



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Federal Highway Administration

23 CFR Part 771

[Docket No. FTA-2011-0056]

RIN 2132-AB03

Environmental Impact and Related Procedures

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

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) provides interested parties with the opportunity to comment on proposed changes to the joint Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) regulations that implement the National Environmental Policy Act (NEPA). The proposed revisions would affect actions by FTA and project sponsors. The proposed revisions are intended to streamline the FTA environmental process for transit projects in response to the Presidential Memorandum on the subject “Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review” of August 31, 2011. The proposed categorical exclusions (CEs) would apply to FTA and improve the efficiency of the NEPA environmental reviews by making available the least intensive form of review for those actions that typically do not have the potential for significant environmental effects and therefore do not merit additional analysis and documentation associated with an Environmental Assessment or an Environmental Impact Statement. FTA and the FHWA

invite comments on the proposals contained in this notice.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by the docket number (FTA-2011-0056) by any of the following methods:

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

U.S. Mail: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, DC 20590.

Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: (202) 493-2251.

Instructions: You must include the agency name (Federal Transit Administration) and docket number (FTA-2011-0056) or Regulatory Identification Number (RIN 2132-AB03) for this rulemaking at the beginning of your comments. All comments received will be posted, without change and including any personal information provided, to <http://www.regulations.gov>, where they will be available to Internet users. Please see the discussion of the **Privacy Act** below.

You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed, stamped postcard. Due to security procedures in effect since October 2001 regarding mail deliveries, mail received through the U.S. Postal Service may be subject to

delays. Parties submitting comments may wish to consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for viewing the docket or visit Docket Operations at the address above.

FOR FURTHER INFORMATION CONTACT: Antoinette Quagliata at (202) 366-4265 or Megan Blum at (202) 366-0463, Office of Planning and Environment (TPE), or Christopher Van Wyk at (202) 366-1733, or Scott Biehl at (202) 366-4011, Office of Chief Counsel (TCC), Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue S.E., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Background

This Notice of Proposed Rulemaking (NPRM) proposes a number of revisions to the procedures that govern how the Federal Transit Administration (FTA) complies with the National Environmental Policy Act (NEPA). The regulation proposed for revision, Part 771 of Title 23, Code of Federal Regulations (CFR), is a joint FTA and Federal Highway Administration (FHWA) regulation, but nearly all of the proposed revisions are written such that they would apply to actions by FTA. The proposed revisions that change FHWA's NEPA implementing regulations are a minor, non-substantive, revision to a footnote discussing supplementary guidance and two spelling corrections. The remaining proposed revisions, including ten proposed categorical exclusions (CEs), apply to FTA.

FTA's primary goal in developing this NPRM has been streamlining the environmental process, without any loss of its environmental value. In a Presidential Memorandum on the

subject, “Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review” issued August 31, 2011, President Obama challenged the heads of Federal agencies to “take steps to expedite permitting and review, through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes.” This proposal is consistent with that direction, and also consistent with Executive Order 13571 issued on April 27, 2011, titled “Streamlining Service Delivery and Improving Customer Service,” through which President Obama challenged Federal agencies to develop and implement plans for, among other actions: “improving the customer experience by adopting proven customer service best practices and coordinating across service channels (such as online, phone, in-person, and mail service);” “streamlining agency procedures to reduce costs and accelerate delivery, while reducing the need for customer calls and inquiries;” and “identifying ways to use innovative technologies to accomplish the customer service activities above, thereby lowering costs, decreasing service delivery times, and improving the customer experience.” The general public, especially anyone affected or served by a transit project, is a primary “customer” served by FTA’s environmental process. FTA therefore proposes to maximize the use of the Internet, in accordance with the President’s Order, to deliver to the public expeditiously and efficiently the customer service provided by the NEPA documents and other environmental documents prepared by FTA. Recognizing that not every customer has

access to the Internet, FTA will continue to use other means, consistent with the President's Executive Order, of providing public access to FTA's environmental documents.

