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DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA-2012-0092]

FHWA RIN 2125-AF46

FTA RIN 2132-AB04

Environmental Impact and Related Procedures

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

ACTION: Final rule.

SUMMARY: This final rule amends the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) joint procedures that implement the National Environmental Policy Act (NEPA) by enacting a new categorical exclusion (CE) for emergency actions as required by the Moving Ahead for Progress in the 21st Century Act (MAP-21). The final rule modifies the existing lists of FHWA and FTA CEs and expands the existing CE for emergencies to include emergency actions as described in MAP-21 and pursuant to this rulemaking.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background

On July 6, 2012, President Obama signed into law MAP-21 (Pub. L. 112-141, 126 Stat. 405), which contains new requirements that the FHWA and FTA, hereafter referred to as the “Agencies,” must meet in complying with NEPA (42 U.S.C. 4321 et seq.). Section 1315(a) of MAP-21 required the Secretary of Transportation to engage in rulemaking to categorically exclude from the requirements to prepare an environmental assessment (EA) or environmental impact statement (EIS) under 23 CFR part 771, the repair or reconstruction of any road, highway, or bridge damaged by an emergency that is either (1) declared by the Governor of the State and concurred in by the Secretary; or (2) declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) if such repair or reconstruction activity is in the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the declaration; and is commenced within a 2-year period beginning on the date of the declaration. In addition, pursuant to section 1315(b) of MAP-21, the Secretary must ensure that the rulemaking helps conserve Federal resources and protect public safety and health by providing for periodic evaluations to determine whether reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities.

The Agencies published a notice of proposed rulemaking (NPRM) addressing the

section 1315 MAP-21 requirements on October 1, 2012 (77 FR 59875). This final rule makes changes to 23 CFR 771.117(c)(9) and adds 771.118(c)(11) in response to MAP-21's section 1315 requirements and the comments provided during the NPRM comment period.

It should be noted that the Agencies jointly published an NPRM in March 2012 (77 FR 15310) and subsequently a final rule on February 7, 2013 (78 FR 8964), which, among other changes, created section 771.118. The Agencies are calling attention to this new section because it will be referenced throughout this final rule. Section 771.118 contains categorically excluded actions and examples, as well as criteria, for FTA actions. With this revision, section 771.117 applies to FHWA actions, and section 771.118 applies to FTA actions.

It is important to emphasize that the availability of the CEs for emergency actions is subject to the same requirements for the use of any other CE in part 771. First, the CEs, like any other CE in part 771, apply to the Agencies' actions. Second, the use of the emergency-related CEs would include an identification of any unusual circumstances requiring further environmental studies to determine if the CE classification is proper (23 CFR 771.117(b) and 771.118(b)). Examples of unusual circumstances include significant environmental impacts, substantial controversy on environmental grounds, significant impacts on properties protected by 23 U.S.C. 138 / 49 U.S.C. 303 (also known as "section 4(f)" of the Department of Transportation Act) or section 106 of the National Historic Preservation Act (NHPA), or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action (23 CFR 771.117(b)(1)-(4) and 23 CFR 771.118(b)(1)-(4)). Third, the

availability of the CEs does not exempt the applicability of other environmental requirements such as, but not limited to, section 7 of the Endangered Species Act (ESA), section 106 of NHPA, section 404 permits under the Clean Water Act (CWA), 23 U.S.C. 138 / 49 U.S.C. 303 (section 4(f)), and bridge permits under the General Bridge Act of 1946. These requirements must be met regardless of the applicability of the CE under NEPA. Some of these requirements may involve major Federal actions for other Federal agencies (e.g., approvals or issuance of permits) that would trigger a different NEPA process for those Federal agencies. Early coordination amongst the applicants and the Federal agencies is highly recommended to prevent a conflict in the Federal agencies' NEPA, permitting, and other review processes.

Fourth, the action must comply with NEPA requirements relating to connected actions and segmentation (see, e.g., 40 CFR 1508.25 and 23 CFR 771.111(f)). The Agencies recognize the importance of ensuring that projects are not improperly segmented. The action must have independent utility, connect logical termini when applicable (i.e., linear facilities), and not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. Finally, a CE may not be established if the action normally has significant environmental impacts either individually or cumulatively and may not be applied to a proposed action if there are unusual circumstances. For example, a CE may not be used if the action induces significant impacts to planned growth or land use for the area; requires the relocation of significant numbers of people; has significant impacts on any natural, cultural, recreational, historic, or other resource; involves significant air, noise, or water quality impacts; or has significant impacts on travel patterns (23 CFR 771.117(a) and 23 CFR

771.118(a)).

