



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

#### **49 CFR Part 602**

**[Docket No. FTA-2013-0004]**

**RIN 2132-AB13**

#### **Emergency Relief Program**

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

**ACTION:** Final Rule.

**SUMMARY:** This final rule establishes procedures governing the implementation of the Federal Transit Administration's (FTA) Public Transportation Emergency Relief Program as authorized by the Moving Ahead for Progress in the 21<sup>st</sup> Century Act.

**DATES:** This final rule becomes effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For program issues: Adam Schildge, Office of Program Management, 1200 New Jersey Ave., S.E., room E44-420, Washington, DC 20590, phone: (202) 366-0778, or e-mail, [Adam.Schildge@dot.gov](mailto:Adam.Schildge@dot.gov). For legal issues: Bonnie Graves, Office of Chief Counsel, same address, room E56-306, phone: (202) 366-4011, or e-mail, [Bonnie.Graves@dot.gov](mailto:Bonnie.Graves@dot.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21, Pub. L. 112-141) authorized the Public Transportation Emergency Relief Program at 49 U.S.C. 5324. The

Emergency Relief Program allows FTA, subject to the availability of appropriations, to make grants for eligible public transportation capital and operating costs in the event of a catastrophic event, such as a natural disaster, that affects a wide area, as a result of which the Governor of a State has declared an emergency and the Secretary of Transportation has concurred, or the President has declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, 42 U.S.C. 5121-5207).

The Disaster Relief Appropriations Act, 2013 (Pub. L. 113-2), enacted on January 29, 2013, provides \$10.9 billion for FTA's Emergency Relief Program solely for recovery, relief and resilience efforts in areas affected by Hurricane Sandy. The law required FTA to issue interim regulations (an interim final rule) for the Emergency Relief Program, which FTA did on March 29, 2013 ([See 78 FR 19136, <http://www.gpo.gov/fdsys/pkg/FR-2013-03-29/pdf/2013-07271.pdf>](http://www.gpo.gov/fdsys/pkg/FR-2013-03-29/pdf/2013-07271.pdf)). FTA requested comments on the interim regulations, and in this notice FTA is addressing the comments received.

This final rule applies to FTA's Emergency Relief Program, authorized at 49 U.S.C. 5324, and is not limited to Hurricane Sandy response. The rule includes a description of eligible projects, the criteria FTA will use to identify projects for funding, and additional details on how FTA will administer the program.

#### **Authority**

Section 5324(a)(2) of title 49, United States Code, defines an "emergency" as a natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm, or landslide) or a catastrophic failure from any external cause, as a result of which—

- the Governor of a State has declared an emergency and the Secretary has concurred; or
- the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

Section 5324(b) of title 49, United States Code, authorizes the Secretary to make grants and enter into contracts and other agreements (including agreements with departments, agencies, and instrumentalities of the Government) for—

- capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system operating in the United States or on an Indian reservation that the Secretary determines is in danger of suffering serious damage, or has suffered serious damage, as a result of an emergency; and
- eligible operating costs of public transportation equipment and facilities in an area directly affected by an emergency during—
  - the 1-year period beginning on the date of a declaration; or
  - if the Secretary determines there is a compelling need, the 2-year period beginning on the date of a declaration.

In addition, section 5324(d) provides that a grant awarded under section 5324 shall be subject to the terms and conditions the Secretary determines are necessary, and made only for expenses that are not reimbursed under the Stafford Act. Accordingly, FTA will not fund project expenses that the Federal Emergency Management Agency (FEMA) has funded.

### **Interim Final Rule and Request for Comments**

FTA issued the interim final rule and request for comments on March 29, 2013. The interim final rule, which took effect immediately upon publication, and on which FTA sought comment, included definitions, policy, and eligibility, as well as provisions regarding federal share and pre-award authority, grant requirements and application procedures.

