

at <http://dms.dot.gov> by using the above docket number. Comments that were previously received in response to the EA scoping may also be reviewed at this Web site under Docket No. FAA-2004-17174.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

In developing an ATMP and any associated rulemaking actions, the FAA is required to comply with the National Environmental Policy Act of 1969 (NEPA), which calls on Federal agencies to consider environmental issues as part of their decisionmaking process. For the purposes of compliance with NEPA on this project, the FAA is the Lead Agency and the NPS is a Cooperating Agency. The FAA ATMP Program Office and the NPS Natural Sounds Program Office are responsible for the overall implementation of the ATMP Program. Pete Ciesla is the FAA's principal program manager responsible for all parts of the EIS and performance of required consultation regarding cultural resources and endangered and threatened species. For the park, Superintendent Marilyn Parris is responsible for park operations and management and for recommending the draft and final EIS and Record of Decision to the NPS Pacific West Regional Director.

The EIS is being prepared in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, NPS Director's Order #12: Conservation Planning, Environmental Impact Analysis, and Decisionmaking, and NPS Management Policies. The FAA is now inviting the public, agencies, and other interested parties to provide written comments, suggestions, and input regarding: (1) The scope, issues, and concerns related to the development of the ATMP for Haleakala National Park; (2) the scope of issues and the identification of significant issues regarding commercial air tours and their potential impacts to be addressed in the NEPA process; (3) the

potential effects of commercial air tours on natural resources, congressionally designated wilderness, cultural resources, and the visitor experience; (4) preliminary ATMP alternatives; and, (5) past, present, and reasonably foreseeable future actions which, when considered with ATMP alternatives, may result in significant cumulative impacts. The FAA requests that comments be as specific as possible in response to actions that are being proposed under this notice.

Scoping documents that describe the Haleakala National Park ATMP project in greater detail and the preliminary ATMP alternatives under consideration are available at the following locations:

- FAA Air Tour Management Plan Program Web site, [http://www.faa.gov/about/office\\_org/headquarters\\_offices/arc/programs/air\\_tour\\_management\\_plan/](http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/).
- Haleakala National Park, Mile Marker 11, Crater Road, Kula, HI 96790.
- National Park Service, Pacific West Region—Honolulu Office, 300 Ala Moana Boulevard, Box 50165, Honolulu, HI 96850.
- Hawai'i State Library, Hawai'i Documents Center, 478 South King Street, Honolulu, HI 96813.
- Hana Public and School Library, 4111 Hana Highway, Hana, HI 96713.
- Makawao Public Library, 1159 Makawao Avenue, Makawao, HI 96768.
- Kahului Public Library, 90 School Street, Kahului, HI 96732.
- Maui Community College Library, 310 Ka'ahumanu Avenue, Kahului, HI 96732.
- Kihei Public Library, 35 Waimahaihai Street, Kihei, HI 96753.
- Lahaina Public Library, 680 Wharf Street, Lahaina, HI 96761.
- Wailuku Public Library, 251 High Street, Wailuku, HI 96793

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**Peter F. Ciesla,**

*FAA, Air Tour Management Plan Program Manager, AWP-4.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Federal Highway Administration

[Docket Number: FTA-2006-24905]

### Notice of Availability of Guidance on Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

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

**ACTION:** Notice of availability.

**SUMMARY:** This notice announces the availability of final guidance on the application of section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144) to projects funded by the Federal Transit Administration (FTA), the Federal Highway Administration (FHWA), or both. Section 6002 of SAFETEA-LU, which went into effect on August 10, 2005, adds requirements and refinements to the environmental review process for highway and public transportation capital projects. The section 6002 guidance describes how the FTA and FHWA will implement the new requirements within the environmental review process required by the National Environmental Policy Act (NEPA) and other Federal laws. The final guidance is available at the following URL: <http://www.fta.dot.gov/environment/guidance/> for FTA and at <http://www.fhwa.dot.gov/hep/section6002/> for FHWA.

**DATES:** *Effective Date:* November 15, 2006.

**FOR FURTHER INFORMATION CONTACT:** For FTA: Joseph Ossi, Office of Planning and Environment (TPE), (202) 366-1613, or Christopher Van Wyk, Office of Chief Counsel (TCC), (202) 366-1733, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. For FHWA: Ruth Rentch, Office of Project Development (HEPE), (202) 366-2034, or Janet Myers, Office of Chief Counsel (HCC), (202) 366-2019, Federal Highway Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

### SUPPLEMENTARY INFORMATION:

### Availability of the Final Guidance and Comments

Copies of the proposed and final guidance on the application of section

6002 of SAFETEA-LU to projects funded by the FTA, the FHWA, or both, the comments received from the public on the proposed guidance, and the agencies' response to comments received are part of docket FTA-2006-24905 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may retrieve the guidance and comments online through the Document Management System (DMS) at: <http://dms.dot.gov>. Enter docket number 24905 in the search field. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. You may download an electronic copy of this document by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's Web page at: <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.gpoaccess.gov/fr/index.html>.

### Background

On August 10, 2005, President Bush signed SAFETEA-LU. Section 6002 of SAFETEA-LU, which has been codified as 23 U.S.C. 139, prescribes a number of changes to existing FTA and FHWA procedures for implementing the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4351, as amended, and for the implementing regulations of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508. Among the topics addressed in section 6002 are the roles of the project sponsor and the lead, participating, and cooperating agencies; requirements for coordinating and scheduling agency reviews; the authority for States to use Federal-aid funds to ensure timely environmental reviews; a 180-day statute of limitations on claims, and a process for resolving interagency disagreements.

On June 29, 2006, the FTA and FHWA published a Notice of Availability and Request for Comments on the proposed guidance on the implementation of SAFETEA-LU section 6002 in the **Federal Register** (71 FR 37156). The agencies requested and received comments on the proposed guidance referenced in the June notice. The purpose of this notice is to announce

the availability of the final guidance. The final guidance reflects the agencies' consideration of these comments and further reviews by the FTA and FHWA. The final guidance is available on the docket (number 24905), which can be accessed by going to <http://dms.dot.gov>. The final guidance is available online line at <http://www.fta.dot.gov/environment/guidance/> for FTA and at <http://www.fhwa.dot.gov/hep/section6002/> for FHWA.

The purpose of the section 6002 guidance is to provide explanations of new and changed aspects of the environmental review process for FTA and FHWA NEPA practitioners. The guidance will inform readers about which aspects of the environmental review process need to be done differently as a result of SAFETEA-LU, and how the new procedures should be handled. Although the guidance outlines a new environmental review process for highway and public transportation capital projects, it does not supersede any previous guidance or regulations promulgated under NEPA. In particular, the previously mentioned CEQ regulations (40 CFR parts 1500-1508) and FHWA-FTA NEPA regulation (23 CFR part 771) are supplemented by the section 6002 guidance and remain in effect. This guidance is consistent with and implements the requirements of U.S. DOT Order 5610.1C, "Procedures for Considering Environmental Impacts."

The intent of the guidance is to provide project sponsors with as much flexibility as possible in administering the environmental review process, while providing a framework to facilitate efficient project management and decisionmaking in accordance with the law. The guidance also is intended to assist agencies and related entities involved in the development of environmental impact statements (EISs) to satisfy the requirements of applicable Federal laws, regulations and policies. Additionally, this guidance is intended to be non-binding and should not be construed as a rule of general applicability. Because the size and scope of EISs can vary, adjustments to the recommended approaches included in the guidance may be appropriate, but the minimum statutory requirement always is noted.

