlines at a minimum the

conditions and procedures to be followed in carrying out the MOU and the responsibilities of the parties to the MOU. FRA may require use of a third-party contractor for preparation of an EA at its discretion.

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

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements. These activities contribute to reducing or eliminating delay, duplicative processes, and conflict, including by incorporating planning outcomes that have been reviewed by agencies and Indian Tribal partners in project development.

(2)(i) The information and results produced by or in support of the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR parts 1500 through 1508, 23 CFR part 450, 23 CFR part 450 Appendix A, or 23 U.S.C. 139(f), 168, or 169, as applicable.

(ii) The planning process described in paragraph (a)(2)(i) of this section may include mitigation actions consistent with a programmatic mitigation plan developed pursuant to 23 U.S.C. 169 or from a programmatic mitigation plan developed outside of that framework.

(3) Applicants intending to apply for funds or request Administration action should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action (see § 771.115) and related environmental laws and requirements and of the need for specific studies and findings that would normally be developed during the environmental review process. A lead agency, in consultation with participating agencies, must develop an environmental checklist, as appropriate, to assist in resource and agency identification.

(b)(1) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

(2) For projects to be evaluated with an EIS, the Administration must respond in writing to a project sponsor's formal project notification within 45 days of receipt.

(c) When the FHWA, FRA, or FTA are jointly involved in the development of an action, or when the FHWA, FRA, or

FTA act as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis. A project sponsor may request the Secretary to designate the lead Federal agency when project elements fall within the expertise of multiple U.S. DOT agencies.

(d) During early coordination, the lead agencies may invite other agencies that may have an interest in the action to participate. The lead agencies must, however, invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139 within 45 days from publication of the notice of intent.<sup>2</sup> Any such agencies with special expertise concerning the action may also be invited to become cooperating agencies. Any such agencies with jurisdiction by law concerning the action must be invited to become cooperating agencies.

(e) Other States and Federal land management entities that may be significantly affected by the action or by any of the alternatives must be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will provide direction to the applicant on how to approach any significant unresolved issues as early as possible during the environmental review process.

(f) Any action evaluated under NEPA as a categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS) must:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

<sup>2</sup> The Administration has guidance on 23 U.S.C. 139 available at <http://www.fhwa.dot.gov> or in hard copy upon request.



(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and CEQ regulations.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process;

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions;

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project that requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest;

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice must also provide information required to comply with public involvement requirements of other laws, executive orders, and regulations;

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process, and

(E) The State highway agency's procedures for receiving both oral and written statements from the public;

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing;

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

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding, in accordance with 23 CFR 774.5(b)(2)(i).

(i) Applicants for FRA programs or the FTA capital assistance program:

(1) Achieve public participation on proposed actions through activities that engage the public, including public hearings, town meetings, and charrettes, and seek input from the public through scoping for the environmental review process. Project milestones may be announced to the public using electronic or paper media (*e.g.*, newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For actions requiring EISs, an early opportunity for public involvement in defining the purpose and need for the action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS.

(2) May participate in early scoping as long as enough project information is known so the public and other agencies can participate effectively. Early scoping constitutes initiation of NEPA scoping while local planning efforts to aid in establishing the purpose and need and in evaluating alternatives and impacts are underway. Notice of early scoping must be made to the public and other agencies. If early scoping is the start of the NEPA process, the early scoping notice must include language to that effect. After development of the proposed action at the conclusion of early scoping, FRA or FTA will publish the notice of intent if it is determined at that time that the proposed action requires an EIS. The notice of intent will establish a 30-day period for comments on the purpose and need, alternatives, and the scope of the NEPA analysis.

(3) Are encouraged to post and distribute materials related to the environmental review process, including, environmental documents (*e.g.*, EAs and EISs), environmental studies (*e.g.*, technical reports), public meeting announcements, and meeting minutes, through publicly-accessible electronic means, including project websites. Applicants should keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Should post all findings of no significant impact (FONSI), combined final environmental impact statements (final EISs)/records of decision (RODs),

and RODs on a project website until the project is constructed and open for operation.