Notice of Proposed Rulemaking

The October 1, 2012, NPRM proposed to expand 23 CFR 771.117(c)(9) with a new subsection (ii) that provided for “[t]he repair or reconstruction of any road, highway, or bridge that is in operation or under construction when damaged by an emergency declared by the Governor of the State and concurred in by the Secretary, or for a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121) if the repair or reconstruction activity is: (A) [i]n the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the declaration, and (B) [c]ommenced within a 2-year period beginning on the date of the declaration” (77 FR 59878). In addition to the proposed CE language, the NPRM sought comments on whether the emergency activities categorically excluded under the revised CE should also include the following: (1) construction of engineering and design changes to a damaged facility to meet current design standards; (2) repair and reconstruction of adjacent transportation facilities within the right-of-way damaged by the emergency (such as bike paths or ancillary structures); (3) construction of betterments to the damaged facilities beyond those eligible under 23 U.S.C. 125; (4) construction of engineering and design changes to a damaged facility for the purpose of seismic retrofitting; (5) construction of engineering and design changes to a damaged facility to deal with future extreme weather events and sea level rise; and (6) construction of other engineering and design changes to a damaged facility to address concerns such as safety and environmental impacts.

The NPRM also sought comment on whether the CE should include actions to

repair, reconstruct, or replace a facility that has experienced catastrophic failure regardless of cause. Catastrophic failure was described as the sudden and complete failure of a major element or segment of the facility that causes a devastating impact on transportation services.

Additionally, the NPRM requested comments on approaches to addressing section 1315(b) of MAP-21. Specifically, the Agencies requested comments on a proposal to address the requirements of this section in future rulemakings required by other provisions of MAP-21. Section 1106 of MAP-21 amends 23 U.S.C. 119 by requiring State departments of transportation (State DOTs) to develop risk-based asset management plans. The MAP-21 also created several new transit programs under chapter 53 of title 49 U.S. Code. The Agencies requested comments on several questions related to the periodic evaluation requirements in section 1315(b).

The comment period for the NPRM closed on November 30, 2012, and additional comments were received on December 3, 2012. All comments were considered in the development of this final rule.

Summary Discussion of Comments Received in Response to the NPRM

Comments were received from 12 State DOTs, 7 public interest groups, 4 transit agencies, and 2 Federal agencies. Commenters provided 111 comments on the NPRM, which were organized thematically and according to whether the comment addressed section 1315(a) or section 1315(b) of MAP-21, or were general comments.

General Comments

Comments generally were supportive of the proposed rulemaking. Commenters offered specific comments to the statutory language adopted from section 1315(a) of

MAP-21; provided input on the disposition of section 1315(b); commented on the six actions proposed for inclusion in the CE; and proposed revised language for consideration in the final rule. Eleven State DOTs, six public interest groups, one rail agency, and three transit agencies provided comments on the six additional activities listed in the NPRM for comment (see Section-by-Section Discussion of Comments below). The commenters indicated support for one or more of the listed activities. Seven State DOTs, three public interest groups, and two transit agencies expressed support for all six proposed activities.

Regarding section 1315(b), one public interest group and seven State DOTs commented on the NPRM that they agreed that the periodic evaluations should be part of risk-based asset management plans developed by the State. The Agencies agree with this proposal and are addressing the periodic evaluations required under MAP-21 section 1315(b) through a rulemaking implementing section 1106 of MAP-21 and through changes to implement the new programs authorized by MAP-21. As discussed in the Section-by-Section Discussion of Comments below, the Agencies relied on section 1315(b)'s requirement to "ensure that the rulemaking helps conserve Federal resources and protect public safety and health" in making improvements to the final CE.

One commenter commented that "once an event is determined to qualify for CE status, this decision should be treated as permanent and not subject to subsequent reconsideration." All NEPA decisions under 23 CFR 771.117 are subject to compliance with sections 771.117(b) and 771.129(c). The NEPA decisions under 23 CFR 771.118 are subject to compliance with sections 771.118(b) and 771.129(c). The final rule does not eliminate these requirements. Additional review resulting from unusual

circumstances may warrant changes to the type of environmental review for a particular proposed project to ensure the Agencies provide the appropriate degree of consideration for environmental impacts resulting from proposed actions.

One commenter recommended that the Agencies establish a flexible process for determining when CEs should be used rather than relying on a constraining list of activities eligible for CEs. The commenter also suggested providing set time limits on a project-by-project basis for the completion of NEPA. The final rule does not include either suggestion; the ideas proposed by the commenter fall outside the scope of this rulemaking.

Section-by-Section Discussion of Comments

Authorities for 49 CFR part 622

No comments were received on this proposed change. The amendment will add a reference to MAP-21 and section 1315 of that statute. The FTA had considered adding a reference to section 20017 of MAP-21, which created the new FTA Emergency Relief program. Since that time, FTA has determined that section 20017 does not provide authority for the CE being added by this rulemaking and is not needed for part 622. For information on the Agencies' authority for this rulemaking, see the section entitled "Statutory/Legal Authority for this Rulemaking" below.

Authorities for 23 CFR part 771

No comments were received on this change. The amendment will add a reference to MAP-21 and section 1315 of that statute. The FHWA had considered adding a reference to section 1106 of MAP-21, which created the requirement for risk-based asset management plans. Since that time, FHWA has determined that section 1106 does not

provide authority for the CE language being added by this rulemaking and is not needed for part 771. For information on the Agencies' authority for this rulemaking, see the section entitled "Statutory/Legal Authority for this Rulemaking" below.