### Response to Comments

In the notice of availability of the proposed guidance, the FTA and FHWA requested comments on specific provisions in the proposed guidance and comments on particular questions posed by the agencies in the **Federal Register** notice. The agencies received

comments from 29 parties. Commenters included four individuals, six transit agencies, 13 State highway agencies, one State environmental agency, one Federal environmental agency, and four national transportation organizations. Commenting entities included the New York Metropolitan Transit Authority, San Francisco Bay Area Rapid Transit District, Central Puget Sound Regional Transit Authority, Washington Metropolitan Area Transit Authority, Lane Transit District, San Diego Association of Governments, Virginia Department of Transportation, Maryland State Highway Administration, Idaho Transportation Department, Montana Transportation Department, North Dakota Transportation Department, South Dakota Transportation Department, Wyoming Transportation Department, Ohio Department of Transportation, Minnesota Department of Transportation, Louisiana Department of Transportation and Development, Florida Department of Transportation, California Department of Transportation, West Virginia Department of Transportation Division of Highways, State of Washington Department of Ecology, U.S. Environmental Protection Agency, American Highway Users Alliance, American Association of State Highway and Transportation Officials, American Road and Transportation Builders Association, and American Public Transportation Association.

This section highlights the key issues identified in the comments on the proposed guidance, including comments in response to the agencies' specific questions. This section also describes the FTA and FHWA response to the comments on section 6002 implementation. The key issues are summarized and addressed below under general headings relating to the topics addressed. The first seven headings relate to the seven specific questions on which the FTA and FHWA requested comments. The remaining headings pertain to topics addressed within the three sections of the proposed guidance (Section 1: The Environmental Review Process; Section 2: Process Management; and Section 3: Statute of Limitations). Accordingly, the FTA and FHWA response is organized under the following headings: Adequacy of Guidance, Flexibility of the Process, Lead Agency Responsibilities, Methodologies for Project Analysis, Coordination with Participating Agencies, Schedules for FTA Projects, New Starts Alternatives Analysis, General Information About the Environmental Review Process,

Applicability Requirements, Project Initiation, Lead Agencies, Participating Agencies, Cooperating Agencies, Purpose and Need, Alternatives Analysis, Preferred Alternative, Coordination and Schedule, Requirements Placed on Non-U.S. DOT Federal Agencies, Concurrent Reviews, Issues Identification and Resolution, Funding of Additional Agency Resources, Statute of Limitations, and Other Comments.

A number of commenters raised questions that relate to issues other than implementation of section 6002, such as inquiries about the FTA or FHWA practices under NEPA that are not affected by the implementation of section 6002. Because the section 6002 guidance is intended to focus on topics relating directly to the new law, FTA and FHWA decided such questions were beyond the scope of the guidance.

#### *1. Adequacy of Guidance*

In the notice of availability of the proposed guidance, the FHWA requested comments on whether the guidance provided enough information and instruction on how best to implement the new requirements under section 6002. The FHWA received several comments on this question. In general, commenters appear satisfied with the level of information provided. Where commenters felt a particular part of the guidance warranted additional information or a different interpretation, they submitted their comments in the context of those specific questions. The key comments in terms of the overall adequacy of the guidance, and the agencies' response, appear below.

Several commenters stated that the FTA and FHWA should more strongly emphasize their intention to apply section 6002 in a manner that promotes faster processing of projects. We agree that the guidance could benefit from more emphasis on the streamlining goals of section 6002. The FTA and FHWA have revised the answer to Question 6 of the guidance to stress the opportunities for flexibility in designing an environmental review process that meets the statutory requirements of section 6002. This includes continuing to use existing procedures where appropriate. Revisions have been inserted in appropriate places throughout the guidance to identify opportunities to reduce paperwork by documenting the steps taken under section 6002 within types of documents already in use to comply with NEPA or other project-related procedures.

One commenter stated there is a need for more information about how to interpret the guidance in the case of

States assuming Federal responsibilities for NEPA or other aspects of the environmental review process, on a pilot basis, under section 6005 of SAFETEA-LU. On April 5, 2006, FHWA published a notice of proposed rulemaking in the **Federal Register** (71 FR 107040, April 5, 2006) for the implementation of section 6005. Following issuance of the final rule and receipt of applications from the pilot States, the FHWA will work with pilot States to identify and address any issues created by the pilot States' assumption of Federal environmental review responsibilities. We do not feel it is necessary to address this issue in the section 6002 guidance.

#### *2. Flexibility of the Process*

In the notice of availability of the proposed guidance, the FHWA requested comments on whether there are specific areas where the guidance could and should provide more flexibility while still meeting section 6002 requirements. The request also asked that commenters consider how customization in particular areas might permit better responses to issues of regional concern. Six commenters submitted comments identified as responses to the FHWA questions on flexibility. The FTA and FHWA have considered various comments and concluded that the proposed guidance may not have identified the available flexibilities clearly enough. The agencies have revised the final guidance to highlight the flexibility inherent in implementation of many of the provisions of section 6002. The guidance continues to encourage agencies to tailor procedures to meet their needs, within the statutory parameters of section 6002 and other applicable laws, regulations, and funding agency requirements.

Several commenters also stated that, where possible, the guidance should support the use of existing processes or procedures to meet section 6002 administrative requirements. The FTA and FHWA agree with this comment and the final guidance clarifies that existing processes can be used as is, or modified as required, so long as the resulting procedures meet the statutory requirements of section 6002 [23 U.S.C. 139] and other applicable Federal laws, regulations, and policies.

#### *3. Lead Agency Responsibilities*

The FHWA asked for comments concerning the adequacy of the descriptions in the proposed guidance of the responsibilities, authorities, and limitations of lead agencies. The FHWA also requested comment on whether the

division of labor, responsibility and authority was appropriate. Several commenters addressed this topic through their comments on specific questions in the proposed guidance. The FHWA and FTA response to those comments appears with the relevant questions.

#### *4. Methodologies for Project Analysis*

The FHWA asked for comments on whether the proposed guidance adequately addressed the process for involving participating agencies in the selection of methodologies for project analysis. In particular, the FHWA wanted to know whether the process in the proposed guidance would serve to minimize the occurrence of debates about methodologies late in the project development process. Two commenters indicated a concern that the methodologies process could evolve into a document-intensive and contentious process. The FTA and FHWA appreciate that the determination of methodologies can be a challenging aspect of the environmental review process and have considered the comments and made several clarifications in the text of Question 38 of the final guidance. The clarifications are intended to improve the guidance's explanation of the timing of coordination and decisionmaking on methodologies, and to facilitate the use of programmatic agreements on methodologies to the extent appropriate.

#### *5. Coordination With Participating Agencies*

Comments were requested on whether the proposed guidance provided sufficient detail about the coordination process with participating agencies. In particular, comments were sought on whether changes in schedule should require coordination with participating agencies. Two commenters replied to these questions and stated that the guidance, by requiring a project schedule for Federal-aid highway projects, is more restrictive than section 6002 [23 U.S.C. 139(g)(1)(B)]. The statute makes schedules an optional part of the required coordination plan. The FHWA believes that a schedule is critical to successfully managing large or complex projects, including managing the environmental review process for such projects. The FHWA revised the final guidance to clarify that the FHWA, in its Federal lead agency capacity, assumes that a schedule will be used on all EA and EIS projects processed under section 6002. If the non-Federal lead agency believes that a schedule is not needed, then the non-Federal lead agency will be expected to

consult with the FHWA about how the project will proceed. For further detail on the use and modification of schedules, see the comments and responses to Questions 47–57.

The FTA and FHWA have considered comments on coordination needed for changes to the schedule, along with the comments and have concluded that the concurrence requirement for schedule modification should apply only to cooperating agencies. This is consistent with the statute. However, the FTA and FHWA note that a successful environmental review process for a project often depends upon close and pragmatic coordination of the original and any modified schedule with all agencies that play a role in the review of a project.

#### 6. Schedules for FTA Projects

The FTA requested comment whether it should require the development of a schedule for all FTA projects requiring an EIS. The notice of availability noted that section 6002 makes the inclusion of a project schedule in the “coordination plan” for the project optional, but that the FHWA was proposing the use of a project schedule for all EIS and EA projects. The FTA sought comments on whether to require, in the interest of good project management, the development of a project schedule and its inclusion in the coordination plan for any transit project requiring an EIS.

A number of commenters addressed this question. All but one advocated keeping the schedule optional for FTA projects. These commenters generally argued that complex transit projects will frequently require schedule revisions, and the consultations required to revise a schedule when one is included in the coordination plan would defeat the objective of expediting by managing to a schedule. The one commenter who disagreed with this point of view argued for a mandatory schedule as a necessary project management tool. Having considered all of these comments, FTA has decided to keep the schedule optional.