### **Summary Discussion of Comments Received in Response to the Interim Final Rule**

The comment period closed on May 28, 2013. FTA received comments from eight entities: five transit agencies, two transportation workers union organizations, and one public transportation trade association. Several comments were outside the scope of the rulemaking and are therefore not addressed in this notice. For example, some comments were specific to Hurricane Sandy response or to the Disaster Relief Appropriations Act, which provided funding for Hurricane Sandy response. Where appropriate, FTA reached out to commenters to address those concerns. Comments pertaining to the rulemaking are addressed in this notice.

In addition, FTA intends to issue an Emergency Relief Manual or Circular later this year that will provide more detail than what is provided in the regulation. Therefore, FTA will address some of the comments by providing guidance in the Manual or Circular rather than including text in this rule. FTA will provide interested stakeholders with notice and an opportunity to provide comment on the Emergency Relief Manual.

### **General Comments**

In addition to the regulatory text, the interim final rule sought comments on several specific issues: (1) the possibility of imposing a minimum monetary damage threshold for FTA Emergency Relief grants, including the most appropriate method to calculate such a

minimum monetary damage threshold; (2) the specificity of the term “forecast with some certainty to hit the affected area,” which under the interim final rule triggers the availability of pre-award authority for evacuations and activities to protect public transportation assets in predictable weather events; (3) the appropriate extent of a benefit-cost analysis in the context of emergency repairs, permanent repairs, and resilience projects, including the extent of risk analysis appropriate for resilience projects, as well as methods for evaluating collateral costs resulting from a decrease in overall transit infrastructure capacity; and (4) whether applications for Emergency Relief should incorporate requirements of Section 1315(b) of MAP-21, which requires a periodic evaluation to determine whether there are reasonable alternatives to roads, highways, or bridges that have repeatedly required repair or reconstruction in the past as a result of emergencies or major disasters. The comments and FTA responses are in the section-by-section discussion of comments, below.

### **Section-by-Section Discussion of Comments**

#### Section 602.1 Purpose

Two commenters suggested amending the purpose section. One commenter suggested removing the term “serious” in relation to the damage suffered, noting that currently FEMA allows reimbursement for minor and major damages, while the proposed FTA Emergency Relief program could make minor costs ineligible, requiring the transit agency to incur the costs or apply to FEMA. The commenter also noted the potential lack of eligibility for damage from terrorist acts, as such acts would not qualify as a “natural disaster,” and might also not meet the definition of a “catastrophic failure.” To address this issue, the commenter suggested including “manmade disasters” within the scope of

this section's purpose. Another commenter recommended that the eligibility requirements for resilience projects include projects that enhance network resilience and redundancy, and not just those projects that narrowly target the physical location of a specific piece of infrastructure. The commenter suggested that the regulatory language listing "protection, replacement, repair or reconstruction" should be amended to, for example, "protection, replacement, repair, *redundant capability*, *relief*, or reconstruction of public transportation equipment, facilities, *capacity or networks*. . . ." The commenter expressed specific concern about island communities and the need to access the mainland via multiple means, particularly if bridges and tunnels are impacted by an emergency or disaster.

FTA declines to make the suggested changes to this section. The language included in this section comes directly from the statute, which provides that FTA may fund "capital projects to protect, repair, reconstruct or replace equipment and facilities of a public transportation system . . . that the Secretary determines is in danger of suffering serious damage or has suffered serious damage, as a result of an emergency." In addition, FTA interprets "catastrophic failure from an external cause" to include manmade disasters.

As for redundancy, FTA agrees that the resilience of a transit system is dependent in part on the availability of backup systems or facilities for critical functions, such as communications, signaling, and power; and that potential alternative service configurations made possible by the availability of redundant infrastructure, such as backup storage, maintenance, or fueling facilities, can significantly improve a transit system's emergency response and recovery efforts, while maintaining service to the

public. In so far as projects to construct or install such infrastructure contribute to the protection of the equipment or facilities of a transit system, they may be eligible for funding under this program. Projects that would increase overall system capacity, such as the acquisition of vehicles or construction of infrastructure for permanent additional routes, may increase the overall resilience of a transit system, but would generally not be eligible under this program. In the event a transit agency or community has identified, through the planning process, a need for additional public transit services that may be redundant of existing services, other sources of funds, such as FTA formula funds or Capital Investment Grant program (section 5309) funds, are more appropriate for this purpose, because the primary benefit of “redundant” services would be to provide new capacity on a daily basis—not just in the case of a future emergency that cannot be predicted in terms of time, location, or magnitude.