In addition to the recent Presidential direction noted above, the Council on Environmental Quality's regulations for implementing the provisions of NEPA direct agencies to "review their policies, procedures, and regulations ... and revise them as necessary to insure full compliance with the purposes and provisions of the Act" (40 CFR §1500.6). FTA's shared environmental procedures were last modified in 2009 with very minor revisions to comply with certain provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), but the procedures have not undergone a complete retrospective analysis by FTA since their creation in 1987. An NPRM proposing major revisions to this regulation was published on May 25, 2000, but was never finalized.

FTA recognizes that the use of CEs, whenever appropriate, is an easy and effective way to streamline the environmental process. However, it has been more than 10 years since FTA comprehensively considered the CEs listed in the environmental procedures that apply to transit and more than 20 years since changes to the CEs were made as a result of a comprehensive review. For this reason, FTA has now embarked on an initiative to update the CEs for particular types of proposed transit projects and other FTA proposed actions. The current CEs listed in paragraphs (c) and (d) of 23 CFR §771.117 are proposed to be FHWA CEs. FTA proposes to create a new section 771.118(c), the new list of FTA CEs being proposed as part of this rulemaking action, which would apply to FTA actions. The list of new CEs to be located in section 771.118(c) is intended to cover the actions that

previously applied to FTA in section 771.117(c), though expanded for purposes of streamlining. If the new CEs are finalized, FTA expects to publish guidance to show how the list of CEs in section 771.117(c), which currently apply to FTA, is subsumed for FTA purposes by the new list at section 771.118(c). Consistent with past practice, FTA is proposing to continue to allow the categorical exclusion of other actions through documentation with language proposed for section 771.118(d), which mirrors the existing 23 CFR § 771.117(d). FTA is proposing to delete, however, some items in the list of illustrative examples in section 771.117(d) from the new list in section 771.118(d) as they are duplicative of the new CEs being proposed for FTA in section 771.118(c).

According to the CEQ regulations (40 CFR § 1508.4), CEs are defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” CEQ guidance on establishing CEs, issued in November 2010, reiterates CEQ’s encouragement to Federal agencies to characterize the types of CE actions through broadly defined criteria, including clearly defined eligible categories and constraints, followed by examples. Accordingly, the CEs that FTA is proposing today are organized into ten defined categories of actions each accompanied by examples representing the types of FTA activities that fall within each category. The examples included are representative of the types of activities that fit within the defined criteria of the CE; they are not intended to limit the CE or to broaden it beyond those activities that do not typically, either individually or cumulatively, cause significant environmental effects.

The proposed CEs have been substantiated with supporting documentation, which includes, but is not limited to, comparative benchmarking and expert opinion. The supporting documentation includes FTA Findings of No Significant Impact (FONSI) for projects that fall within the ten broad categories. Comparative benchmarking provides support to the revised CEs by using the experience of other Federal agencies that conduct actions of similar nature, scope, and intensity. Additionally, FTA convened an expert panel to review and evaluate each of the revised CEs with respect to concept, applicability, and potential environmental effects. Information describing the basis for the CEs determinations (i.e., the substantiation package) and information concerning the members of the expert panel, and their NEPA-related experience, can be found on the FTA website (<http://fta.dot.gov/about/12347.html>) and in the docket for this NPRM in Regulations.gov as described above.

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

This rulemaking action stems in part from the U.S. Department of Transportation's "Retrospective Review and Analysis of Existing Rules" in response to Executive Order

13563. Information on that process can be obtained either on DOT's website at <http://regs.dot.gov/RetrospectiveReview.htm> or at Regulations.gov under docket number DOT-OST-2011-0025.

What this NPRM Contains

The following section of this preamble includes a "Section-by-Section Analysis" of the revisions to the regulatory text proposed by this action. These explanations will aid the reader in understanding the reason behind each proposed regulatory change.

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

The NPRM concludes with the actual proposed revisions to the regulatory text in the amendatory language required by the Office of the Federal Register. This language, if finalized, would modify the procedures that govern FTA's compliance with NEPA. FTA seeks public comment on the proposed regulatory revisions.

Section-by-Section Analysis

Section 771.105 Policy.