#### 7. New Starts Alternatives Analysis

The FTA requested comment whether it should continue to allow a New Starts Alternatives Analysis, as defined in 49 U.S.C. 5309(a)(1), to be developed as a non-Federal planning document not subject to NEPA regulatory requirements, or require that the New Starts Alternatives Analysis be merged into the NEPA document (normally an EIS for New Starts projects), be subject to NEPA regulatory requirements, and be signed by the FTA Regional Administrator.

The agencies received a number of comments on this question, and the commenters unanimously agreed that the flexibility of the status quo should be maintained. Accordingly, the FTA has decided to maintain the flexibility of performing a Small Starts or New Starts Alternatives Analysis as a planning study or as a NEPA document.

One commenter requested clarification on whether, in this guidance, the term “New Starts projects” also encompassed “Small Starts projects” or not. The FTA has now decided to distinguish between transit fixed guideway projects that meet the Small Starts criteria [49 U.S.C. 5309(e)] and those that do not [49 U.S.C. 5309(d)], by referring to them as “Small Starts” and “New Starts” respectively. The requested clarifications, namely that this guidance applies to any FTA project requiring an EIS, including but not limited to any Small Starts project requiring an EIS, and that Question 13 on the New Starts Alternatives Analysis also applies to Small Starts, have been made in the final guidance.

#### 8. General Information About the Environmental Review Process (Proposed Guidance Questions 1–7)

Several parties offered comments on this segment of the proposed guidance. A number of the comments related to editing the proposed guidance for consistency in terminology and usage. The FTA and FHWA have considered those concerns in preparing the final guidance. The major comments on the content of this segment are described below.

One commenter on Question 3 thought that the FHWA should adopt the FTA policy of not applying section 6002 to projects that are processed as environmental assessment (EA) and categorical exclusions (CE) projects under NEPA. One commenter advised the FTA not to rule out the use of section 6002 on EA projects. The FTA and FHWA have considered the comments, and both agencies have considered the role that EAs play in their programs. The FHWA and FTA have revised the final guidance to indicate that neither agency at this time intends to apply section 6002 to CE projects. In the case of EA projects, the “default case” adopted by both agencies in the final guidance is that section 6002 will not apply. However, the FHWA and FTA recognize that in some cases section 6002 may be appropriate for an EA project and, in such cases, section 6002 procedures may be used. The text in the final guidance relating to Question 8 has been revised accordingly. The decision of the lead

agencies to use section 6002 for an EA project will be documented in, and communicated through, the coordination plan.

Another commenter suggested that the guidance should clarify that some environmental laws are administered by the U.S. DOT agencies and some are under the authority of other Federal agencies. The commenter also asked that the guidance clarify that in some cases, such as the New Jersey and Michigan Clean Water Act Section 404 programs, a Federal program is partly or wholly operated under the authority of a State. The agencies have revised Question 3 of the final guidance to acknowledge these points.

A number of commenters supported giving lead agencies the option to use interagency merger agreements, which currently provide for integrated project review processes under NEPA, the Clean Water Act, and other Federal laws, to meet the requirements of section 6002. Some commenters on Question 6 thought that the guidance should provide more information on the use of merger concurrence points and the effect of section 6002 on signatory agencies’ authority under the merger agreements. Commenters held differing views on whether concurrence points should apply in the future, and whether there is a need to renegotiate merger agreements in light of the provisions of section 6002.

The FTA and FHWA agree that the use of merger agreements, where they are in effect and working well, should continue. The agencies have revised Questions 6, 9, and 48 in the final guidance to clarify this point. The revisions include an explanation that the merger agreement may be used by those entities that are signatories to it, but that the environmental review process must provide to others the opportunities for involvement specified in section 6002. The final guidance also states that, where a pre-existing merger agreement includes concurrence requirements, the lead agencies may continue to use those parts of the merger agreement if they wish. However, if the lead agencies conclude that concurrence on an issue is not achievable, then the lead agencies must exercise their decisionmaking obligations under Section 6002. For these reasons, lead agencies may find that, when preparing coordination plans, they need to supplement the provisions of a merger agreement to ensure that the requirements of section 6002 are satisfied.

Several commenters indicated that the FTA and FHWA should permit merger processes to be “grandfathered” under

section 6002, treating such agreements as an “existing environmental review process \* \* \* approved by the Secretary under section 1309 of the Transportation Equity Act for the 21st Century \* \* \*” (TEA–21) (Pub. L. 105–178; 112 Stat. 107), thereby allowing the substitution of the merger agreement for section 6002 procedures. The FTA and FHWA do not believe that a merger agreement is considered an “existing environmental review process” within that provision unless it adequately addresses the entire environmental review process, including the Section 6002 procedures for providing opportunities for involvement to all parties that are entitled to such opportunities and the procedures for collaboration with participating agencies on methodologies (see Question 9 in final guidance).

A commenter requested clarification in Question 7 as to whether the Tier 2 EIS process had to start over with the section 6002 procedures such as notice of initiation and invitations to participating agencies. The FTA and FHWA have revised Question 7 to state that when initiating a Tier 2 EIS, most section 6002 procedures will apply as though Tier 2 is a new project. However, the lead agencies have the discretion to determine the degree to which Tier 2 environmental review procedures should be modified in order to recognize the Tier 1 decisions that are final and carried into the Tier 2 proceedings.

#### *9. Applicability Requirements (Proposed Guidance Questions 8–10)*

Several of the comments on this segment of the proposed guidance related to how the FTA and FHWA would apply section 6002 to EA and CE projects. The agencies addressed this topic in their response to comments on Question 3 and Question 8 of the proposed guidance.

Commenters also suggested that the decision to use section 6002 for an EA should require the agreement of the project sponsor. The FTA and FHWA have considered this issue and have concluded that they will not adopt a requirement that the project sponsor agree to the use of section 6002 for an EA project. The agencies note, however, that if the project sponsor is a joint lead agency, it would have to agree to the use of Section 6002 process for an EA project as part of the joint decisionmaking described in Section 11 (Lead Agencies) below. Private sponsors will be free to make their views known, but the government agencies responsible for NEPA must make the decision.

One commenter thought that the guidance should clarify in Question 9 whether an exemption from section 6002 procedures based on an existing environmental review process approved under section 1309 of TEA–21 may be applied on a project-by-project basis. The FTA and FHWA have revised Question 9 to clarify that an environmental review process that is approved as a substitute for section 6002 procedures must be used for a program or for a pre-approved class of projects, but cannot be substituted for section 6002 procedures on a project-by-project basis.

A commenter described Question 10 of the proposed guidance as too restrictive and in conflict with regulations at 23 CFR 771.130(d) and 40 CFR 1502.9(c)(4) that eliminate scoping from the process for a supplemental EIS (SEIS). The commenter believed that section 6002 should not apply to SEISs that do not involve the reassessment of the entire action. Question 10 has been revised to state that a SEIS under 23 CFR 771.130 for a project with a notice of intent that was issued prior to the enactment of SAFETEA–LU will not need to follow the SAFETEA–LU environmental review process if the SEIS does not involve the reassessment of the entire action.

#### *10. Project Initiation (Proposed Guidance Questions 11–13)*

Several comments focused on the need for minor editing of the proposed guidance. The FTA and FHWA have reviewed those comments and the guidance, and made revisions as appropriate. Key comments on the content of the guidance, and the agencies’ responses, appear below.

Several commenters questioned the effectiveness of trying to meet project initiation requirements when only limited information might be available about permit and approval requirements or other project details. They viewed the information required for the notice of initiation as a violation of NEPA because a determination about needed approvals requires knowledge of the alternatives to be considered and such knowledge is not available until later in the environmental review process.