(j) Information on the FHWA environmental process may be obtained from: FHWA Director, Office of Project Development and Environmental Review, Federal Highway Administration, Washington, DC 20590, or [www.fhwa.dot.gov](http://www.fhwa.dot.gov). Information on the FRA environmental process may be obtained from: FRA Chief, Environmental and Corridor Planning Division, Office of Program Delivery, Federal Railroad Administration, Washington, DC 20590, or [www.fra.dot.gov](http://www.fra.dot.gov). Information on the FTA environmental process may be obtained from: FTA Director, Office of Environmental Programs, Federal Transit Administration, Washington, DC 20590 or [www.fta.dot.gov](http://www.fta.dot.gov).

#### **§ 771.113 Timing of Administration activities.**

(a) The lead agencies, in cooperation with the applicant and project sponsor, as appropriate, will perform the work necessary to complete the environmental review process. This work includes drafting environmental documents and completing environmental studies, related engineering studies, agency coordination, public involvement, and identification of mitigation measures. Except as otherwise provided in law or in paragraph (d) of this section, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction must not proceed until the following have been completed:

(1)(i) The Administration has classified the action as a CE;

(ii) The Administration has issued a FONSI; or

(iii) The Administration has issued a combined final EIS/ROD or a final EIS and ROD;

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

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR part 450, subpart B, and 23 CFR part 630, subpart A, have been met.

(b) For FHWA actions, completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental review documents unless otherwise specified by the approving official.

(c) Letters of Intent issued under the authority of 49 U.S.C. 5309(g) are used

by FTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by FTA until the NEPA process is completed.

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

(1) Early acquisition, hardship and protective acquisitions of real property in accordance with 23 CFR part 710, subpart E for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of § 771.118 for FTA.

(2) The early acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q) and FTA guidance.

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

(4) FRA may make exceptions on a case-by-case basis for purchases of railroad components or materials that can be used for other projects or resold.

#### § 771.115 Classes of actions.

There are three classes of actions that prescribe the level of documentation required in the NEPA process. A programmatic approach may be used for any class of action.

(a) *EIS (Class I)*. Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally require an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

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

(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing transportation right-of-way.

(5) New construction or extension of a separate roadway for buses not located primarily within an existing transportation right-of-way.

(6) New construction of major railroad lines or facilities (*e.g.*, terminal passenger stations, freight transfer yards, or railroad equipment maintenance facilities) that will not be located within an existing transportation right-of-way.

(b) *CE (Class II)*. Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c) for FHWA actions or

pursuant to § 771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d) for FHWA actions or pursuant to § 771.118(d) for FTA actions. FRA's CEs are listed in § 771.116.

(c) *EA (Class III)*. Actions for which the Administration has not clearly established the significance of the environmental impact. All actions that are not EISs or CEs are EAs. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

#### § 771.116 FRA categorical exclusions.

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

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

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

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

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

(c) Actions that FRA determines fall within the following categories of FRA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FRA approval. FRA may request the applicant or project sponsor submit documentation to demonstrate that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

(1) Administrative procurements (*e.g.*, for general supplies) and contracts for personal services, and training.

(2) Personnel actions.

(3) Planning or design activities that do not commit to a particular course of action affecting the environment.

(4) 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.

(5) Internal orders, policies, and procedures not required to be published in the **Federal Register** under the Administrative Procedure Act, 5 U.S.C. 552(a)(1).

(6) Rulemakings issued under section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916.

(7) Financial assistance to an applicant where the financial assistance funds an activity that is already completed, such as refinancing outstanding debt.

(8) Hearings, meetings, or public affairs activities.

(9) Maintenance or repair of existing railroad facilities, where such activities do not change the existing character of the facility, including equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; tunnels; maintenance-of-way and maintenance-of-equipment bases.

(10) Emergency repair or replacement, including reconstruction, restoration, or retrofitting, of an essential rail facility damaged by the occurrence of a natural disaster or catastrophic failure. Such repair or replacement may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the rail facility's original construction.