A minor, non-substantive revision is proposed for the footnote to paragraph (a) to recognize the fact that both FTA and FHWA frequently update guidance relevant to the preparation of environmental documents. Thus, the phrase "but is not limited to" is proposed for addition to clarify this point, such that the introduction to supplementary guidance would read: "FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to

...” In addition, the spelling of the word “Web sites” is proposed to be changed to “websites.”

Section 771.109 Applicability and Responsibilities.

One minor, non-substantive revision is proposed for this section: to correct the spelling of the word “construction.”

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

The revised procedures in paragraph (i) are proposed to provide FTA grant applicants with flexibility and efficiency in the public participation aspect of the environmental process. Paragraph (i)(1) would clarify that applicants may announce project milestones using either electronic or paper media. Currently, the use of electronic means is already practiced by some transit applicants, but FTA would note the option for all transit applicants. It is FTA’s experience that providing various means for seeking public input in the environmental process, such as increasing the use of websites, adds value and flexibility that broadens public access and input and, thereby, ultimately expedites project review.

Paragraph (i)(2) formally presents the option of doing “early scoping,” which can be used to link the metropolitan and statewide transportation planning process mandated by 49 U.S.C. §§ 5303-5304 with the NEPA process to provide a seamless transition from transportation planning to project-specific environmental evaluation. Major capital investments by FTA on fixed guideway transit projects under 49 U.S.C. § 5309 (“New Starts”) have specific planning requirements that do not apply to FHWA programs nor to other FTA programs. Early scoping provides a logical connection between the

planning-level alternatives analysis currently required by 49 U.S.C. § 5309 and the environmental evaluation of alternatives required by NEPA. Early scoping produces a specific proposed action to be studied during the NEPA environmental process, and the process could also prove useful in providing a link between the planning and NEPA processes for projects not funded under the New Starts program. Steps for following the early scoping process are included in the proposed paragraph (i)(2).

To increase the public transparency of FTA environmental documents, the proposed paragraph (i)(3) encourages posting and distributing environmental process-related materials through publicly-accessible electronic means, including project websites.

FTA proposes through a new paragraph, (i)(4), to encourage the posting of all environmental impact statements (EIS) (draft and final) and environmental records of decision on a transit grant applicant's project website and maintaining it there until the project is constructed and operating. Additionally, the Environmental Protection Agency (EPA) is developing an electronic filing system for EIS documents, which will also allow for posting of EISs on the EPA website. FTA will provide a link on its website to direct the public to EPA's comprehensive EIS database. This NPRM would not change the current rules for distribution of hard copies of FTA environmental documents upon request, and the placement of such documents in public libraries and local government buildings within the project area.

Section 771.113 Timing of Administrative activities

The proposal of a new section 771.118 for FTA CEs and the designation of the current section 771.117 for FHWA CEs require updates to existing references to 771.117. As such, paragraph (d)(1) is proposed to be revised to clarify that the reference to

771.117(d)(12) applies to FHWA and to add a reference to the newly proposed sections 771.118(c)(6) and (d)(3) that apply to FTA. Paragraph (d)(2) is proposed to be revised to change the current reference from 771.117(d)(13) to 771.118 (d)(4), as the paragraph refers to a transit action.

Section 771.115 Classes of actions.

Paragraph (a)(3) is proposed to be revised to clarify that the construction or extension of a fixed-guideway transit facility not located within an existing transportation right-of-way normally requires the preparation of an environmental impact statement. In addition, Bus Rapid Transit (BRT), as defined in the National Transit Database - Glossary was added to the list of examples of such transit facilities. The current regulation, which this NPRM proposes to revise, could be interpreted to include a proposed transit project that would be located within an existing transportation right-of-way as an activity typically requiring an environmental impact statement. FTA is proposing to amend the current regulation because it has been the agency's experience that most transportation projects constructed within an existing transportation right-of-way do not have significant impacts on the environment; thus, they do not necessitate the preparation of an environmental impact statement. In fact, as noted in the analysis of section 771.118 below, certain transit facilities qualify for a CE when constructed predominantly within a transportation right-of-way. In any instance where potential unusual circumstances would cause such a project not to qualify for a CE, it would be reviewed with an EA or, if significant impacts are expected, an EIS.