After considering the comments, the FTA and FHWA agree with the concern that in some cases not all project approval needs will be known at the time of project initiation. Question 11 in the final guidance has been revised to acknowledge that lead agencies will be expected to act on the best available knowledge at the time of initiation. Because the information in the notice of initiation will be used to plan the

project proceedings, it is in the interest of all parties to have as much information as possible early in the process, and to pass along to the Federal lead agency any new information as soon as it becomes available.

Several commenters expressed concern about the added paperwork that would be caused by the notice of initiation and asked whether the notice of intent for an EIS or the use of existing project initiation procedures could be combined with the notice of initiation under section 6002. Also, a commenter asked whether programmatic notices of initiation could be used rather than project-by-project notices. The FTA and FHWA agree with the commenters that it is desirable to avoid duplication and unnecessary paperwork. The agencies also recognize that the purposes of the notice of initiation include advising the Federal lead agency that it is time to start project review proceedings, and helping the lead agencies determine the scope of the required environmental review process. The agencies have revised Question 11 in the final guidance to more clearly support the adaptation of existing procedures to cover the notice of initiation requirement under section 6002. The procedure used must provide the information required under the project initiation provisions of the statute, to the extent the information is available. The use of one document to cover multiple project needs is fully endorsed by the FTA and FHWA. Whatever form or format is used also should indicate the timeframe within which the environmental review process should commence. In light of the staffing implications for all agencies involved, including the Federal lead agency, the initiation notice must be from an individual appropriately authorized by the project sponsor.

#### *11. Lead Agencies (Proposed Guidance Questions 14–20)*

Many commenters focused their comments on the operation of section 6002 with respect to lead agencies and lead agency decisionmaking. The major comments and the Federal response are described below.

Commenters were concerned about the FHWA requirement in the proposed guidance that the State DOT serve as the non-Federal lead agency under section 6002 [23 U.S.C 139(c)(3)] for projects currently handled by local government agencies (hereinafter referred to as local government agencies) that receive “pass-through” project funding. Commenters suggested that the FHWA should allow local government agencies, as subrecipients of Federal funds, to

serve as the mandatory non-Federal lead agency under section 6002. Commenters felt that the local government agencies would be best positioned to fulfill the section 6002 non-Federal lead agency role in the case of locally initiated projects. Commenters also cited the added burden that would be placed on the State DOTs if they were required to serve as the non-Federal lead agency for local projects. One commenter was concerned that the requirement that the recipient of funding serve as the non-Federal lead agency would disturb the procedures presently followed by the FTA and local transit agencies. Some commenters expressed the view that State agencies should have the option, at the State agency's discretion, to serve as a non-Federal joint lead agency along with the local governmental agency. A few commenters encouraged allowing the State DOT to continue allowing local government agencies to prepare NEPA documents while the State DOT serves in a "NEPA reviewer" and quality assurance role, rather than requiring the State to hold the larger scope of responsibility described in the proposed guidance.

The FHWA and FTA have considered the many comments on this topic and have concluded that the proposed guidance correctly interpreted the language of section 6002 on mandatory joint lead agencies. The final guidance continues to reserve mandatory lead agency status to the U.S. DOT agency and the direct recipient of Federal funds. The FTA and FHWA believe that this interpretation follows the language of section 6002 and recognizes the legal relationships embedded in other Federal laws and regulations relating to recipient and subrecipient responsibilities. However, the FTA and FHWA agree that revisions to Questions 14–16 are appropriate to clarify and provide more detail on the lead agencies exercise of their discretion to extend invitations to agencies to serve as joint lead agencies under CEQ regulations.

Question 15 of the final guidance notes that State or regional toll authorities are among the agencies that lead agencies may invite to serve as a joint lead agency. That part of the guidance also specifies that agencies invited to serve as joint lead agencies under CEQ regulations assume the full spectrum of decisionmaking roles and responsibilities assigned to lead agencies under section 6002. Because of the scope of the decisionmaking roles held by joint lead agencies, the lead agencies will want to assess carefully which status (joint lead, cooperating, or participating) is most appropriate for

various agencies with an interest in the project.

Question 16 revisions make it clear that the lead agencies typically will invite a local governmental agency to serve as a joint lead agency if it will be taking on design and construction responsibilities for the project. Once the local governmental agency accepts the invitation, the three agencies are "lead agencies" for purposes of section 6002. The three agencies then will determine how to allocate roles and responsibilities among themselves based on resources, expertise, project needs, and other relevant factors. However, the FHWA will continue to require the State, as the direct recipient of the Federal-aid highway funds, to serve as a joint lead agency on all projects regardless of the participation of a local governmental agency as a joint lead agency. The State remains legally responsible and liable for the proper performance of any NEPA or section 6002 work assigned to the local governmental agency, and the State must provide active oversight and supervision to the local governmental agency's work. This means that the State must be an active and knowledgeable participant in decisionmaking and must ensure that the local governmental agency, in carrying out any responsibilities assigned to it, fully complies with NEPA and section 6002. The FHWA's legal relationship, including oversight for the environmental review process, will continue to be with the State as the direct recipient of Federal-aid highway funds. Thus, the lines of oversight and legal responsibility of the FHWA, the State, and the local governmental agency remain the same as they were prior to the enactment of section 6002.

Several commenters raised questions on this and other parts of the proposed guidance about the FTA and FHWA interpretation of decisionmaking roles for the section 6002 Federal lead agency and non-Federal lead agencies. The main concern was that the U.S. DOT agencies were reserving to themselves the final decisionmaking authority, when section 6002 calls for joint decisionmaking between the two entities. A second concern was that the guidance did not describe how the lead agencies would resolve disagreements among themselves. The FTA and FHWA have considered the comments on the topic of lead agency decisionmaking and concluded that revisions should be made to the guidance to reflect a stronger joint decisionmaking process under section 6002. The agencies have revised Questions 19, 21, 32, 36, 38 and 39 to include language that addresses

these issues and to eliminate references to the Federal lead agency making the final decision in specified situations. The Federal lead agency and all joint lead agencies collectively constitute the "lead agency" under section 6002 and they will engage in joint decisionmaking on matters involving the environmental review process. Disagreement on an issue must be resolved among those lead agencies before further action can be taken on the project that relates to the disputed issue. The effect of this decisionmaking process is that each party effectively holds a veto over the decision and the entities must cooperate in order to move the project forward on the issue in question. This is consistent with the discussion of joint lead agency decisionmaking in Conference Report 109–203 at pages 1046–1052.

#### *12. Participating Agencies (Proposed Guidance Questions 21–29)*

One commenter expressed concern that the information provided in the proposed guidance was insufficient to advise lead agencies of how to operate under the participating agencies provision of section 6002. The FTA and FHWA have considered the comments and revised the final guidance to provide additional detail and to emphasize areas of flexibility.

A few commenters raised questions about the process for identifying and inviting participating agencies. While commenters generally endorsed the process described in the proposed guidance, some commenters thought that the proposed guidance implied too broad an interpretation of an "interest" that would support inviting an entity to be a participating agency under section 6002. Those commenters requested inclusion of a definition of "interest" in the guidance. They suggested that the term be limited to mean those agencies that have more than a remote or speculative interest in the project. The FTA and FHWA have considered the comments and agree with the need to clarify the intended interpretation of what level of interest is sufficient to warrant participating agency status. The agencies have revised Question 21 to provide that there must be more than a tangential, speculative, or remote interest in the project to support participating agency status. Indicators of an "interest" include agencies that have an expertise in a topic relevant to the project, have jurisdiction over some aspect of the project, or are responsible for governmental function(s) that may be affected by the project or its impacts. However, the final guidance also recognizes the flexibility lead agencies have in this area, and the guidance

acknowledges that practices may vary from State to State.

A few commenters raised a question about the effect of agency resources on the responsibility of participating agencies to participate in the environmental review process under section 6002. The FTA and FHWA revised Question 22 to address this concern. The FTA and FHWA acknowledge that many agencies face resource constraints on their operations, and that such constraints may affect the ability of an agency to participate in every project. At the same time, section 6002 clearly establishes Congress's intent to make the environmental review process work more efficiently in terms of the time required to deliver projects. In order to meet the environmental review process requirements under section 6002, some agencies may have to determine which projects are priorities and to allocate resources accordingly. The lead agencies also will be affected by this challenge, and they will need to consider the potential effects of not having full participation by an agency on a project. For example, non-participation may have unfavorable impacts later when a participating or cooperating agency has to make its own decisions on the project.