Section 771.117(c)(9)

Three public interest groups, one rail agency, six State DOTs, and two transit agencies commented that the final rule should include language that expands the CE to cover catastrophic failures regardless of cause. One commenter specifically noted that a scenario could occur where there is a catastrophic failure of a major bridge or tunnel from a disaster that does not rise to the level of an emergency declared by the Governor and concurred in by the Secretary, or a disaster or emergency declared by the President under the Stafford Act. One commenter noted that "the effects of catastrophic failures to public safety and transportation are essentially the same as emergencies, and the need to quickly and safely repair the failures remains the same." The commenter encouraged the Agencies to define all qualifying terms such as "sudden and complete failure" and "devastating impact" to account for different temporal and spatial scales. For example, "a bridge may be rendered unusable due to river scouring over several months without the bridge completely collapsing; the impact of such a bridge failure would be devastating to the public and the economy in many areas" of a State.

The Agencies have decided to limit the CE language to the same circumstances that would trigger the FHWA and FTA emergency relief programs. Under the Agencies' emergency relief programs, the damage to the facility must have been caused by a natural disaster or a catastrophic failure from an external cause. Limiting the new CE language to the same circumstances that trigger the emergency relief programs would ensure

consistency. It also will avoid the need to create a separate and independent process for the Secretary's concurrence with a Governor's emergency declaration for catastrophic failures that do not qualify for the emergency relief programs.

The Agencies are amending section 771.117(c)(9) by adding the introductory phrase “[t]he following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121).” This introductory phrase clarifies that all the actions covered in the amended and new CE language must be the result of the Agencies’ (or their applicants or recipients’) efforts to restore surface transportation in the aftermath of Presidentially declared emergency or disasters, or emergencies declared by the Governor of a State and concurred in by the Secretary.

This introductory language also is included in 23 CFR 771.118(c)(11) with the same intent. As mentioned above, categorically excluded FTA actions are now found at 23 CFR 771.118. Through this final rule, FTA is incorporating the new emergency CE established pursuant to section 1315 of MAP-21 by adding a new CE at section 771.118(c)(11) that is equivalent to the CE applicable to FHWA found at 23 CFR 771.117(c)(9). This new CE covers emergency repairs under 49 U.S.C. 5324 for public transportation infrastructure “damaged by an incident resulting in an emergency declared by the Governor of the State and concurred by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121).”

Section 771.117(c)(9)(i)

One public interest group and three State DOTs expressed a desire to maintain the

CE currently found in 23 CFR 771.117(c)(9) to ensure that flexibility is maintained with the final rule to continue categorically excluding emergency repairs under 23 U.S.C. 125, the FHWA Emergency Relief Program.

The Agencies continue to believe that “emergency repairs” do not typically result in significant environmental impacts. “Emergency repairs” are defined in the FHWA Emergency Relief Program regulations as “[t]hose repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1)[m]inimizing the extent of damage, (2) [p]rotecting remaining facilities, or (3) [r]estoring essential traffic” (23 CFR 668.103). The original language in section 771.117(c)(9) is retained as new paragraph (c)(9)(i) to continue covering these types of actions. The CE language for emergency repairs under 23 U.S.C. 125 was not carried forward to section 771.118(c)(11), however, due to its lack of applicability to FTA actions.

Section 771.117(c)(9)(ii)

One rail agency and three public interest groups commented on the section 1315(a) language noting that the language was overly restrictive and should be expanded to include infrastructure components specific to rail and transit infrastructure. One commenter proposed specific language to amend section 771.117(c)(9)(ii) to read “[t]he repair or reconstruction of any road, highway, bridge, or transit facility that is in operation or under construction...” and to amend proposed 23 CFR 771.117(c)(9)(ii)(A) to read “[i]n the same location with the same capacity, dimensions, and design as the original road, highway, bridge, or transit facility as before the declaration...” Another commenter proposed adding railroad right-of-way, railroad bridge, or railroad tunnel to

proposed 23 CFR 771.117(c)(9)(ii)(A). Another commenter recommended clarification of the wording to include “critical transportation infrastructure including but not limited to any road, highway, rail, bridge, tunnel, or dock...”

The Agencies added the term “transit facility” to the list of transportation facilities that are subject to the new CE language at sections 771.117(c)(9)(ii) and 771.118(c)(11)(ii). The addition of this term expands the CE language to include the emergency repair or reconstruction of all transit facilities following an emergency or disaster, not just those that are co-located on roads or highways. The term “transit facility” includes rail transit and components of ferry terminals and systems, such as docks, piers, platforms, pedestrian loading structures, and ticketing facilities. This addition goes further than the list of transportation facilities provided in section 1315 of MAP-21. Documentation supporting this expansion is discussed below.

The final rule also adds section 771.118(c)(11)(i) to cover emergency repairs pursuant to 49 U.S.C. 5324. This addition will cover activities under the Public Transportation Emergency Relief Program (49 U.S.C. 5324) created by section 20017 of MAP-21. The types of activities covered (i.e., emergency repair of transit facilities) are analogous to the activities covered by the existing CE for emergency repairs in FHWA’s Emergency Relief Program.