(11) Operating assistance to a railroad to continue existing service or to increase service to meet demand, where the assistance will not significantly alter the traffic density characteristics of existing rail service.

(12) Minor rail line additions, including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards or right-of-way, provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.

(13) Acquisition or transfer of real property or existing railroad facilities, including track and bridge structures; electrification, communication, signaling or security facilities; stations; and maintenance of way and maintenance of equipment bases or the right to use such real property and railroad facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties or facilities.

(14) Research, development, or demonstration activities on existing railroad lines or facilities, such as advances in signal communication or train control systems, equipment, or track, provided that such activities do not require the acquisition of a significant amount of right-of-way and do not significantly alter the traffic density characteristics of the existing rail line or facility.

(15) Promulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.

(16) Alterations to existing facilities, locomotives, stations, and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms.

(17) The rehabilitation, reconstruction or replacement of bridges, the rehabilitation or maintenance of the rail elements of docks or piers for the purposes of intermodal transfers, and the construction of bridges, culverts, or grade separation projects that are predominantly within existing right-of-way and that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, construction or reconstruction of approaches or embankments to bridges, or construction or replacement of short span bridges.

(18) Acquisition (including purchase or lease), rehabilitation, transfer, or maintenance of vehicles or equipment, including locomotives, passenger coaches, freight cars, trainsets, and construction, maintenance or inspection equipment, that does not significantly alter the traffic density characteristics of an existing rail line.

(19) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, passenger amenities, benches, signage, sidewalks or trails, equipment enclosures, and fencing, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras.

(20) Environmental restoration, remediation, pollution prevention, and mitigation activities conducted in conformance with applicable laws, regulations and permit requirements, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water oil/water separators, installation of pollution containment systems, slope stabilization, and contaminated soil removal or remediation activities.

(21) Assembly or construction of facilities or stations that are consistent with existing land use and zoning requirements, do not result in a major change in traffic density on existing rail or highway facilities, and result in approximately less than ten acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping.

(22) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, installing, maintaining, or restoring drainage ditches, cleaning ballast, constructing minor curve realignments, improving or replacing interlockings, and the installation or maintenance of ancillary equipment.

(d) Any action qualifying as a CE under § 771.117 or § 771.118 may be

approved by FRA when the applicable requirements of those sections have been met. FRA may consult with FHWA or FTA to ensure the CE is applicable to the proposed action.

**§ 771.117 FHWA categorical exclusions.**

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

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

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

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

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

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

(1) Activities that do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions that establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's highway safety plan under 23 U.S.C. 402.

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

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 23 U.S.C. 125; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by

existing facilities or by new facilities that themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives.

(21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

(22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

(23) Federally funded projects:

(i) That receive less than \$5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) and Federal funds

comprising less than 15 percent of the total estimated project cost.

(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 lanes), if the action meets the constraints 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 constraints 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 constraints 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 that 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 the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

(d) Additional actions that 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. The applicant must submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied, and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1)–(3) [Reserved]

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required, and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning, and where there is no significant noise impact on the surrounding community.

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

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to

alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

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

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

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

(3) A finding of "adverse effect" to historic properties under the National Historic Preservation Act, the 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 a finding of "may affect, 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 existing road, bridge, or ramps that would result in major traffic disruptions;

(5) Changes in access control;

(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.

(f) Where a pattern emerges of granting CE status for a particular type of action, the FHWA will initiate rulemaking proposing to add this type

of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

(g) 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, for CEs specifically listed in paragraphs (c) and (d) of this section and that meet the criteria for a CE under 40 CFR 1508.4, and are identified in the programmatic agreement. 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. FHWA must take into account the State DOT's performance when considering renewal of the programmatic CE agreement; and

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

(h) Any action qualifying as a CE under § 771.116 or § 771.118 may be approved by FHWA when the applicable requirements of those sections have been met. FHWA may consult with FRA or FTA to ensure the CE is applicable to the proposed action.