The FTA and FHWA also note that, in their experience, an agency often finds it difficult to make meaningful contributions to the environmental review process if it becomes fully involved for the first time only after major decisions have been made. For these reasons, participating agency resource constraints are an important factor that the lead agencies should consider in developing the project coordination plan, including the timing of decision points in the process. The FTA and FHWA wish to emphasize that States still have the authority under 23 U.S.C. 139(j) to use Federal funds received under Title 23 and Title 49 to provide financial assistance to agencies for the purpose of expediting the environmental review process. In the final analysis, however, section 6002 does not provide any exemption from participation for agencies that face staffing, financial, or other resource constraints and the FTA and FHWA have not revised the final guidance to create one.

Some commenters asked about the timing of the participating agency invitations and asked whether participating agency invitations could be handled prior to the beginning of scoping, or whether the scoping process could be used to identify participating agencies. The FTA and FHWA have

revised Question 23 to clarify that the timing of invitations to serve as participating agencies may vary. To the extent that the lead agencies know prior to scoping that certain entities should be invited to serve, the lead agencies may send invitations at or after the time of the project notice of initiation. If, as the project progresses, the lead agencies identify additional entities that should be invited to serve as participating agencies, then they should invite those entities promptly.

Some commenters expressed concern about the difference in treatment of Federal and non-Federal agencies with respect to response, or the lack of response, to an invitation to be a participating agency. The provisions of section 6002 relating to invitations to participating agencies [23 U.S.C. 139(d)(2)–(3)] create a mandatory protocol for handling Federal agency invitations and the subsequent responses or lack of responses. The proposed and final guidance reflect that statutory procedure in Question 25. Because participating agency status carries with it certain responsibilities that accompany the benefits of the opportunity for early and substantive participation in the project decisionmaking process, the FTA and FHWA concluded that conferring “involuntary” participating agency status on non-Federal agencies is neither feasible nor appropriate. The final guidance retains the original procedure for non-Federal agencies.

A number of commenters proposed changes to the language in Questions 26–27. Question 26 relates to how to handle situations in which an agency becomes a participating agency after the environmental review process is underway, either because new information indicates that there is a need for the agency's participation, or because the agency originally declined to participate but has changed its mind. Question 27 addresses what happens if an agency declines to be a participating agency but makes comments on the project anyway. Commenters had varying concerns. The most prevalent issue raised was how to ensure that decisions, once made, are not revisited unnecessarily, yet how to make certain that a new participating agency's interest and concerns were adequately addressed. The agencies determined that the procedures described in Question 26 of the proposed guidance establish the appropriate standards for the scenarios described in both Question 26 and Question 27. The agencies have revised Question 27 to clarify that the procedures in Question 26 apply in the case of an agency that

initially declines to be a participating agency but later decides to submit comments on the project.

Question 27 of the proposed guidance stated that comments received from agencies that declined to be participating agencies “are not entitled to any greater or lesser deference than those of the general public.” A number of commenters inferred from this proposed language that participating agency comments would receive more weight than comments from the general public. Commenters asked for a clarification on this point. The FTA and FHWA have reviewed the text and have revised the text for Question 27 by deleting the phrase in question and inserting a reference to the process for handling comments that is outlined in the text for Question 26 of the final guidance. The lead agencies will consider all comments on a project, and evaluate the comments by considering relevant factors that may affect the credibility and weight that the agencies should afford the comments.

Some commenters suggested that the guidance should recognize that participating agencies may have different roles and levels of participation in the environmental review process and indicated that lead agencies should have the authority to identify a core group of participating agencies for regular meetings and provide more limited opportunities for participation to the remaining participating agencies. The FTA and FHWA have revised Question 28 to clarify that expectations and commitments about agency participation should be addressed in the coordination plan. It is appropriate to tailor an agency's participation to its area of interest or jurisdiction, but the lead agencies should make their choices after considering the potential effects if the agency is not provided an opportunity for involvement in some aspects of the environmental review process. Lead agencies also are free to honor requests from participating agencies to limit the participating agency's involvement, but in such cases the participating agency remains bound by the section 6002 process and the participating agency's self-imposed non-participation or selective participation may deprive it of the ability to influence the outcome of specific decision points in the process.

One commenter asked that the guidance be revised to reflect the ability of participating agencies to submit comments later in the process if additional information from technical studies or development of the draft EIS becomes available. The FTA and FHWA



agree that there are occasions when significant and relevant new information that is materially different than the information available at the time of the original comment period would merit an additional round of comments or require reconsideration of previous decisions on a project. The lead agencies will have to determine on a case-by-case basis whether such a situation exists. The FTA and FHWA have revised Question 28 to reflect this aspect of the process.

### *13. Cooperating Agencies (Proposed Guidance Questions 30–31)*

One commenter asked for clarification in Question 31. The FTA and FHWA have revised Question 31 to indicate that invitations to agencies to participate in the environmental review process should be explicit about each role that the invited agency is being asked to serve. The agencies also clarified that, in the interest of efficiency, the lead agencies should use a single invitation whenever possible to address both cooperating agency and participating agency status.

### *14. Purpose and Need (Proposed Guidance Questions 32–35)*

A commenter noted that the guidance should better recognize that, because other agencies may have to make decisions on the project, it would be useful for the agencies to jointly develop the statement of purpose and need. The FTA and FHWA agree with the suggestion and have revised Question 31 accordingly.

Commenters questioned the use of the term “collaboration” in the proposed guidance when discussing the decisionmaking process for purpose and need (Question 32) and range of alternatives (Question 36). Questions 32 and 36 have been revised to state that the lead agencies are responsible for the development of the purpose and need statement and the range of alternatives, after considering input from the participating agencies and the public.

Section 6002 calls for giving participating agencies and the public an opportunity for involvement on purpose and need and range of alternatives. Commenters on this topic generally considered “opportunity for involvement” to authorize something different than, and potentially less interactive than, “collaboration.” Several commenters noted that the use of the phrase “in a timely and meaningful way” in the answer to Question 34 did not provide enough guidance on when or how lead agencies should provide an “opportunity for involvement” on purpose and need. The

FTA and FHWA have revised Question 34 to clarify that the opportunity for involvement is not a static concept, but flexible and depends on the project and issues involved. “Opportunity for involvement” is intended to gather information and perspectives, and to make sure that decisionmakers understand the concerns of interested parties. The FTA and FHWA believe it is important to provide maximum flexibility to the lead agencies on the timing and nature of involvement opportunities. The agencies have concluded that it would be difficult to provide a more precise description in the guidance without becoming prescriptive.

A number of commenters expressed concerns about how the guidance references the transportation planning process and its products in Questions 33 and 35. Questions 33 and 35 have been revised to describe the considerations that apply to using the results of the planning process when developing the statement of purpose and need.

### *15. Alternatives Analysis (Proposed Guidance Questions 36–38)*

Commenters made nearly identical comments on the purpose and need and alternatives analysis segments of the proposed guidance with respect to the use of the term “collaboration” and the desirability of coordinating decisions on these issues with agencies that make decisions on the project under other laws. The agencies responded to those questions in the purpose and need segment of this notice, and made the same revisions to both the purpose and need segment and this alternatives analysis segment of the final guidance.

Commenters objected to the use of the term “timely and meaningful” in Question 37 as overly broad, and to the statement in the proposed guidance that opportunities for involvement on purpose and need and range of alternatives “may be concurrent or sequential” as failing to recognize that the range of alternatives for analysis can be determined only after the purpose and need of the project is decided. The agencies agree that the phrase “timely and meaningful” is overly broad and have revised Question 37 by removing the phrase. Additionally, the question has been revised to further explain that the opportunity for involvement must be provided prior to the lead agencies’ decision regarding the range of alternatives. The agencies also clarified that lead agencies must consider whether additional opportunity for involvement on the range of alternatives is required if changes to the purpose and need arise out of involvement by

the participating agencies and the public.