To support the inclusion of public transportation infrastructure in sections 771.117(c)(9) and 771.118(c)(11), FTA revisited and cross-referenced the substantiation record for FTA’s March 2012 NEPA NPRM (Docket No. FTA-2011-0056-0002), which proposed a new list of CEs for FTA (77 FR 15310 (Mar. 15, 2012)). A substantiation record summary is provided in the docket for this rulemaking. The FTA also identified

new supporting documentation, which includes, but is not limited to: the FTA documented CEs and Findings of No Significant Impact for past disaster-related projects, and for repair and reconstruction projects for transit facilities. The FTA also utilized comparative benchmarking, which provides support for the additional CE language by using the experience of other Federal agencies that conduct actions of similar nature, scope, and intensity. Although some of the actions covered by this added language might be covered by other CEs listed in sections 771.117 and 771.118, there is value in adding this CE language specifically for the FTA's Emergency Relief Program for ease of application when a practitioner is faced with emergency or disaster-related actions.

One commenter indicated that it was not clear why bridges are specifically mentioned, but other critical infrastructure such as tunnels and docks were not included. The commenter recommended wording to add tunnels and docks.

As discussed above, the term "transit facility" includes rail transit and components of ferry terminals and systems, such as docks, piers, platforms, pedestrian loading structures, and ticketing facilities. The Agencies have included "tunnels" in the list of transportation facilities covered by the CE language. Damaged tunnels can result in as much traffic and transit disruption as damaged bridges and therefore, deserve similar consideration. The types of tunnel-related actions necessitated by emergencies include dewatering to remove flood waters; repairs to electrical and mechanical systems; repairs to suspended ceilings and to ceiling or wall tiles; and, for highway tunnels, repairs to pavement. The environmental impacts from these types of actions would be similar for both highway and transit tunnels. Highway and transit tunnels are structurally and functionally similar, although design details and equipment are different because a tunnel

is designed to address the operating needs of the mode(s) the tunnel serves. For example, the air vent system for a highway tunnel typically would be more extensive than for a tunnel serving only transit, but repairs performed on highway tunnel air vents within the right-of-way would not be expected to have significant environmental effects. In the Agencies' experience, the level of impacts for these actions is typically not significant because the actions are limited to the existing right-of-way and must substantially conform to the preexisting design, function, and location of the original facility.

The CEs would only cover the repair, reconstruction, retrofit, or replacement of an existing tunnel as long as it occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original. Including those conditions in the text of the CE ensures its applicability does not extend to construction of new tunnels. There may be situations when the nature of the damage to a tunnel (e.g., complete collapse) or the activity needed (e.g., substantial reconstruction or replacement) would warrant careful consideration of unusual circumstances. In these situations, the reviewer must determine if further environmental studies are needed to determine if the CE classification is proper or if a different class of NEPA review is warranted.

In response to the six questions noted below, seven State DOTs, three public interest groups, and one transit agency commented overall on the questions and proposal, stating that the Agencies needed to allow for flexible interpretation of the language in section 1315(a) of MAP-21. A specific concern with section 1315(a) was that the language could preclude use of the CE for projects that meet current design standards. The commenters encouraged an interpretation of this language to mean that the project

meets the “present-day equivalent of the original design standards for the facility.” One commenter specifically noted that they have experienced frequent emergency projects in recent years with extreme weather events that “bring high rainfall and runoff rates, as well as tidal surges that lead to river and marsh flows over top of roads, bridges and culverts.” The commenter noted this has resulted in washed out pipe culverts and collapse of the roadways over the culverts. The commenter also reported experience with pavement and long-term road closures due to storm surge events on coastal roadways resulting in interruption of travel and evacuation routes. The commenter noted that in-kind replacements guarantee repeat failures and are a waste of taxpayer money. In addition, another commenter noted that the Federal Emergency Management Agency (FEMA) includes some of the proposed activities as a CE under 44 CFR 10.8(d)(2)(xv) (FEMA CE (xv)) for the “[r]epair, reconstruction, restoration, elevation, retrofitting, upgrading to current codes and standards, or replacement of any facility in a manner that substantially conforms to the preexisting design, function, and location.”

The Agencies agree with these comments. Upgrades to current codes and standards can avoid repetitive damage to transportation facilities and can also help protect public safety and health. Additionally, in certain situations, environmental conditions have changed to a degree that would warrant consideration of more protective measures than the existing codes and standards. Allowing these actions for damaged facilities is consistent with MAP-21’s section 1315(b) requirement that the Secretary ensure the rule helps conserve Federal resources and protect public safety and health.