#### § 771.118 FTA categorical exclusions.

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

(b) Any action that normally would be classified as a CE but could involve unusual circumstances will require FTA, in cooperation with the applicant, to conduct appropriate environmental

studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

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

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

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

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

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

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

(4) Planning and administrative activities that do not involve or lead directly to construction, such as: Training, technical assistance and research; promulgation of rules, regulations, directives, or program guidance; approval of project concepts; engineering; and operating assistance to transit authorities to continue existing service or increase service to meet routine demand.

(5) Activities, including repairs, replacements, and rehabilitations, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: The deployment of Intelligent Transportation Systems and components; installation and

improvement of safety and communications equipment, including hazard elimination and mitigation; installation of passenger amenities and traffic signals; and retrofitting existing transportation vehicles, facilities or structures, or upgrading to current standards.

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

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

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

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

(10) Development of facilities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities,

such as: Police facilities, daycare facilities, public service facilities, amenities, and commercial, retail, and residential development.

(11) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 49 U.S.C. 5324; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

(12) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities.

(13) Federally funded projects:

(i) That receive less than \$5,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 (as adjusted annually by the Secretary to reflect any increases in the Consumer Price Index prepared by the Department of Labor, see [www.fhwa.dot.gov](http://www.fhwa.dot.gov) or [www.fta.dot.gov](http://www.fta.dot.gov)) and Federal funds comprising less than 15 percent of the total estimated project cost.

(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 and drainage pipes.

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

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

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

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

proceed until the NEPA process has been completed.

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

(ii) Protective acquisition is done to prevent imminent development of a parcel that may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

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

(5) [Reserved]

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

(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.

(e) Any action qualifying as a CE under § 771.116 or § 771.117 may be approved by FTA when the applicable requirements of those sections have been met. FTA may consult with FHWA or FRA to ensure the CE is applicable to the proposed action.

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

#### **§ 771.119 Environmental assessments.**

(a)(1) The applicant must prepare an EA in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration concludes an EA would assist in determining the need for an EIS.

(2) When FTA or the applicant, as joint lead agency, select a contractor to prepare the EA, then the contractor must execute an FTA conflict of interest disclosure statement. The statement must be maintained in the FTA Regional Office and with the applicant. The contractor's scope of work for the preparation of the EA should not be finalized until the early coordination activities or scoping process found in paragraph (b) of this section is completed (including FTA approval, in consultation with the applicant, of the scope of the EA content).

(3) When FRA or the applicant, as joint lead agency, select a contractor to prepare the EA, then the contractor must execute an FRA conflict of interest disclosure statement. In the absence of an applicant, FRA may require private project sponsors to provide a third-party contractor to prepare the EA as described in 771.109(e).

(b) For actions that require an EA, the applicant, in consultation with the Administration, must, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: Determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures that might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements that should be performed concurrently with the EA. The applicant must accomplish this through early coordination activities or through a scoping process. The applicant must summarize the public involvement process and include the results of agency coordination in the EA.

(c) The Administration must approve the EA before it is made available to the public as an Administration document.

(d) The applicant does not need to circulate the EA for comment, but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices or, for FRA at Headquarters, for 30 days and in accordance with paragraphs (e) and (f) of this section. The applicant must send the notice of availability of the EA, which briefly describes the action and its impacts, to the affected units of Federal, Tribal, State and local government. The applicant must also send notice to the State intergovernmental review contacts established under Executive Order 12372. To minimize hardcopy requests and printing costs, the Administration

encourages the use of project websites or other publicly accessible electronic means to make the EA available.

(e) When a public hearing is held as part of the environmental review process for an action, the EA must be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The applicant must publish a notice of the public hearing in local newspapers that announces the availability of the EA and where it may be obtained or reviewed. Any comments must be submitted in writing to the applicant or the Administration during the 30-day availability period of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in § 771.111.