Paragraph (b) is proposed to be revised to clarify that in the explanation of the list of CEs not normally requiring documentation, the reference to 771.117(c) applies to FHWA

CEs and to add in a new reference, 771.118(c), to the location of the FTA CEs. Further, the explanation of CEs that require documentation is proposed to be revised to clarify that the reference to 771.117(d) applies to the FHWA CEs and to add in a new reference to 771.118(d) for the FTA CEs.

Section 771.117 FHWA categorical exclusions.

The header for section 771.117, is proposed to be changed to “FHWA categorical exclusions,” because the CEs listed in section 771.117 would apply to FHWA actions. Conforming amendments to clarify that the list applies to FHWA are proposed that change “the Administration” to “the FHWA” in paragraphs (b), (c), and (d).

Section 771.118 FTA categorical exclusions.

A new section, 771.118, is proposed to be added to 23 CFR that contains CEs applicable to FTA actions. The section will contain a paragraph (a) that describes and defines CE actions; a paragraph (b) that defines unusual circumstances; and a paragraph (e) that addresses the consideration for adding new CEs in the future. These three paragraphs mimic existing paragraphs (a), (b) and (e) at section 771.117. A new paragraph (c) will be added that describes the proposed FTA CEs. The section will also include a paragraph (d), which mimics the existing paragraph (d) at section 771.117, except in that it lists fewer examples in light of the separate lists and the more expansive list proposed for section 771.118(c), focusing on those most applicable to FTA. The CEs listed in paragraphs (c) and (d) of section 771.117 still may apply to multimodal projects that contain FHWA and FTA elements (such as the reconstruction of a highway lane within existing right-of-way with express bus service). FTA will issue guidance regarding the use of the new CEs for transit projects upon finalization of the FTA list at section 771.118(c).

Per CEQ guidance, the CEs are presented as general categories that include appropriate limitations and provide an informative list of examples. The CEs proposed in this NPRM are listed below along with a summary of how each was substantiated. A summary of the substantiations are available on the FTA website (<http://fta.dot.gov/about/12347.html>) and in the NPRM docket on Regulations.gov. The proposed CEs in paragraph (c) are:

“(1) Acquisition, installation, operation, evaluation, and improvement of discrete utilities and similar appurtenances (existing and new) within or adjacent to existing transportation right-of-way, such as: utility poles; underground wiring, cables, and information systems; and power substations and transfer stations.” This proposed CE, which would focus on discrete installation and improvements of utilities, would expand upon the current CE at 23 CFR § 771.117(c)(2) (“Approval of utility installations along or across a transportation facility”). The additional activities (i.e., acquisition, operation, evaluation, and improvement) are consistent with other activities categorically excluded under the current FTA procedures and are supported by at least eight FTA FONSIIs and in the established CEs of seven other federal agencies that conduct actions of a similar nature, scope, and intensity. FTA considered whether to propose a geographic limit on utility-related activity, but, based on the substantiating record for this CE, proposes that no such limit be included. FTA specifically seeks comment on this proposal. FTA also requests that commenters include evidence and demonstrate experience with the activity when possible.

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

which would focus on the construction and improvements related to recreation, pedestrian or bicycle facilities, would expand upon the current CE at 23 CFR § 771.117(c)(3) (“Construction of bicycle and pedestrian lanes, paths, and facilities”). The additional activities (i.e., acquisition, rehabilitation, improvement, and limited expansion) are within the realm of construction and, therefore, consistent with the current CE. The rationale for the proposed CE is supported by at least five FTA FONSIIs and in the established CEs of three federal agencies that conduct actions of a similar nature, scope, and intensity. FTA considered whether to propose physical limitations on the activities included in this CE, such as restricting relevant activities to those within or adjacent to a transportation right-of-way or restricting by the scale of the activities, but, based on the substantiating record for this CE, proposes not to include such limitations. FTA specifically invites comments on this proposal in addition to general comments on the proposed CE. FTA also requests that commenters include evidence and demonstrate experience with the activity when possible.