The Agencies have relied on their past experience as well as on benchmarking CEs covering similar activities, such as on the FEMA CE (xv) (44 CFR 10.8(d)(2)(xv)), to

modify the language originally proposed in 23 CFR 771.117(c)(9)(ii) of the NPRM for the final rule. The FEMA's CE is explicitly for "[r]epair, reconstruction, restoration, elevation, retrofitting, upgrading to current codes and standards, or replacement of any facility in a manner that substantially conforms to the preexisting design, function, and location." The final rule modifies the proposed 23 CFR 771.117(c)(9)(ii) language and establishes 771.118(11)(ii) to read, "[t]he repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action: (A) [o]ccurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and [i]s commenced within a 2-year period beginning on the date of the declaration." The Agencies' repair, reconstruction, restoration, retrofit, and replacement actions are similar to FEMA's actions of Federal financial assistance for transportation facilities. The Agencies' and FEMA's actions are typically carried out as permanent work that is eligible under a post-disaster assistance program. The only difference between a FEMA-funded and a FHWA- or FTA-funded repair, reconstruction, restoration, retrofit, or replacement of road, bridge, or transit facility is the funding source. The nature and typical level of impacts are similar, particularly when the actions substantially conform to the preexisting design, function, and location. In the Agencies' experience the level of impacts for these actions are typically not significant because the

actions are limited to the existing right-of-way and must substantially conform to the preexisting design, function, and location of the original facility. This is consistent with FEMA's availability and use of FEMA CE (xv) and a review of FEMA's publicly available NEPA documents. A substantiation record summary based on benchmarking is provided in the docket for this rulemaking.

The term "reconstruction" means the demolition and rebuilding of a damaged facility, or part of a damaged facility, within the same footprint of the original. The term "retrofitting" refers to the addition of elements to a damaged facility to extend the life of the facility or to conform to a protective measure (e.g., earthquake retrofit, measure to reduce flood vulnerability, safety). The term "replacement" is meant to capture situations where a comparable facility is needed. These actions are covered by the new CE language as long as they occur within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original.

The phrase "substantially conforms to the preexisting design, function, and location" is used to limit the amount of ground disturbance or resource impact. The phrase "substantially conforms" allows for some deviation from the original footprint, design, and function, but does not allow construction of a facility that is substantially different in nature. This addition goes beyond the language provided in section 1315 of MAP-21, but is consistent with the Agencies' practice in funding these actions. Work is restricted to the area within the existing right-of-way as an additional measure to limit the likelihood of potential impacts to protected resources. The phrase "which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction" allows for the restoration of

the facility taking into account up-to-date codes and standards, but also allows for situations where restoration should accommodate changed conditions. For example, new flood risk information could be taken into account in the design of the transportation facility even when the community has not adopted a higher floodplain code. Another example is when the reconstruction of water crossing presents an opportunity to address fish passage concerns. In these situations conditions have changed since the original construction that may warrant a construction approach that goes beyond existing codes and standards. As previously noted, even if the new CE language applies, the Agencies must comply with the requirements of other environmental laws (e.g., section 106 under NHPA, section 404 of the CWA, 23 U.S.C. 138 / 49 U.S.C. 303 (section 4(f)), section 7 under ESA, bridge permits under the General Bridge Act of 1946) to address impacts in those unique situations where protected resources are present in the existing right-of-way.

The language in the final rule addresses the six additional activities proposed in the NPRM and comments received from the public on the inclusion of these activities. Below is a discussion of comments received on each of the proposed additional activities and how the final rule language reflects modifications to the proposal in response to these comments.

(1) Construction of engineering and design changes to a damaged facility to meet current design standards

One commenter expressed support for including this activity as a CE, noting that FEMA includes this activity as a CE under 44 CFR 10.8(d)(2)(xv), which allows for a CE for the “[r]epair, reconstruction, restoration, elevation, retrofitting, upgrading to current codes and standards, or replacement of any facility in a manner that substantially

conforms to the preexisting design, function and location.” Others commented in support of this provision with one noting that “this provision would help to ensure that emergency repair projects can qualify for a CE when they are designed to meet current standards.”

The Agencies agree with these comments and modified the proposed language in the NPRM. The new sections 771.117(c)(9)(ii) and 771.118(c)(11)(ii) provide for the “repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action: (A) [o]ccurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and [i]s commenced within a 2-year period beginning on the date of the declaration.” A substantiation record summary which includes benchmarking FEMA’s CE(xv), is provided in the docket for this rulemaking.

(2) Repair and reconstruction of adjacent transportation facilities within the right-of-way damaged by the emergency (such as bike paths or ancillary structures):

One commenter noted that “adjacent facilities often are affected by emergencies and are in need of emergency repairs at the same time primary facilities are repaired. Not repairing adjacent facilities may expose the primary facility to further damage and increase the risk of repeated failure.” Another commenter noted that many of the listed activities are already covered under 23 CFR 771.117(c) and expressed support for including this activity in the CE. One commenter recommended inclusion of

“transportation facilities and infrastructure damaged by the emergency” in this provision.

The Agencies agree with these comments and have included ancillary transportation facilities in the final CE language. Ancillary transportation facilities, such as pedestrian/bicycle paths, bike lanes, and streetscape, contribute to the function of the road, highway, bridge, tunnel, or transit facility and are co-located to provide for the overall functioning of the transportation system network. Permanently repairing such adjacent facilities that previously existed or are under construction at the time of the incident and are co-located with the primary transportation facility ensures that already approved transportation facilities are fully replaced and provides for the complete functioning of the transportation network damaged by the incident. With this change, the CE language would cover the whole project when the restoration of the road, highway, bridge, tunnel, or transit facility includes repairing damaged ancillary facilities. In the Agencies’ experience, the level of impacts of restoring damaged ancillary transportation facilities is typically not significant when they are limited to the existing right-of-way and must substantially conform to the preexisting design, function, and location of the original facility. This is consistent with FEMA’s availability and use of FEMA CE (xv) and a review of FEMA’s publicly available NEPA documents. A substantiation record summary based on benchmarking is provided in the docket for this rulemaking.