(f) When a public hearing is not held, the applicant must place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice must invite comments from all interested parties. Any comments must be submitted in writing to the applicant or the Administration during the 30-day availability period of the EA unless the Administration determines, for good cause, that a different period is warranted.

(g) If no significant impacts are identified, the applicant must furnish the Administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and executive orders, or provide reasonable assurance that their requirements can be met.

(h) When the FHWA expects to issue a FONSI for an action described in § 771.115(a), copies of the EA must be made available for public review (including the affected units of government) for a minimum of 30 days before the FHWA makes its final decision (See 40 CFR 1501.4(e)(2)). This public availability must be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

(j) If the Administration decides to apply 23 U.S.C. 139 to an action involving an EA, then the EA must be

prepared in accordance with the applicable provisions of that statute.

#### **§ 771.121 Findings of no significant impact.**

(a) The Administration will review the EA, comments submitted on the EA (in writing or at a public hearing or meeting), and other supporting documentation, as appropriate. If the Administration agrees with the applicant's recommendations pursuant to § 771.119(g), it will issue a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

(b) After the Administration issues a FONSI, a notice of availability of the FONSI must be sent by the applicant to the affected units of Federal, State and local government, and the document must be available from the applicant and the Administration upon request by the public. Notice must also be sent to the State intergovernmental review contacts established under Executive Order 12372. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the FONSI available.

(c) If another Federal agency has issued a FONSI on an action that includes an element proposed for Administration funding or approval, the Administration will evaluate the other agency's EA/FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's EA/FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

#### **§ 771.123 Draft environmental impact statements.**

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

(b)(1) After publication of the notice of intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process that may take into account any planning work already accomplished, in accordance with 23 CFR 450.212, 450.318, 23 CFR part 450 Appendix A, or any applicable provisions of the CEQ regulations at 40 CFR parts 1500–1508. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. Scoping is normally achieved through public and agency involvement procedures required by § 771.111. If a scoping meeting is to be held, it should be announced in the Administration's notice of intent and by appropriate means at the State or local level.

(2) The lead agencies must establish a coordination plan, including a schedule, within 90 days of notice of intent publication.

(c) The draft EIS must be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The draft EIS must evaluate all reasonable alternatives to the action and document the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The range of alternatives considered for further study must be used for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, unless the lead and participating agencies agree to modify the alternatives in order to address significant new information and circumstances or to fulfill NEPA responsibilities in a timely manner, in accordance with 23 U.S.C. 139(f)(4)(B). The draft EIS must also summarize the studies, reviews, consultations, and coordination required by environmental laws or executive orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c). When FTA or the applicant, as joint lead agency, select a contractor to prepare the EIS, then the contractor must execute an FTA conflict of interest disclosure statement. The statement must be maintained in the FTA Regional Office and with the applicant. The contractor's scope of work for the preparation of the EIS will not be finalized until the early coordination activities or scoping process found in paragraph (b) of this



section is completed (including FTA approval, in consultation with the applicant, of the scope of the EIS content). When FRA or the applicant, as joint lead agency, select a contractor to prepare the EIS, then the contractor must execute an FRA conflict of interest disclosure statement.

(e) The draft EIS should identify the preferred alternative to the extent practicable. If the draft EIS does not identify the preferred alternative, the Administration should provide agencies and the public with an opportunity after issuance of the draft EIS to review the impacts of the preferred alternative.

(f) At the discretion of the lead agency, the preferred alternative (or portion thereof) for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or compliance with other legal requirements, including permitting. The development of such higher level of detail must not prevent the lead agency from making an impartial decision as to whether to accept another alternative that is being considered in the environmental review process.<sup>3</sup>

(g) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet. The cover sheet should include a notice that after circulation of the draft EIS and consideration of the comments received, the Administration will issue a combined final EIS/ROD document unless statutory criteria or practicability considerations preclude issuance of the combined document.

(h) A lead, joint lead, or a cooperating agency must be responsible for publication and distribution of the EIS. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee that is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the draft EIS available.