Some commenters stated that the guidance should clarify the parameters of the collaboration process for choosing methodologies, including the timeframes for comment. Another concern was that reaching closure on methodologies during scoping may not be feasible, and that the process for selecting methodologies discussed in Question 38 could become time-consuming and contentious.

The FTA and FHWA have considered all of the comments on the process for selection of methodologies and have concluded that revisions to Question 38 are warranted. The agencies agree that collaboration on methodologies need occur only with agencies that have some expertise, experience, statutory mission, or jurisdiction relevant to the object of the pending analysis. The FTA and FHWA note that this standard should be interpreted reasonably, so that participating agencies are not inappropriately excluded from collaborating on methodologies. If the lead agencies elect to establish a comment period under section 6002 [23 U.S.C. 139(g)(2)(B)] to help bring closure to the selection process, then they will need to follow procedures for giving notice of the comment period (see Question 54). Issues on methodologies should be raised and resolved as soon in the environmental review process as the lead agencies believe there is sufficient information on the particular issue to reasonably support selection of the methodology for analysis. The FTA and FHWA have concluded that the language on documenting the selection of methodology, and any objections thereto by participating agencies, is appropriate and consistent with NEPA requirements. Such documentation also is a good administrative practice, particularly in the event of later litigation. That language is retained in the final guidance.

A commenter raised a concern that the language in Question 38 on “comments late in the process” appears to conflict with 40 CFR part 1503 requirements for the consideration of comments received during the draft EIS comment period. The NEPA regulation at 40 CFR 1503.4(a) does require an agency preparing a final EIS to “assess and consider” comments made on a draft EIS. However, under 40 CFR 1503.4(a)(5), the agency preparing the final EIS may “explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would



trigger agency reappraisal or further response.” The FTA and FHWA have concluded that the lead agencies are not required to revisit an issue on which participating agencies had an opportunity to comment earlier in the environmental review process. The exception would be if the draft EIS is the first opportunity a participating agency has to comment on significant and material new information affecting the selection. The FTA and FHWA have determined that the language in the proposed guidance represents an appropriate interpretation that is in harmony with both the NEPA regulatory provisions and section 6002 requirements.

The FTA and FHWA also have revised Question 38 to clarify the procedure for developing and applying a methodology for a program, region, or class of projects.

#### *16. Preferred Alternative (Proposed Guidance Questions 39–46)*

Several commenters asked for clarification of Question 39, concerning who decides whether the preferred alternative can be developed to a higher level of detail. Some objected to the use of the term “locally preferred alternative” because it is not a term used in the statute. The agencies have revised Question 39 to eliminate the term “locally preferred alternative.” The agencies also have adopted in Question 39, as throughout the final guidance, language that reflects joint decisionmaking among the lead agencies. If the joint decisionmaking process does not result in mutual agreement on whether there is a preferred alternative or whether the section 6002 criteria for doing a higher level of design for a preferred alternative [23 U.S.C. 139(f)(4)(D)] are satisfied, then no action can be taken that relies on such decision(s) until there is agreement among all of the lead agencies.

Commenters asked for clarification of what “accepted” means in Questions 39 and 41 with respect to the preferred alternative. The FTA and FHWA have revised Question 41 to clarify this point. Some commenters asked whether acceptance of the identification of a preferred alternative affects the New Starts or Small Starts rating process. The FTA has revised Question 41 to state that neither acceptance of a preferred alternative, nor a decision to do a higher level of design on a preferred alternative, affects the New Starts or Small Starts rating process.

Several commenters asked the FTA and FHWA to consider ways to reduce the analysis and documentation

requirements for the determination whether to do a higher level of design on the preferred alternative (see Questions 42–44), and to clarify when the lead agency can identify a preferred alternative. The FTA and FHWA have considered all of the comments on this issue and appreciate the commenters’ desire to streamline the process for making the decision on doing a higher level of detail. The agencies note that the criteria for the decision, and the limitations on the purposes for which the work can be done and the scope of work that can be performed, appear in section 6002 [23 U.S.C. 139(f)(4)(D)]. Those provisions echo language in NEPA regulations and relevant case law. The agencies have concluded that the requested revisions would not be consistent with those laws, particularly with respect to the required finding of impartiality in future decisionmaking on the selection of alternatives. Lead agencies are encouraged to identify workable methods for expediting this decision, but the requirement for project-by-project review is retained in the final guidance.

The FTA and FHWA have clarified in Question 43 when the lead agencies may decide on a preferred alternative and the performance of a higher level of design work for the preferred alternative. In keeping with NEPA and agency practices prior to SAFETEA–LU, a decision on a preferred alternative cannot occur until after the lead agencies have conducted sufficient scoping and analysis of alternatives to support the identification. Further, there cannot have been sufficient scoping until after an opportunity for the involvement of participating agencies and the public on the purpose and need and the range of alternatives has occurred.

A number of commenters asked the FTA and FHWA to consider amending Question 40 to authorize, during the completion of the NEPA process, design work that goes beyond the level of work described in section 6002. The types of work that the commenters indicated should be permitted, and would not bias decisionmaking, included geotechnical assessments, hydraulic and hydrologic analysis, traffic studies, hazardous materials assessments, utility engineering, cost estimates, and development of preliminary design drawings. The FTA and FHWA have considered the various comments on the issues of the level of additional design work and purposes for which additional design work could be done for a preferred alternative during NEPA review and have decided not to make the requested revisions. The agencies

note that the types of work listed by the commenters often are a part of the higher level of design work allowed in order to meet NEPA or permitting agency requirements for information about engineering and operational feasibility, impacts, or other issues. The type of work is not determinative. The key questions are whether the purpose of the additional work is one that is authorized by law, and whether the scope of work to be done is limited to what is needed to satisfy such authorized purpose(s). The FTA and FHWA will continue to require good faith and reasonable determinations that the permitted level of design is what is needed to meet a purpose authorized by applicable laws and regulations, including section 6002.

#### *17. Coordination and Schedule (Proposed Guidance Questions 47–57)*

This segment of the proposed guidance drew many comments, particularly with respect to the need for a schedule and the process of modifying a schedule. The concerns of many commenters focused on when parties other than the lead agencies have a role in scheduling decisions. With respect to transit projects, commenters questioned the applicability of section 6002 to New Starts and Small Starts projects, and one commenter suggested that FTA exempt Small Starts projects from the project coordination plan requirements under section 6002 because Small Starts projects are intended to have streamlined processes and should be allowed to develop individualized plans for project planning, development, and implementation.

The FTA and FHWA agree with the commenter’s sentiments about the importance of streamlining the process and having plans that are tailored to the needs of the project. The FTA and FHWA believe the coordination plan requirements will promote these objectives, not hinder them. The agencies have made no change to the final guidance in terms of the projects that are subject to the coordination plan requirements.

Some commenters suggested the addition of language advising lead agencies to give cooperating and participating agencies a role in the development of project coordination plans. Question 47 has been revised to state that because key elements of the coordination plan may be setting expectations that require resource commitments by the participating agencies, consultation with the participating agencies is strongly encouraged.

A number of commenters submitted questions about the scope, content, and use of schedules in project coordination plans under section 6002. Some commenters objected to the FHWA requirement for a schedule (Question 52), citing the optional nature of schedules under section 6002 [23 U.S.C. 139(g)(1)(B)]. Others were concerned by the use of the word "negotiated" in the Question 52 discussion of the process for creating a schedule, especially the potential interpretation of that word as requiring the agreement of participating agencies to a proposed schedule. The FTA and FHWA have considered the various comments on this topic. The agencies also have considered that section 6002 is intended to expedite the environmental review process, and to avoid duplication and waste. The use of a project schedule is one important tool to use to achieve those goals. Both the FTA and the FHWA support tailoring the form and substance of project schedules to meet the needs of the particular projects and the factors specified in section 6002 [23 U.S.C. 139(g)(1)(B)(ii)].