(3) Construction of betterments to the damaged facilities beyond those eligible under 23 U.S.C. 125;

Two commenters noted that inclusion of betterments would provide the opportunity to address scenarios where a culvert affected by an emergency is too small to handle the current debris flows. Inclusion of betterments would provide opportunities to

install appropriately sized culverts and to armor bridge abutments as part of permanent repairs resulting from an emergency and help reduce long-term environmental impacts by reducing the frequency of catastrophic failure. One commenter stated that some betterments are minor activities, such as installation of riprap or raising the elevation of the roadway, and that these activities may add to the safety and life expectancy of the facility. One commenter noted that many betterments are already listed CEs. Additionally, other commenters expressed concerns about the lack of specificity as to what constituted betterments beyond those eligible under 23 U.S.C. 125.

The FHWA defines “betterments” as “[a]dded protective features, such as rebuilding of roadways at a higher elevation or the lengthening of bridges, or changes which modify the function or character of a highway facility from what existed prior to the disaster or catastrophic failure, such as additional lanes or added access control” (23 CFR 668.103). Under the FHWA Emergency Relief Program, betterments are eligible for Federal assistance if they are economically justified in accordance with 23 CFR 668.109(b)(6). Betterments may add protective features within the right-of-way such as rebuilding roadways at a higher elevation, installation of riprap, raising bridges, increasing the size of drainage structures, installation of seismic retrofits on bridges, and adding scour protection at bridges. Betterments may also add protective features that do not take place in the right-of-way such as relocating roadways or stabilizing slide areas. Another group of betterments involve the change of function or character of the transportation facility such as adding grade separations and improving access control. Upgrades to current codes and standards are eligible actions but are not considered to be “betterments.” The FTA does not currently use the term “betterments.”

The Agencies believe that they do not need to specifically call out “betterments” in the new CE language because it is not a term of art that is used in the FTA Emergency Relief Program. The Agencies agree that the new CE language can include some improvements on the original project or facility that was damaged, particularly if they help conserve Federal resources and protect public safety and health (see MAP-21 sec. 1315(b)). Therefore, improvements that are related to the covered activities (i.e., repair, reconstruction, restoration, retrofitting, or replacement) and that meet the specified conditions (i.e., occur within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original) are covered by the new CE language. For example, enlarging a culvert or armoring activities may be covered if they are needed for the upgrade of the facility to current codes, conditions, and standards.

One commenter specifically commented that betterments “may either deliberately or inadvertently facilitate increased traffic capacity and/or cause significant ground disturbance in previously undisturbed areas. These actions could significantly impact archaeological properties, historic facilities (such as the road or bridge needing repair), or a historic district that surrounds or is adjacent to the facility needing repair” and noted that compliance with 36 CFR part 800 typically is required for actions of this type. The commenter acknowledged that a CE does not equate to a waiver of section 106 requirements, but thought that confusion may result on the part of agencies responsible for fulfilling NEPA requirements on the project. The commenter recommended that the final rule clarify that the CE does not exempt the Agencies from other regulatory requirements and should “specify extraordinary circumstances as an integral element of

the categorical exclusion to ensure that where appropriate, the presence of historic properties may require a more extensive environmental review under NEPA.”

The Agencies agree with the comment. The Agencies have clarified throughout the preamble of this final rule the requirement for consideration of unusual circumstances, which give rise to the potential for significant impacts on properties protected by 23 U.S.C. 138/49 U.S.C. 303 (section 4(f)) or section 106 of NHPA (sections 771.117(b)(3) and 771.118(b)(3)), when applying the CE to a proposed action. The Agencies also acknowledge the need for compliance with other environmental requirements in addition to NEPA. Finally, through the language in this final rule, the Agencies are applying this CE only to those improvements that are part of the reconstruction, retrofit, or replacement action when they occur within the existing right-of-way and substantially conform to the pre-existing design, function, and location as the original.

(4) Construction of engineering and design changes to a damaged facility for the purpose of seismic retrofitting;

One commenter suggested broadening this provision to allow for seismic retrofitting prior to a natural disaster or structure failure in addition to seismic retrofitting following an event that caused damage in order to extend the life of the facility. The commenter noted that seismic retrofitting to prevent damage might result in less damage to the environment than waiting to perform seismic retrofitting activities after damage has occurred. Another commenter expressed support for inclusion of seismic retrofitting activities in the CE.