(i) The applicant, on behalf of the Administration, must circulate the draft EIS for comment. The draft EIS must be made available to the public and

transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS must be transmitted to:

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

(2) Cooperating and participating agencies. The draft EIS must also be transmitted directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) States and Federal land management entities that may be significantly affected by the proposed action or any of the alternatives. These transmittals must be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(j) When a public hearing on the draft EIS is held (if required by § 771.111), the draft EIS must be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS must be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice must be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

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

**§ 771.124 Final environmental impact statement/record of decision document.**

(a)(1) After circulation of a draft EIS and consideration of comments received, the lead agencies, in cooperation with the applicant (if not a lead agency), must combine the final EIS and ROD, to the maximum extent practicable, unless:

(i) The final EIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts of the proposed action.

(2) When the combined final EIS/ROD is a single document, it must include the content of a final EIS presented in § 771.125 and present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project, and document any required Section 4(f) approval in accordance with part 774 of this chapter.

(3) If the comments on the draft EIS are minor and confined to factual corrections or explanations that do not warrant additional agency response, an errata sheet may be attached to the draft statement pursuant to 23 U.S.C. 139(n)(1) and 40 CFR 1503.4(c), which together must then become the combined final EIS/ROD.

(4) A combined final EIS/ROD will be reviewed for legal sufficiency prior to issuance by the Administration.

(5) The Administration must indicate approval of the combined final EIS/ROD by signing the document. The provision on Administration's Headquarters prior concurrence in § 771.125(c) applies to the combined final EIS/ROD.

(b) The **Federal Register** public availability notice published by EPA (40 CFR 1506.10) will not establish a waiting period or a period of time for the return of comments on a combined final EIS/ROD. When filed with EPA, the combined final EIS/ROD must be available at the applicant's offices and at appropriate Administration offices. A copy should also be made available at institutions such as local government offices, libraries, and schools, as appropriate. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the combined final EIS/ROD available.

**§ 771.125 Final environmental impact statements.**

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS must be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS must identify the preferred alternative and evaluate all reasonable alternatives considered. It must also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and

<sup>3</sup> FHWA Order 6640.1A clarifies the Federal Highway Administration's (FHWA) policy regarding the permissible project related activities that may be advanced prior to the conclusion of the NEPA process.

describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in paragraphs (b) and (d) of § 771.109. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and executive orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort must be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS must identify those issues and the consultations and other efforts made to resolve them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that:

(i) Additional coordination with other Federal, State or local governmental agencies is needed;

(ii) The social, economic, or environmental impacts of the action may need to be more fully explored;

(iii) The impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or

(iv) The action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

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

(e) The initial publication of the final EIS must be in sufficient quantity to meet the request for copies that can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee that is not more than the actual

cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(f) The final EIS must be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant must also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13, which implements Executive Order 12372. When filed with EPA, the final EIS must be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the final EIS available.

(g) The final EIS may take the form of an errata sheet pursuant to 23 U.S.C. 139(n)(1) and 40 CFR 1503.4(c).

#### § 771.127 Record of decision.

(a) When the final EIS is not combined with the ROD, the Administration will complete and sign a ROD no sooner than 30 days after publication of the final EIS notice in the **Federal Register** or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project, and document any required Section 4(f) approval in accordance with part 774 of this chapter. To minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means to make the ROD available.

(b) If the Administration subsequently wishes to approve an alternative that was not identified as the preferred alternative but was fully evaluated in the draft EIS, combined FEIS/ROD, or final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised or amended ROD must be subject to review by those Administration offices that reviewed the final EIS under § 771.124(a) or § 771.125(c). To the extent practicable,

the approved revised or amended ROD must be provided to all persons, organizations, and agencies that received a copy of the final EIS.

#### § 771.129 Re-evaluations.

The Administration must determine, prior to granting any new approval related to an action or amending any previously approved aspect of an action, including mitigation commitments, whether an approved environmental document remains valid as described in this section.