The final guidance recognizes that schedules are optional, not mandatory, under section 6002. The FTA decision to treat schedules as optional remains unchanged in the final guidance. The FHWA believes that management and stewardship of public funds within the Federal-aid highway program dictates the need for a schedule for EA and EIS projects. The final guidance states that FHWA assumes that a schedule will be used on all EA and EIS projects processed under section 6002. If the non-Federal lead agency believes that a schedule is not needed, then the non-Federal lead agency will be expected to consult with the FHWA about how the project will proceed. The development of a schedule will involve consulting with the participating agencies, but does not require consensus or concurrence.

A few commenters suggested that the factors for establishing a project schedule, listed in Question 53 of the proposed guidance, were incomplete because they failed to include a factor that recognized the need to speed up the environmental review process. The FTA and FHWA agree with the commenters that it is important to always keep in mind that the section 6002 provisions are intended to expedite effective project environmental reviews, which includes realistic schedules that focus on timely decisionmaking. The agencies note that the factors listed in Question 53 are derived from the statute. The FTA and FHWA have revised Question 53 to recognize explicitly the importance of using a schedule to help

expedite project reviews, and the ability of the lead agencies to consider whatever array of factors they believe may have a substantial effect on moving the environmental review process forward in an efficient and effective manner.

Some commenters raised concerns about how to handle needed changes in project schedules. They expressed particular interest in how to accommodate changes in the level of knowledge about issues affecting the project. Commenters also asked for clarification about the type of interaction with other agencies that is required before changing a schedule. Section 6002 [23 U.S.C. 139(g)(1)(D)] permits the lead agencies to lengthen a schedule for good cause. Concurrence of other agencies is required only if a schedule is shortened, and even then agreement is needed only from cooperating agencies that would be affected by the shorter schedule. The agencies have revised Question 56 to clarify this point. If the component of the schedule that the lead agencies propose to shorten does not apply to a particular cooperating agency, then that agency's concurrence is not required for the change. The FTA and FHWA do encourage lead agencies to consider the benefits that can be obtained by coordinating proposed schedule changes with both cooperating and participating agencies so that all affected agencies can plan appropriately.

One commenter suggested that the guidance should emphasize that there is flexibility in setting the deadlines for comments if there is good cause for exceeding the section 6002 statutory time periods [23 U.S.C. 139(g)(2)], which may include where there is new information or a substantial change to the project. The FTA and FHWA agree with the commenter that there may be circumstances when good cause will exist for the lead agencies to extend a comment period or, in extreme cases, to reopen comments on an issue by creating a second comment period. It is a lead agency decision whether such circumstances exist on a particular project. The FTA and FHWA have revised Question 54 of the final guidance to point out the lead agencies' ability to extend comment periods for good cause. The lead agencies may provide notice to participating agencies and the public about when a particular comment period starts and concludes through distribution of the schedule or by other means.

The agencies have revised Question 57 to clarify that where the lead agencies decide to adjust a schedule,

section 6002 [23 U.S.C. 139(g)(1)(E)] does require the lead agencies to provide a copy of the revised schedule to the participating agencies, the State DOT, and the project sponsor (if not the State). The revised schedule also must be made available to the public.

#### *18. Requirements Placed on Non-U.S. DOT Federal Agencies (Proposed Guidance Questions 58–59)*

Several commenters objected to the Question 58 language that describes the 180-day deadline for decisions under Federal laws as applying only to decisions made by Federal agencies. The commenters stated that the deadline for decisionmaking also should apply to decisions by State agencies that are made under Federal law, such as a Section 401 water quality certification under the Clean Water Act, 33 U.S.C. 1341. The language of the statute itself references "the failure of the Federal agency to make the decision" [23 U.S.C. 139(g)(3)(A)]. The Conference Substitute Report for SAFETEA-LU [Conference Report on the Committee of the Conference on H.R. 3, House of Representatives Report 109–23, page 1051] refers to the section as "provid[ing] notice \* \* \* of the failure of a Federal agency to make decisions in the environmental review process (section 139(g)(3))." The FTA and FHWA have concluded that the language in the proposed guidance is correct.

#### *19. Concurrent Reviews (Proposed Guidance Question 60)*

In connection with Question 60, one commenter asked for additional information on how the FHWA will ensure that the participating agencies fulfill their responsibilities under section 6002 [23 U.S.C. 139(h)(3)] to identify issues of concern as early as practicable. The FTA and FHWA believe that all lead and participating agencies have legal and general governmental obligations to work cooperatively to improve the environmental review process. In particular, the agencies point to the roles and responsibilities specified in section 6002 for lead agencies [23 U.S.C. 139(c)(6) and (h)(2)] and participating agencies [23 U.S.C. 139(d)(7) and (h)(3)]. The U.S. DOT is working with other Federal agencies to help them understand their obligations under section 6002 and to encourage actions to meet those obligations. The FTA and FHWA have revised the final guidance to better capture these points.

## 20. Issues Identification and Resolution (Proposed Guidance Questions 61–63)

A number of comments were submitted relating to dispute resolution procedures and the effect of the new issue resolution provisions in section 6002 [23 U.S.C. 139(h)]. Commenters wanted clarification on which procedures apply, when they apply, and who can initiate the procedures. Some commenters asked for clarification of the differences between the SAFETEA–LU section 6002 procedure and other agency dispute resolution processes (including “informal” procedures). The agencies believe that the starting point for this topic is a better definition of what the section 6002 procedure [23 U.S.C. 139(h)] does, and does not, encompass. The FTA and FHWA agree with the commenters who observed that the section 6002 process may be initiated only by the project sponsor (as defined in section 6002) or the Governor of the State in which the project is located. The agencies have revised Question 61 in the final guidance to clarify this point.

The FTA and FHWA also note that the section 6002 dispute resolution process applies “at any time \* \* \* to resolve issues that could delay the completion of the environmental review process or could result in denial of any approvals required for the project under applicable law.” Disputes that are likely to affect the progress of a project often are disputes over decisions that lie outside the decisionmaking authority of the lead agencies, so the lead agencies are not able to impose a final decision if the dispute is not otherwise resolved. The FTA and FHWA do believe the likelihood of success will be enhanced if the individuals attending a dispute resolution meeting have the rank and authority to make “on-the-spot” commitments that will bind their respective agencies or organizations. The guidance has been revised to highlight this principle and to recognize that the organizational level of the persons invited should be guided by the kinds of issues in dispute.

Some commenters stated that the dispute resolution guidance and order issued under section 1309 of TEA–21<sup>1</sup> should be withdrawn because section 1309 was repealed by section 6002 of SAFETEA–LU. Those commenters suggested that the section 6002 provision was intended to replace other agency dispute resolution procedures,

and that States should have the flexibility to establish their own dispute resolution procedures so long as they are consistent with the provisions of section 6002.

The FTA and FHWA recognize that there is nothing in the section 6002 dispute resolution process that assures resolution of the disagreement. The endpoint of the section 6002 process, as indicated in Question 61 of the proposed guidance, is notice to specified congressional committees that the dispute remains unresolved [23 U.S.C. section 139(h)(4)(B)]. For these reasons, the FTA and FHWA encourage separate dispute resolution procedures at the State and Federal levels to address disagreements over important issues of concern. Lead agencies may include dispute resolution procedures in project coordination plans. This may be done on a project-by-project basis or as part of program-wide coordination plan provisions.

Individual Federal agencies have recognized the value of dispute resolution procedures and many have such procedures either as a matter of administrative policy or as a result of statutory provisions. The FTA and FHWA do not believe that the repeal of section 1309 of TEA–21 in any way affects Federal agency authority to maintain and apply dispute resolution procedures. The FHWA and FTA have concluded that most of the dispute resolution guidance developed after the adoption of TEA–21 simply describes dispute resolution principles and practices that continue to be useful. The U.S. DOT Order 5611.1A, entitled “U.S. Department of Transportation National Procedures for Elevating Highway and Transit Environmental Disputes” (October 10, 2003),<sup>2</sup> which was created under section 1309 of TEA–21, does not apply to section 6002 projects. The FHWA will develop updated procedures to guide FHWA-initiated dispute resolution efforts on projects subject to Section 6002.