#### Section 602.3            Applicability

FTA did not receive any comments on this section, and is not amending this section.

#### Section 602.5            Definitions

Four entities submitted comments on several of the proposed definitions. The comments and agency responses are sorted by each definition, as follows:

“Building” and “Contents Coverage.” FTA is adding these two definitions, which are consistent with FEMA’s National Flood Insurance Program definitions at 44 CFR 59.1, for purposes of FTA’s policy on insurance, further discussed in section 602.7, Policy. In particular, for the definition of “building,” FEMA requires flood insurance for “manufactured homes” and includes these in the definition of building as structures “built on a permanent chassis, transported to its site in one or more sections, and affixed to a

permanent foundation.” Federal transit recipients often use manufactured or modular office trailers that meet this definition. Therefore, we have included office trailers in the definition of building.

“Catastrophic Failure.” Two commenters expressed concern over the provision that a catastrophic failure must not be primarily attributable to gradual and progressive deterioration or lack of proper maintenance. While both commenters agreed that damage caused by lack of maintenance should not be eligible under the Emergency Relief program, they asserted that the phrase as formulated presents a risk of subjectivity and ambiguous eligibility standards. One of the commenters said that the distinction should be based on the ability to link damages and related costs to the disaster, using, for example, maintenance records, photographs, and/or engineering assessments linking damage to the event. The other commenter said that FTA should clarify the criteria and process it proposes to apply in determining whether a catastrophic failure has been experienced.

FTA disagrees that the definition is ambiguous, and notes that catastrophic failure must be read with the definition of “external cause.” The spontaneous collapse of a transit bridge, not due to external cause, would be primarily attributable to gradual and progressive deterioration or lack of proper maintenance or to a design flaw. A transit bridge that collapses as a result, for example, of being hit by a vehicle or an act of terrorism collapses due to an external cause. In order to be eligible for Emergency Relief funds, the failure must be the result of an external cause. In the event it is not clear whether the failure of an asset is due to an external cause or to an inherent defect in or

lack of maintenance of the asset, FTA will consider maintenance records, photographs, and/or engineering assessments.

“Emergency Operations.” Two commenters addressed the definition of “emergency operations.” One commenter suggested that since the term “emergency operations” includes bus or ferry service to replace inoperable rail service or to detour around damaged areas, the definition should also include the deployment of rail service via alternate routes for the same purpose. Another commenter requested that the list of emergency operations include any costs incurred as a result of any memorandum of understanding (MOU) and/or any memorandum of agreement (MOA) that transit agencies may establish pre- or post-disaster.

The definition of “Emergency Operations” in the interim final rule for temporary service stated “including but not limited to ...” various types of temporary service. Deployment of rail service via alternate routes would fit within the “Emergency Operations” definition as a relocation of public transportation route service before, during, or after an emergency. For clarity, FTA is amending the final rule definition to provide that “bus, ferry or rail service to replace inoperable service or to detour around damaged areas,” is an eligible expense. Regarding the second comment, costs incurred as a result of an MOU and/or MOA that a transit agency may establish pre- or post-disaster would be eligible only to the extent that the costs related to evacuation services; rescue operations; temporary public transportation service; or reestablishing, expanding, or relocating public transportation route service before, during, or after an emergency.

“Emergency Protective Measures.” One commenter requested that FTA depart from FEMA standards under 44 CFR 206.228(a)(2)(iii) and allow regular time as well as

standby costs within the definition of emergency protective measures, as these costs were allowed for Hurricane Sandy response. The commenter opined that FEMA's practice of disallowing regular time for in-house personnel rewards applicants who outsource emergency work to contractors, and may not be conducive to restoring transportation in a timely manner in part because a third-party contractor may not have the same expertise or availability as in-house employees or be available. Further, the commenter stated that standby costs are unavoidable during emergency evacuation, reverse evacuation, and transportation restoration. Pre-positioning of resources is part of effective storm planning, and this commenter's labor agreements, for example, require bus operators to be paid for standby time. Finally, the commenter recommended that the definition be revised to include operating costs as well as capital costs for projects undertaken immediately before, during, or after an emergency.