“(3) Limited activities designed to mitigate environmental harm that cause no harm themselves or to maintain and enhance environmental quality and site aesthetics, and employ construction best management practices, such as: noise mitigation activities; rehabilitation of public transportation buildings, structures, or facilities including those that are listed or eligible for listing on the National Register of Historic Places when there are no adverse effects under the National Historic Preservation Act; retrofitting for energy conservation; and landscaping or re-vegetation.” This CE, which would focus on activities designed to lessen harm to or enhance environmental quality, would consolidate and expand upon the current CE at 23 CFR § 771.117(c)(6)

(“The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction”) and (c)(7) (“Landscaping”). Expansion of activities within this category (i.e., those designed to lessen environmental harm and enhance and maintain the natural environment) is consistent with other activities categorically excluded under current procedures, and is supported in fact by at least nine FTA FONSIIs, and in the established CEs of five federal agencies that conduct actions of a similar nature, scope, and intensity.

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

This CE, which would include a variety of internal administrative activities that inherently have no potential for significant environmental impacts, would expand modestly on the current CEs at 23 CFR § 771.117(c)(1) (“Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs, research activities as defined in 23 U.S.C. 307; approval of a unified work program and any finding required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 C.F.R. Part 630; approval of project concepts under 23 C.F.R. Part 476, engineering to define the elements of a proposed action or alternative so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system”); 23 CFR § 771.117(c)(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”); and 23 CFR §

771.117(c)(20) (“Promulgation of rules, regulations, and directives”). The proposed category identifies additional activities that are consistent with the established CEs of nine federal agencies that conduct actions of a similar nature, scope, and intensity.

“(5) Discrete activities, including repairs, designed to promote transportation safety, security, accessibility and effective communication within or adjacent to existing right-of-way, such as: the deployment of Intelligent Transportation Systems and components; installation and improvement of safety and communications equipment, including hazard elimination and mitigation measures; and retrofitting existing transportation vehicles, facilities or structures.” This CE, which would focus on discrete equipment, amenities, fittings, and improvements designed principally to secure passenger and pedestrian safety and convenience, would consolidate and expand slightly upon the current CEs at 23 CFR § 771.117(c)(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”); at 23 CFR § 771.117(c)(15) (“Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons”); and at 23 CFR § 771.117(c)(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”). Expansion of activities within this category (i.e., installation and improvement of safety and communications equipment) is consistent with other activities categorically excluded under the current procedures, and it is supported with at least four FTA FONSI and in the established CEs of seven federal agencies that conduct actions of a similar nature, scope, and intensity.

“(6) Acquisition or transfer of an interest in real property that is not within or adjacent to recognized environmentally sensitive areas (e.g., wetlands, non-urban parks, wildlife management areas) and does not result in a substantial change in the functional use of the property or in substantial displacements, such as scenic easements and historic sites for the purpose of preserving the site. This CE extends only to acquisitions that will not limit the evaluation of alternatives.” The actions contemplated in this proposed CE have no potential for significant environmental impacts, as the scope is limited to potential acquisitions and transfers that avoid real property within or adjacent to environmentally sensitive areas to ensure the subsequent use of the property would avoid the potential to cause harm to the human environment, and avoid a substantial change in the functional use of the property as a change in use could pose potential impacts. This CE would expand on the current CEs at 23 CFR § 771.117(c)(10) (“Acquisition of scenic easements”); 23 CFR § 771.117(d)(12) (“Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including

shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed”); and at 23 CFR § 771.117(d)(13) (“Acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c). No project development on the acquired railroad right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed”). Expansion of activities within this category including the acquisition activity, and identifying additional examples is consistent with other activities categorically excluded under the current procedures that are supported by at least five FTA FONSI, and in the established CEs of seven federal agencies that conduct actions of a similar nature, scope, and intensity.