Another commenter stated that the FTA and FHWA should not require the completion of agency dispute resolution procedures before initiation of the section 6002 issue resolution procedure. The FTA and FHWA have considered this comment and agree that the final guidance should clarify this point. The agencies emphasize that State and Federal dispute resolution procedures, both formal and informal, should operate to complement the section 6002 issue resolution procedure. State or

Federal agency dispute resolution procedures are not considered as legally required prior to the initiation of the section 6002 issue resolution process. State or Federal agency dispute resolution procedures may be used prior to, or concurrent with, the section 6002 procedure. However, the FTA and FHWA strongly believe that the State and Federal agency dispute resolution procedures provide an effective method for solving major disagreements. The agencies know, based on experience, that resolution of issues at the lowest possible level through problem solving among the immediate parties to the dispute typically is the most effective way to keep a project on track.

A few commenters indicated that more guidance is needed in Question 62 on the scope of the term “issues of concern” so that practitioners can understand which types of disagreements are subject to the issue resolution provisions of section 6002. Commenters generally were concerned that too many issues would be referred for dispute resolution procedures, thereby delaying the decisionmaking process. One commenter observed that carefully defining the kinds of issues that are important enough to trigger the dispute resolution procedures contributes to the successful use of a dispute resolution procedure.

The FTA and FHWA have considered the comments on this point, and have concluded that lead agencies and participating agencies should be guided by the statutory language in section 6002 [23 U.S.C. 139(h)(3)–(4)]. The agencies have revised Question 62 to track the statutory language. The provision on participating agency responsibilities states that participating agencies “shall identify, as early as practicable, any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for a project.” In practice, this means that both lead agencies and participating agencies have responsibilities for identifying the importance of a disagreement. The lead agencies need to manage the project and its schedule well enough, and consult with participating agencies effectively enough, to know when there is an issue that is unresolved and likely to cause delay or prevent issuance of a permit needed for the project. A participating agency has the obligation to come forward as soon as it is aware that there may be an issue that will cause a substantial delay or permit denial if not satisfactorily resolved. When a participating agency informs the lead agencies of an issue of concern within the meaning of section 6002, the lead

<sup>1</sup> U.S. Department of Transportation Collaborative Problem Solving: Better and Streamlined Outcomes for All (2002), available online at the following URL: <http://www.environment.fhwa.dot.gov/strmlng/adrguide/index.asp>.

<sup>2</sup> The order is available online at [http://www.environment.fhwa.dot.gov/strmlng/dot5611\\_order.asp](http://www.environment.fhwa.dot.gov/strmlng/dot5611_order.asp).

agencies should evaluate whether further dispute resolution efforts using formal or informal processes other than section 6002 can be productive. This step by the lead agencies does not foreclose the initiation of the section 6002 issue resolution procedure by the project sponsor or the State Governor, but the FTA and FHWA discourage use of the section 6002 issue resolution procedure as the "first step" after a participating agency disclosure of an issue of concern. The FTA and FHWA believe that it is clear from the limiting language in the statute itself that few disputes should be deemed of sufficient importance to trigger the section 6002 issue resolution process. Disputes of lesser importance should be resolved by the parties through the section 6002 authorities for lead agency decisions, if applicable, or through other dispute resolution procedures.

#### *21. Funding of Additional Agency Resources (Proposed Guidance Questions 67–69)*

One commenter asked that the guidance make it clear that no additional funds are given to States for the purpose of providing the financial assistance authorized by section 6002. The agencies have revised Question 67 to make this point.

#### *22. Statute of Limitations (Proposed Guidance Section 3)*

The final guidance retains the election by the FTA and FHWA to approach administration of the statute of limitations (SOL) provision in section 6002 [23 U.S.C. 139(l)] in different ways. Comments received on the SOL segment (Section 3) of the proposed guidance indicated that the final guidance should provide greater emphasis on this fact, and the FTA and FHWA have made appropriate revisions to Section 3 of the final guidance.

Agencies receiving funding from the FTA should consult the part of Section 3 of the final guidance that is specific to FTA. Similarly, agencies receiving funding through the FHWA should refer to the FHWA portion of Section 3 of the final guidance. Procedures described in Appendix E apply only to FHWA and the recipients of Federal-aid highway funding. Despite the differences in the implementation procedures between FTA and FHWA, the agencies stress that they interpret the scope and intent of the SAFETEA–LU SOL provision in the same way and that their implementation decisions are based solely on administrative differences between the FTA and FHWA programs.

For the FHWA, the final guidance replaces its earlier "Interim Guidance

on the Use of 23 U.S.C. 139(l) Limitations on Claims Notices," dated December 1, 2005, that informed actions to implement the SAFETEA–LU SOL provision between the effective date of SAFETEA–LU and the effective date of the final guidance on section 6002. The final guidance contains not only SOL revisions responding to comments received in the docket, but also changes initiated by the FHWA as a result of the agency's experience with the SOL provisions since the effective date of SAFETEA–LU.

Only a small number of major comments were submitted with respect to the FHWA SOL guidance in Appendix E. Some commenters asked for clarification in Appendix E about which Federal agencies may publish the SOL notice, and how to handle publication where a substantial period of time has elapsed between the FHWA Record of Decision (ROD) and the last permit decision by other agencies. The FTA and FHWA have considered the comment and have added clarifying language to Section 3 of the final guidance. The FHWA has revised Question E–16 in Appendix E of the final guidance to clarify that the FHWA, as Federal lead agency, expects to publish all notices regardless of the lapse of time between the ROD and the last Federal agency project decision.

One commenter asked for guidance on whether the publication of a SOL notice for a SEIS will reopen issues covered in the original EIS for which a SOL notice previously was published. The FHWA amended Question E–21 in the final guidance to include this issue. The effect of a SEIS SOL notice on decisions covered by a SOL notice published for an earlier ROD will depend on the circumstances. The FHWA believes that litigation of earlier decisions that are unrelated to topics addressed by the SEIS will be foreclosed by the expiration of the 180-day period after the publication of the SOL notice covering those earlier decisions. Any issues addressed in the SEIS proceedings, and the Federal agency decisions that rely on the information developed during the SEIS proceedings, would be subject to the SOL notice(s) published in the **Federal Register** after the SEIS and related ROD.

Another commenter noted that the SOL notice is a Federal requirement and expressed the view that the cost of the notice should be borne by the FHWA. The SOL notices are an optional measure that will be used on individual projects. As such, the cost of publishing the notices is logically a project-related expense that may be necessary or appropriate to the ultimate construction

of an approved project. Until a system is in place to handle State reimbursement of FHWA for SOL notice costs, the FHWA will continue to pay for the publication of the notices in the **Federal Register**.

#### *23. Other Comments*

A number of commenters asked whether electronic communications could be used in place of hard copy letters for various actions that require documentation, such as invitations to participating agencies. The commenters cited the prevalence of electronic communications and the potential timesavings that can be accomplished by using electronic communications. The FTA and FHWA agree with the commenters that electronic means of communication can be used, subject to certain common sense recordkeeping and authentication requirements so that lead agencies maintain the required project records and have assurance that they are dealing with properly authorized agency representatives. The FTA and FHWA revised the final guidance to reflect this view.

One commenter asked for guidance on how lead agencies should handle situations where actions were taken after August 10, 2005, on a project that is subject to section 6002, but the actions may not conform to all requirements of the final guidance because the guidance did not exist. The FTA and FHWA have considered the comment and have revised Question 8 of the final guidance to clarify how to handle such cases. If the difference relates to a substantial requirement under the final guidance, then the Federal lead agency will assess whether additional action is needed and can be taken to cure the discrepancy.

The FTA and FHWA recognize and appreciate the efforts of all parties who provided comments for consideration in the development and finalization of the section 6002 guidance.

(Authority: 23 U.S.C. 315; Pub. L. 109–59, 119 Stat. 1144; 49 U.S.C. 5334; 23 U.S.C. 139; 49 CFR 1.48; 49 CFR 1.54)

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