Seismic retrofits of a damaged facility (i.e., road, highway, bridge, tunnel, transit

facility, or ancillary transportation facility) would be covered by the new CE language. The new CE language specifically addresses the need for expediency in the restoration of transportation infrastructure damaged by qualifying events and to capitalize on the opportunity created by these events to incorporate resiliency principles in these restoration activities. Incorporation of resiliency principles would help conserve Federal resources by avoiding repetitive damage to these facilities as a result of similar disasters and to avoid significant damage from other potential hazards. The Agencies agree that improving surface transportation facilities before a disaster strikes is the ideal approach. Seismic retrofits prior to a disaster are outside the scope of section 1315(a) of MAP-21 and this regulation. However, the Agencies note that there are other CEs in 23 CFR part 771 that could be relied upon to make improvements to a transportation facility prior to a disaster such as 23 CFR 771.117(c)(12), (c)(8), (d)(1), (d)(2), and (d)(3) for FHWA actions and 23 CFR 771.118(c)(1), (c)(2), (c)(8), (d)(1), and (d)(6) for FTA actions.

(5) Construction of engineering and design changes to a damaged facility to deal with future extreme weather events and sea level rise;

One commenter expressed support for inclusion of this provision and provided an example of improvements made to a bridge, and processed as a CE, that allowed for improvements to the bridge as part of emergency repairs that increased the likelihood of the structure withstanding the stresses of future extreme weather events. The commenter also provided other examples of roadways that were improved to accommodate future storm events after being washed out. Another commenter expressed support of this provision and noted that recent severe storm events on the East Coast underscore the importance of providing flexibility to States to easily update infrastructure design to

upgrade facilities after storm events to accommodate future storm events.

The Agencies agree that the new CE language should allow for some improvements on the original transportation facility based on the Agencies' experience with past actions, consideration of FEMA's experience with its CE (xv), and the determination that those types of improvements do not typically have a significant effect on the environment. Changes to a damaged facility that are related to the covered activities (i.e., repair, reconstruction, restoration, retrofitting, or replacement) and that meet the specified conditions (i.e., occur within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original) are covered by the new CE language. The phrase "substantially conforms to the preexisting design, function, and location" is used to limit the amount of ground disturbance or resource impact. The phrase "substantially conforms" allows for some deviation from the original footprint, but does not allow construction of a facility that is substantially different in nature. Improvements that are not covered by the new CE language may be covered by other CEs in 23 CFR part 771 such as 23 CFR 771.117(c)(12), (c)(8), (d)(1), (d)(2), and (d)(3) for FHWA actions and 23 CFR 771.118(c)(1), (c)(2), (c)(8), (d)(1), and (d)(6) for FTA actions.

One commenter raised concerns about the potential impacts of these types of actions on the human environment. The commenter provided that, as an example, projects covered by this provision could involve potential relocation of infrastructure to accommodate sea level rise. One commenter proposed inclusion of additional text should the final rule include the six proposed additional activities: "(7) Modifications to the design or betterments to a damaged facility shall be a CE if such changes do not expand

the footprint of the facility or have negative environmental impacts that would be greater than a reconstruction without such modifications or betterments.”

The Agencies agree that some actions under the proposed activity could raise environmental impact concerns, which is one of the reasons for consideration of unusual circumstances prior to applying the CE. In the Agencies’ experience the level of impacts for these actions is normally not significant. The Agencies have created restrictions that limit the amount and level of environmental impacts, including impacts on the human environment. The phrase “substantially conforms to the preexisting design, function, and location” is used to limit the amount of ground disturbance or resource impact. The phrase “substantially conforms” allows for some deviation from the original footprint, but does not allow construction of a facility that is substantially different in nature. In addition, work is restricted to the area within the existing right-of-way as an additional measure to limit impacts to protected resources. The proposed actions must continue to meet the requirements of other environmental laws (e.g., section 106 under NHPA, section 404 of CWA, 23 U.S.C. 138/49 U.S.C. 303 (section 4(f)), section 7 under ESA, bridge permits under the General Bridge Act of 1946) when protected resources are present in the existing right-of-way. The additional safeguards provided under other applicable laws and regulations provide further assurance that the activities included in the new FHWA and FTA CEs do not have the potential to result in significant impacts on the human environment. This is consistent with FEMA’s availability and use of FEMA CE (xv) and a review of FEMA’s publicly available NEPA documents. A substantiation record summary based on benchmarking is provided in the docket for this rulemaking.

(6) Construction of other engineering and design changes to a damaged facility to

address concerns such as safety and environmental impacts.

Two commenters supported allowing proactive approaches to natural hazards under the emergency repairs CE, like design and engineering changes to address earthquakes, extreme weather events, sea level rise, and other safety and environmental impacts. One commenter stated that including these activities in the CE will allow States and transit agencies to reduce the impact of future emergency events, rather than limiting the agencies' efforts merely to reacting to emergencies. One commenter expressed support for this provision noting the example modifications to a roadway following a washout event that provided the opportunity for the State DOT to modify the roadway revetment and protect sea turtle nesting habitat. One commenter noted that these activities should be expanded to include transit related infrastructure.

The final CE language in sections 771.117(c)(9)(ii) and 771.118(c)(11)(ii) includes engineering and design changes to address safety and environmental impacts as long as they are related to the covered activities (i.e., repair, reconstruction, restoration, retrofitting, or replacement) and meet the specified conditions (i.e., occur within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original). As discussed above, the final language includes “transit facilities” in the infrastructure covered by the new CE language.