Although this comment was submitted in reference to the definition of "Emergency Protective Measures," FTA believes that some of the commenter's concerns over regular time and standby costs are addressed within the definition of "Emergency Operations." The definitions of "Emergency Operations" and "Emergency Protective Measures" are complementary: "Emergency Operations" encompasses operating costs and "Emergency Protective Measures" encompasses costs related to protecting assets and infrastructure. In general, the purpose of the Emergency Relief program is to reimburse affected recipients for extraordinary costs related to an emergency or major disaster. Regular time – as opposed to overtime – is not an extraordinary cost. However, the operating costs the commenter describes relating to regular time and standby costs would be eligible for reimbursement as long as they satisfied the definition of "Emergency Operating Costs,"

i.e., costs relating to evacuation service; rescue operations; temporary public transportation service; or reestablishing, expanding, or relocating public transportation route service before, during, or after an emergency. Similarly, operating costs incurred to perform emergency protective measures, such as relocating rolling stock, sandbagging and debris removal, would be eligible for reimbursement.

“Emergency Repairs.” Two commenters expressed concern that the definition of emergency repairs was limited to projects undertaken immediately following the emergency or major disaster. One commenter noted emergency repairs could be delayed for weeks or even months. The other commenter stated that once service is restored, significant time may be needed before permanent repairs are made, requiring interim or temporary repairs conducted in the meantime. The commenter suggested an additional definition for “interim repairs” or “temporary repairs” to accommodate this circumstance.

In response to comments, FTA is removing the word “immediately” from the definition. Since emergency repairs may be either temporary or permanent, we have retained the term “emergency repairs,” but added an additional purpose of emergency repairs: to ensure service can continue to be provided until permanent repairs are made. This will allow interim or temporary repairs to fit within the definition of emergency repairs.

“Incident Period.” FTA is adding a definition for “incident period:” the time interval during which the emergency-causing incident occurs. This definition is relevant with regard to pre-award authority, as FTA will not approve pre-award authority for projects unless the damage to be alleviated resulted from the emergency-causing incident during the incident period or was incurred in anticipation of that incident. The reason for

this additional definition is to have consistency with FEMA’s definition of “incident period” at 44 CFR 206.32(f). For each Stafford Act incident, FTA will adopt the incident period established by FEMA. The term is used in section 602.11, Pre-Award Authority, and replaces the phrase, “the effective date of a declaration of emergency or major disaster.”

“Major Disaster.” One commenter suggested that the definition of “major disaster” conflicts with the definitions of “resilience” and “resilience projects.” The commenter recommended substituting the term “multi-hazard” for the term “natural catastrophe” to encompass manmade disasters.

Congress defined “Major Disaster” in the Stafford Act, at 42 U.S.C. § 5122(2), and FTA includes that definition in the rule without change. Due to the coordination between FEMA, FTA, and Emergency Relief recipients contemplated within the final rule, FTA believes it is prudent to maintain the interim final rule’s inclusion of the statutory definition of “Major Disaster.”

“Net Project Cost.” One commenter suggested that the term “net” should be removed and the definition revised since the proposed definition does not stipulate if all costs incurred, including indirect costs, are eligible. FTA notes that Federal cost principles apply to all FTA grants and indirect costs are eligible consistent with those principles. These and other administrative requirements for all FTA programs, including the Emergency Relief program, are explained in FTA Circular 5010.1D, Grant Management Requirements. (See, [http://www.fta.dot.gov/legislation\\_law/12349\\_8640.html](http://www.fta.dot.gov/legislation_law/12349_8640.html)).

“Resilience.” FTA is making minor edits to this definition in order for the definition to be consistent with Executive Order 13653, Preparing the United States for the Impacts of Climate Change, Nov. 1, 2013.