“(7) Acquisition, rehabilitation and maintenance of vehicles or equipment, within or accommodated by existing facilities, that does not result in a change in functional use of the facilities, such as: equipment to be located within existing facilities and with no substantial off-site impacts; and vehicles, including buses, rail cars, trolley cars, ferry boats, and people movers that can be accommodated by existing facilities or by new facilities that qualify for categorical exclusion.” This CE, which would focus on acquisition and maintenance of public transportation vehicles and maintenance equipment to ensure passenger and pedestrian safety and to improve operations while not creating significant off-site impacts, would consolidate and expand slightly upon the current CEs at 23 CFR § 771.117(c)(14) (“Bus and rail car rehabilitation”); 23 CFR § 771.117(c)(17) (“The acquisition or lease (a) of vehicles where the vehicles can be accommodated by existing facilities or by new facilities which qualify for a CE; and (b) of existing facilities

or other equipment”); and 23 CFR § 771.117(c)(19) (“Purchase or lease and installation of operating or maintenance equipment to be located within the transit facility where there are no substantial off-site impacts”). Expansion of activities within this category is consistent with other activities categorically excluded under the current procedures and is supported by at least four FTA FONSI and in the established CEs of nine federal agencies that conduct actions of a similar nature, scope, and intensity.

“(8) Maintenance and minimally intrusive rehabilitation and reconstruction of facilities that occupy substantially the same environmental footprint and do not result in a change in functional use, such as: improvements to bridges, tunnels, storage yards, buildings, and terminals; and construction of platform extensions and passing track.” This CE, which would focus on maintenance, rehabilitation, and reconstruction of facilities ensuring passenger safety and convenience while improving operations, would consolidate and expand slightly upon the current CEs at 23 CFR § 771.117(c)(18) (“Routine maintenance and rehabilitation (a) of buses and rail cars; (b) of existing transportation facilities, such as pavement; bridges, terminals, storage yards and buildings, including ferry facilities, where there are no substantial changes in the footprint of the facilities or other disruptions; and (c) of track and rail-bed maintenance and improvements when carried out within the existing right-of-way”); CFR § 771.117(d)(3) (“Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings”); and CFR § 771.117(d)(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”). Expansion of activities within this category

(rehabilitation of tracks and improvements to bridges and tunnels) is consistent with other activities categorically excluded under the current procedures and is supported by at least six FTA FONSI and in the established CEs of seven federal agencies that conduct actions of a similar nature, scope, and intensity. The term “footprint” refers to the physical boundary of the referenced facility.

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

This proposed CE, would focus on construction of facilities consistent with existing land use and zoning requirements, and would consolidate and expand slightly upon the current CEs at 23 CFR § 771.117(d)(4) (“Transportation corridor fringe parking facilities”); 23 CFR § 771.117(d)(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”); 23 CFR § 771.117 (d)(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”); and 23 CFR § 771.117(d)(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”). Expansion of activities within this category (busways and streetcar lines within existing transportation right-of-way, including new lanes for buses, and parking facilities) is consistent with other activities categorically excluded under the current procedures and is supported by at least 39 FTA FONSIIs and in the established CEs of three federal agencies that conduct actions of a similar nature, scope, and intensity. FTA considered whether to propose additional physical limitations on the activities included in this CE, but, based on the substantiating record for this CE, proposes not to include such limitations. FTA specifically invites comments on this proposal in addition to general comments on the proposed CE. FTA also requests that commenters include evidence and demonstrate experience with the activity when possible.

“(10) Development activities for transit and non-transit purposes, located on, above, or adjacent to existing transit facilities, that are not part of a larger transportation project and do not substantially enlarge such facilities, such as: police facilities, daycare facilities, public service facilities, and amenities. This CE would apply to those activities taking place within or at a public transportation facility that do not substantially expand the footprint, and thereby do not impact the natural or human environments. Joint development activities may increase user interactions at the transit facility, which could increase the productivity of the public transportation facility (e.g., economic development activities). These related but separate opportunities may increase public safety (e.g., police facilities), public transportation-user convenience (e.g., daycare facilities), or consolidate government activities (e.g., public service facilities). This proposed CE is supported by at least nine FTA FONSIIs, and in an established CE of the U.S. Army. FTA considered whether to propose additional physical limitations on the activities included in this CE, but,

based on the substantiating record for this CE, proposes not to include such limitations. FTA specifically invites comments on this proposal in addition to general comments on the proposed CE. FTA also requests that commenters include evidence and demonstrate experience with the activity when possible.

Section 771.119 Environmental assessments.