Statutory/Legal Authority for this Rulemaking

The Agencies derive explicit authority for this rulemaking action from 49 U.S.C. 322, which provides authority to “[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.” That authority is delegated to the Agencies through 49 CFR 1.81(a)(3), which provides that the authority

to prescribe regulations contained in 49 U.S.C. 322 is delegated to each Administrator “with respect to statutory provisions for which authority is delegated by other sections in [49 CFR Part 1].” Included in 49 CFR Part 1, specifically 49 CFR 1.81(a)(5), is the delegation of authority with respect to NEPA, the statute implemented by this final rule. Moreover, the Council on Environmental Quality regulations that implement NEPA provide at 40 CFR 1500.6 that “[a]gencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of [NEPA].”

Rulemaking Analyses and Notices

The Agencies considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket at the above address. The Agencies also considered comments received after the comment closing date and filed in the docket prior to this final rule.

Immediate Effective Date

The Agencies have determined that this rule be made effective immediately upon publication. The Administrative Procedure Act (5 U.S.C. 553(d)) requires that a rule be published 30 days prior to its effective date unless one of three exceptions applies. One of these exceptions is when the agency finds good cause for a shorter period. Here, the Agencies have determined that “good cause” exists for immediate effectiveness of this rule because this rule is expected to apply in many cases that address the immediate need to fund repairs of transit systems facilities and equipment damaged by Hurricane Sandy. Hurricane Sandy affected mid-Atlantic and northeastern States in October 2012, and particularly devastated transit operations in New Jersey and New York. These operations

serve about 40 percent of all transit riders in the country. With Congress' passage of supplemental appropriations, Pub. L. 113-2, that fund FTA's Emergency Relief Program authorized at 49 U.S.C. 5324, immediate promulgation of the categorical exclusion for actions under that program will expand the FTA's ability to support much needed Hurricane Sandy recovery efforts and process these new funding requests in an expeditious manner, while still ensuring that the environment is protected. Thus, it is in the public interest for this final rule to have an immediate effective date. The Agencies acknowledge that although the justification for making this rule immediately effective stems from the need for transit recovery actions in response to Hurricane Sandy, the revisions contained within this final rule will be immediately applicable to a broader suite of the Agencies' funded and approved projects.

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 nor would it be significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impact of this rulemaking would be minimal. The changes that this rule

proposes are requirements mandated by MAP-21 increase efficiencies in environmental review by making changes in the Agencies' environmental review procedures.

The activities this final rule adds to sections 771.117(c)(9) and 771.118(c)(11), which are described in section 1315(a), are inherently limited in their potential to cause significant environmental impacts because the use of the CEs is subject to the unusual circumstances provision in 23 CFR 771.117(b) and 23 CFR 771.118(b), respectively. These provisions require appropriate environmental studies, and may result in the reclassification of the NEPA evaluation of the project to an EA or EIS, if the Agencies determine that the proposal involves potentially significant or significant environmental impacts. These changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

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

result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the Agencies have determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this action will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The NPRM invited 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. No comments on this issue were provided by State or local governments.

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, dated November 6, 2000, and believe that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal

governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs and were carried out in the development of this rule.

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12898 (Environmental Justice)

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

The Agencies have evaluated the CE under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies have determined that the designation of the new CE for emergency actions through this rulemaking will not cause disproportionately high and adverse effects on minority or low income populations. The rule simply adds a provision to the Agencies’ NEPA procedures under which they may decide in the future that a project or program does not require the preparation of an EA or

EIS. The rule itself has no potential for effects until it is applied to a proposed action requiring approval by the FHWA or FTA.

At the time the Agencies apply the CE established by this rulemaking, the Agencies have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance. The adoption of this rule does not affect the scope or outcome of that EJ evaluation. Nor does the new rule affect the ability of affected populations to raise any concerns about potential EJ effects at the time the Agencies consider applying the new CE. Indeed, outreach to ensure the effective involvement of minority and low income populations in the environmental review process is a core aspect of the EJ orders and guidance. For these reasons, the Agencies also have determined no further EJ analysis is needed and no mitigation is required in connection with the designation of the CE for emergency actions.

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish

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

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 771

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

49 CFR Part 622

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

In consideration of the foregoing, the FHWA and FTA amend 23 CFR part 771 and 49 CFR part 622 as follows:

TITLE 23

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES.

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

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303; 40 CFR Parts 1500-1508; 49 CFR 1.81, 1.85; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, section 1315.

2. Amend § 771.117 by revising paragraph (c)(9) to read as follows:

§ 771.117 FHWA categorical exclusions.

* * * * *

(c) * * *

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

- (i) Emergency repairs under 23 U.S.C. 125; and
- (ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

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

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

* * * * *

3. Amend § 771.118 by adding paragraph (c)(11) to read as follows:

§ 771.118 FTA categorical exclusions.

* * * * *

(c) * * *

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

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

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

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

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

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Title 49

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

4. The authority citation for subpart A is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303; 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81, 1.85; and Pub. L. 112-141, 126 Stat. 405, section 1315.

Issued on: February 8, 2013

Victor M. Mendez

Federal Highway Administrator

Peter Rogoff

Federal Transit Administrator

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