“Resilience Project.” Several commenters expressed concern with the proposed definition of “resilience project.” Three of the commenters proposed deleting any reference to whether a future disaster is “likely to occur.” Some commenters noted that a given disaster may be unlikely to occur, but resilience principles encompass protections against unlikely events as well. One commenter suggested that “resilience project” should include the word “sustainability,” to align with FEMA’s support of the Department of Housing and Urban Development (HUD) program goals, including combining hazard mitigation objectives with the community development objectives, which include livability, sustainability, and social equity values.

To the extent the eligibility of resilience projects is tied to Emergency Relief funds following a specific event, FTA believes it is important to note probable occurrence or recurrence as a factor in determining eligibility for these projects. In response to comments, FTA is slightly modifying the definition to state, “. . . due to a probable occurrence or recurrence of an emergency or major disaster in the geographic area. . .” FTA will provide additional guidance on this in our proposed Emergency Relief Manual, which we intend to publish later this year. Since the primary purpose of resilience projects is to provide protection to transit infrastructure so the taxpayers do not repeatedly pay to replace the same assets, FTA declines to add “sustainability” to the definition of resilience project.

Several commenters provided comments to this section. One commenter repeated an earlier suggestion to include manmade disasters in the relevant sections of the final rule. One commenter highlighted the connection between the interim final rule and FTA's anticipated regulations regarding transit asset management and a definition of "state of good repair," and repeated a suggestion for a high-level definition of "state of good repair."

As stated previously, FTA interprets "catastrophic failure from an external cause" to include manmade disasters. As for the definition of state of good repair, FTA recently published an advance notice of proposed rulemaking (ANPRM) requesting comments on a definition of "state of good repair." (78 FR 61251, Oct. 3, 2013, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-23921.pdf>). The comment period has closed, but FTA encourages interested stakeholders to review the notice of proposed rulemaking when it becomes available. For purposes of the Emergency Relief program, until FTA has published a program-wide definition, we will use the definition provided in the May 29, 2013, Federal Register notice (78 FR 32296) announcing the allocation of Hurricane Sandy relief funds: "a project is considered to bring the transit assets up to a 'state of good repair' if it consists of the installation of comparable equipment that meets the same basic function, class, or capacity of the equipment replaced and also meets current technological or design standards, or a like-new condition."

Regarding paragraph (c), which provides that recipients may include projects that increase the resilience of affected public transportation systems in conjunction with repair and reconstruction activities, two commenters supported the overall policy goal and

provided further suggestions. One commenter requested clarification that resilience and reconstruction work can be done in conjunction without being part of the same project or contract. In addition, one commenter asked whether near-term, temporary resilience projects designed to protect against the possibility of an event, such as hurricane season, would be eligible under the Emergency Relief program. If funds become available for FTA to allocate for resilience projects, such near-term projects may be eligible on a case-by-case basis.

In some cases, it will make sense to do resilience projects as part of the same repair/reconstruction contract or project, and in other cases it may be more appropriate for the resilience work to be done under a separate contract or project. The language in the rule is flexible enough to allow either scenario.

Regarding paragraph (e), one commenter requested further clarification regarding allocation of global insurance proceeds to prevent duplication of funding with FTA grants under the Emergency Relief program. The commenter sought specific language in this section of the rule related to allocation of insurance proceeds, and the use of insurance proceeds as local match.

In response, FTA is adding language to this paragraph regarding allocation of insurance proceeds when 1) recipients receive proceeds for specified assets, and 2) recipients receive blanket, lump-sum, or otherwise unallocated proceeds. In the first case, and consistent with existing FTA policy on insurance proceeds, the recipient must either apply those proceeds to the cost of replacing or repairing the damaged or destroyed project property; or return to FTA an amount equal to the remaining Federal interest in the lost, damaged, or destroyed project property. Interested stakeholders should review

the provisions of chapter IV of FTA Circular 5010.1D, as these provisions will generally apply. In some cases, a recipient's insurance policy may not attribute insurance proceeds to specific assets, and instead will provide unallocated, or lump-sum payments. Such payments may include proceeds for non-transit assets as well as for business interruption if the recipient has this coverage. In this second case, FTA, in consultation with the recipient, will determine the portion of such proceeds that the recipient must attribute to transit assets.