A new paragraph (k) is proposed regarding contracts with environmental contractors or consultants. FTA proposes that contract elements for the preparation of EA documents not be finalized until the process for informal scoping of the EA has been completed and the scope of the EA has been approved by FTA after consulting with the grant applicant. This change is intended to discourage the execution of contract elements for preparation of EA documents that are more extensive and costly to taxpayers than necessary, or take longer to prepare than necessary.

Section 771.123 Draft environmental impact statements.

Language is proposed for paragraph (d) to prevent grant applicants from executing contracts for preparation of EISs that are more extensive and costly to taxpayers than necessary, or take longer to prepare than necessary. FTA proposes that contract elements for the preparation of EIS documents not be finalized until formal scoping has been completed and the scope of the EIS has been approved by FTA after consulting with the grant applicant.

Paragraph (j) is proposed to be deleted as unnecessary. Even without this regulatory provision, FTA will ensure that every FTA draft EIS evaluates a proposed action (also

called a locally preferred alternative) in sufficient detail, and that a planning-level Alternatives Analysis that lacks such detail is used as “early scoping” of the NEPA process and not as a draft EIS. As noted above, a planning-level Alternatives Analysis is currently required by 49 U.S.C. § 5309 for New Starts and Small Starts projects.

Section 771.133 Compliance with other requirements.

One minor change is proposed for this paragraph: The word “Administration’s” would be replaced with “FHWA’s” in the last sentence, given that the requirement referenced applies to FHWA, and not to FTA. FTA’s approval of an environmental document constitutes its finding of compliance with the report requirements of 49 U.S.C. 5323(b), and FTA proposes to add language specific to FTA’s requirement in this section.

Regulatory Analysis and Notices

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

Executive Orders 13563 and 12866 and DOT Regulatory Policies and Procedures

Executive Orders 13563 and 12866 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. FTA and the FHWA have determined that this action is a significant regulatory action under section 3(f) of Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032). Therefore, this proposed rule was submitted to the Office of Management and Budget for interagency review. We also consider this proposal as a means to clarify the existing regulatory requirements. These proposed changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. FTA does anticipate that the changes in this proposal would enable projects to move more expeditiously through the federal review process and would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA and for ensuring that projects are built in an environmentally responsible manner. Under the existing regulations, approximately 90 percent of FTA's actions are CEs (specifically, sections 771.117(c) and (d)). FTA anticipates the percentage will increase especially where new categorically excluded actions are included (e.g., bus rapid transit projects within existing transportation right-of-way). FTA is not able to quantify the economic effects of these changes because the types of projects that will be proposed for FTA funding and their potential impacts are unknown at this time. But FTA requests comment, including data and information on the experiences of project sponsors, on the likely effects of the changes being proposed.

Regulatory Flexibility Act

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

Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FTA and the FHWA have determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. FTA and the FHWA have also determined that this proposed action would not preempt any state law or state regulation or affect the states’ ability to discharge traditional government functions. We invite state and local

governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on state or local governments.

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

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

National Environmental Policy Act

This proposed action would not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (NEPA). The Council on Environmental Quality regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. Agencies are required to adopt NEPA procedures that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an environmental impact statement; those that normally require preparation of an environmental assessment; and those that are

categorically excluded from further NEPA review (40 CFR 1507.3(b)). CEs are one part of those agency procedures, and therefore establishing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation has been upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), aff'd, 230 F.3d 947, 954-55 (7th Cir. 2000). Finally, the proposed action is intended to streamline the environmental process for reviewing proposed transit projects, including projects that will be environmentally beneficial.

Statutory/Legal Authority for this Rulemaking

This rulemaking is issued under authority of 42 U.S.C. 4321 et seq.; 23 U.S.C. 139; 40 CFR parts 1500-1508; and 49 CFR 1.48(b) & 1.51.

Paperwork Reduction Act

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

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each

year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

Privacy Act

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

Unfunded Mandates Reform Act of 1995

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

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13211 (Energy Effects)

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

Executive Order 13045 (Protection of Children)

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

List of subjects in 23 CFR part 771

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

For the reasons stated in the preamble, the Federal Transit Administration and the Federal Highway Administration propose to amend 23 CFR part 771 as follows:

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303, 5301(e), 5323(b), and 5324; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.48(b) and 1.51.