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

(b) The applicant must prepare a written evaluation of the final EIS before the Administration may grant further approvals if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

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

#### § 771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS must be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new

circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD must be prepared and circulated in accordance with § 771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration must so indicate in the project file.

(d) A supplement is to be developed using the same process and format (*i.e.*, draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) In some cases, an EA or supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental document must not necessarily:

- (1) Prevent the granting of new approvals;
- (2) Require the withdrawal of previous approvals; or
- (3) Require the suspension of project activities, for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration must suspend any activities that would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental document is completed.

#### § 771.131 Emergency action procedures.

Responses to some emergencies and disasters are categorically excluded under § 771.117 for FHWA, § 771.118 for FTA, or § 771.116 for FRA. Otherwise, requests for deviations from the procedures in this part because of emergency circumstances (40 CFR 1506.11) must be referred to the Administration's Headquarters for evaluation and decision after consultation with CEQ.

#### § 771.133 Compliance with other requirements.

(a) The combined final EIS/ROD, final EIS or FONSI should document compliance with requirements of all applicable environmental laws, executive orders, and other related requirements. If full compliance is not possible by the time the combined final EIS/ROD, final EIS or FONSI is prepared, the combined final EIS/ROD, final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA's approval of an environmental document constitutes its finding of compliance with the report requirements of 23 U.S.C. 128.

(b) In consultation with the Administration and subject to Administration approval, an applicant may develop a programmatic approach for compliance with the requirements of any law, regulation, or executive order applicable to the project development process.

#### § 771.137 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions that significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration must coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

#### § 771.139 Limitations on actions.

Notices announcing decisions by the Administration or by other Federal agencies on a transportation project may be published in the **Federal Register** indicating that such decisions are final within the meaning of 23 U.S.C. 139(J). Claims arising under Federal law seeking judicial review of any such decisions are time barred unless filed within 150 days after the date of publication of the limitations on claims notice by FHWA or FTA. Claims arising under Federal law seeking judicial review of any such decisions are time

barred unless filed within 2 years after the date of publication of the limitations on claims notice by FRA. These time periods do not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.<sup>4</sup> This provision does not create any right of judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

### PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

- 2. Revise the authority citation for part 774 to read as follows:

**Authority:** 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.81 and 1.91; and, Pub. L. 114–94, 129 Stat. 1312, Sections 1303 and 11502.

- 3. Amend § 774.3 by revising footnote 1 to read as follows:

#### § 774.3 Section 4(f) approvals.

\* \* \* \* \*  
<sup>1</sup> FHWA Section 4(f) Programmatic Evaluations can be found at [www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp](http://www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp).  
 \* \* \* \* \*

- 4. Amend § 774.11 by revising paragraph (i) to read as follows:

#### § 774.11 Applicability.

\* \* \* \* \*  
 (i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established, and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in § 774.17.

(1) Formal reservation of a property for a future transportation use can be demonstrated by a document of public record created prior to or contemporaneously with the establishment of the park, recreation

<sup>4</sup> The FHWA published a detailed discussion of the Department's interpretation of 23 U.S.C. 139(J), together with information applicable to FHWA projects about implementation procedures for 23 U.S.C. 139(J), in appendix E to the "SAFETEA-LU Environmental Review Process: Final Guidance," dated November 15, 2006. The implementation procedures in appendix E apply only to FHWA projects. The section 6002 guidance, including appendix E, is available at <http://www.fhwa.dot.gov/>, or in hard copy by request.

area, or wildlife and waterfowl refuge. Examples of an adequate document to formally reserve a future transportation use include:

(i) A map of public record that depicts a transportation facility on the property;

(ii) A land use or zoning plan depicting a transportation facility on the property; or

(iii) A fully executed real estate instrument that references a future transportation facility on the property.