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

§ 771.105 Policy.

* * * * *

(a) * * * \1\

\1\ FHWA and FTA have supplementary guidance on environmental documents and procedures for their programs. This guidance includes, but is not limited to: FHWA Technical Advisory T6640.8A, October 30, 1987; “SAFETEA-LU Environmental Review Process: Final Guidance,” November 15, 2006; Appendix A of 23 CFR part 450, titled “Linking the Transportation Planning and NEPA Processes”; and “Transit Noise and Vibration Impact Assessment,” May 2006. The FHWA and FTA supplementary guidance, and any updated versions of the guidance, are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7 and on their respective websites at <http://www.fhwa.dot.gov> and <http://www.fta.dot.gov>, or in hard copy by request.

3. Amend §771.109 in paragraph (b) by replacing the misspelled word “contruction” with the word “construction”.

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

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

* * * * *

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

(1) Achieve public participation on proposed projects through activities that engage the public, including public hearings, town meetings, and charettes, and seeking input from the public through the scoping process for environmental review documents. Project milestones may be announced to the public using electronic or paper media (e.g., newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided, pursuant to 49 U.S.C. § 5323(b).

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

(3) Are encouraged to post and distribute materials related to the environmental review process, including but not limited to, NEPA documents, public meeting announcements,

and minutes, through publicly-accessible electronic means, including project websites. Applicants are encouraged to keep these materials available to the public electronically until the project is constructed and open for operations.

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

5. Amend §771.113 by revising paragraph (d) to read as follows:

§ 771.113 Timing of Administration activities.

* * * * *

(d) * * *

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

(2) Paragraph (d)(4) of §771.118 contains an exception for the acquisition of pre-existing railroad right-of-way for future transit use in accordance with 49 U.S.C. 5324(c).

* * * * *

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

§ 771.115 Classes of actions.

* * * * *

(a) * * *

* * * * *

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

* * * * *

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

7. Amend §771.117 by revising the heading of the section and by revising the first sentences of paragraphs (b), (c), and (d) to read as follows:

§ 771.117 FHWA Categorical exclusions.

* * * * *

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

* * * * *

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and §771.117(a) of this regulation and normally do not require any further NEPA approvals by the FHWA.

* * * * *

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

* * * * *

8. Add § 771.118 to read as follows:

§ 771.118 FTA Categorical Exclusions

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

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

- (1) Significant environmental impacts;
- (2) Substantial controversy on environmental grounds;
- (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following FTA CEs meet the criteria for CEs in the CEQ regulation (section 1508.4) and §771.118(a) of this regulation and normally do not require any further NEPA approvals by FTA.

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

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

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

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

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

vehicles, facilities or structures.

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

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

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

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

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

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

(1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).

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

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

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document

on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

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

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

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

9. Amend §771.119 by adding a new paragraph (k) to read as follows:

§ 771.119 Environmental assessments.

* * * * *

(k) For FTA actions: If the applicant selects a contractor to prepare the EA, the contractor's final scope of work for the preparation of the EA will not be determined until the informal scoping process is completed, and the scope of study has been approved by FTA in consultation with the applicant.

10. Amend §771.123 by deleting paragraph (j) and by adding the following sentence at the end of paragraph (d) to read as follows:

§ 771.123 Draft environmental impact statements.

* * * * *

(d)* * *. For FTA actions, the contractor’s final scope of work for the preparation of the EIS will not be determined until scoping has been completed, and the scope of study has been approved by FTA in consultation with the applicant.

11. Amend §771.133 in its final sentence by replacing the word “Administration’s” with the word “FHWA’s” and by adding the following text at the end of the paragraph: “FTA’s approval of an environmental document constitutes its finding of compliance with the requirements of 49 U.S.C. 5323(b) and 49 U.S.C. 5324(b).”

Issued on: March 7, 2012

Peter Rogoff
Administrator
Federal Transit Administration

Victor M. Mendez
Administrator
Federal Highway Administrator

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