(2) Concurrent or joint planning or development can be demonstrated by a document of public record created after, contemporaneously with, or prior to the establishment of the Section 4(f) property. Examples of an adequate document to demonstrate concurrent or joint planning or development include:

(i) A document of public record that describes or depicts the designation or donation of the property for both the potential transportation facility and the Section 4(f) property; or

(ii) A map of public record, memorandum, planning document, report, or correspondence that describes or depicts action taken with respect to the property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

■ 5. Amend § 774.13 by revising paragraphs (a) and (e), and the introductory text of paragraph (g), to read as follows:

**§ 774.13 Exceptions.**

\* \* \* \* \*

(a) The use of historic transportation facilities in certain circumstances:

(1) Common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108.

(2) Improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers, including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of railroad or rail transit line elements, except for:

(i) Stations;

(ii) Bridges or tunnels on railroad lines that have been abandoned, or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers; and

(iii) Historic sites unrelated to the railroad or rail transit lines.

(3) Maintenance, preservation, rehabilitation, operation,

modernization, reconstruction, or replacement of historic transportation facilities, if the Administration concludes, as a result of the consultation under 36 CFR 800.5, that:

(i) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or this work achieves compliance with Section 106 through a program alternative under 36 CFR 800.14; and

(ii) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion that the proposed work does not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or the Administration concludes this work achieves compliance with 54 U.S.C. 306108 (Section 106) through a program alternative under 36 CFR 800.14.

\* \* \* \* \*

(e) Projects for the Federal lands transportation facilities described in 23 U.S.C. 101(a)(8).

\* \* \* \* \*

(g) Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:

\* \* \* \* \*

■ 6. Amend § 774.15 by revising paragraph (f)(2) to read as follows:

**§ 774.15 Constructive use determinations.**

\* \* \* \* \*

(f) \* \* \*

(2) For projected noise levels:

(i) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter; or

(ii) The projected operational noise levels of the proposed transit or railroad project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment or the moderate impact criteria in the FRA guidelines for high-speed transportation noise and vibration impact assessment;

\* \* \* \* \*

■ 7. Amend § 774.17 by revising the definitions for “Administration,” “CE,” and “ROD,” and adding definitions for “Railroad or Rail Transit Line Elements” and “Stations” to read as follows:

**§ 774.17 Definitions.**

\* \* \* \* \*

*Administration.* The FHWA, FRA, or FTA, whichever is approving the transportation program or project at

issue. A reference herein to the Administration means the State when the State is functioning as the FHWA, FRA, or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

\* \* \* \* \*

*CE.* Refers to a categorical exclusion, which is an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.116, § 771.117, or § 771.118 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

\* \* \* \* \*

*Railroad or rail transit line elements.* Railroad or rail transit line elements include the elements related to the operation of the railroad or rail transit line, such as the railbed, rails, and track; tunnels; elevated support structures and bridges; substations; signal and communication devices; maintenance facilities; and railway-highway crossings.

*ROD.* Refers to a record of decision prepared pursuant to 40 CFR 1505.2 and §§ 771.124 or 771.127 of this chapter.

\* \* \* \* \*

*Station.* A station is a platform and the associated building or structure such as a depot, shelter, or canopy used by intercity or commuter rail transportation passengers for the purpose of boarding and alighting a train. A station does not include tracks, railyards, or electrification, communications or signal systems, or equipment. A platform alone is not considered a station.

\* \* \* \* \*

**Title 49—Transportation**

**PART 264—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

■ 8. Revise the authority citation for part 264 to read as follows:

**Authority:** 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303; 23 U.S.C. 139; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405, Section 1319; and Pub. L. 114–94, 129 Stat. 1312, Sections 1432, 11502, and 11503.

■ 9. Revise the heading for part 264 to read as set forth above.

■ 10. Revise § 264.101 to read as follows:

**§ 264.101 Cross reference to environmental impact and related procedures.**

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations,

and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as “Section 4(f),” are set forth in part 774 of title 23 of the Code of Federal Regulations. The procedures for complying with the surface transportation project delivery

program application requirements and termination are set forth in part 773 of title 23 of the Code of Federal Regulations.

**PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

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

**Authority:** 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Pub. L. 114–94, 129 Stat. 1312, Sections 1314 and 1432.

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