Generally, insurance proceeds may not be used as local match. However, in some circumstances, as when a recipient receives insurance payments for activities not eligible for FTA reimbursement, any share of the proceeds that is not due to FTA may be used as local match. FTA is adding language to this effect in the rule.

FTA is adding new paragraphs (f), (g) and (h) to address the flood insurance requirements for transit assets in special flood hazard areas (i.e., 100-year flood zones), and to state FTA's policy with regard to uninsured property. Although not included in the IFR, paragraphs (f) and (g) merely summarize the preexisting requirements of the Flood Disaster Protection Act of 1973 and describe the types of transit assets that must be insured if they are located in a special flood hazard area. As stated above in Section 602.5 Definitions, FTA is adapting the definitions of "building" and "contents coverage" from FEMA's regulation at 44 CFR 59.1 to provide consistency between the National Flood Insurance Program and FTA's Emergency Relief program.

The requirement for flood insurance for transit assets located in special flood hazard areas is not new. In order to ensure compliance with the Flood Disaster Protection Act, Section 23 of FTA's Master Agreement requires recipients to obtain flood insurance as

appropriate, and each recipient certifies annually through the certifications and assurances that it is in compliance with this requirement.

In accordance with section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a), new paragraphs (f) and (g) make clear that a covered structure must be insured through the National Flood Insurance Program or a comparable private policy. The policy must provide coverage at least equal to the project cost for which Federal assistance is provided, or to the maximum limit of coverage available under the National Flood Insurance Act (currently \$500,000 for buildings and \$500,000 for equipment and fixtures), whichever amount is less.

Finally, commenters were opposed to a minimum monetary damage threshold for FTA emergency relief grants, and expressed concern that setting a minimum monetary threshold for capital projects, emergency protective measures or emergency operations would be challenging to implement, given the varying size of transit agencies and resources available to those agencies, and that the threshold calculation, if based on ridership, passenger miles, or some other metric, could be burdensome. In addition, the cost of repairing or replacing assets varies widely depending on the asset.

In response to comments, FTA is not implementing a minimum monetary damage threshold for the Emergency Relief Program.

#### Section 602.9      Federal Share

One commenter stated that since the Emergency Relief program is intended to fund transit agencies' recovery from unplanned natural disasters, FTA should ensure significant flexibility in the local match funding requirements, which are often unbudgeted. If a one hundred percent federal share is not feasible, the commenter urged

FTA to allow for flexibility in the use of matching funds, including the following:

Transportation Development Credits, insurance money, over-match budgeted in other FTA funded capital projects already planned or underway in the disaster area, and funds included in approved and funded operating budgets that are intended for identifiable emergency relief tasks.

In response to these comments, FTA notes that the law provides that an Emergency Relief grant shall be for up to 80 percent of the net project cost, and that the Secretary may waive the non-federal share. FTA notes that the federal share for FEMA's Public Assistance grants is 75 percent unless the Federal share is increased, depending on the extent of the damage related to the disaster. The rule provides only information related to the percent federal share, and not the source of local match, as the source of local match is statutory. 49 U.S.C. 5324(e)(2). Sources of local match include an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital. In addition, Transportation Development Credits (i.e., toll credits) are eligible as match pursuant to 23 U.S.C. 120. Further, in accordance with 42 U.S.C. 5305(i), U.S. Department of Housing and Urban Development Community Development Block Grant (CDBG) funds that are available for transportation projects may be used as non-federal match for Emergency Relief fund grants.

#### Section 602.11 Pre-award Authority

Five commenters submitted comments on this section. One commenter suggested that the final rule should clarify whether pre-award authority would encompass resilience projects in addition to emergency preparation and response activities. The commenter also recommended that, rather than limiting pre-award authority "to a maximum amount

as determined by FTA” based on facts specific to each disaster, FTA should instead allow pre-award authority generally for “valid and justifiable expenses.” Another commenter suggested that when money has been appropriated specifically for a particular situation, the full amount should be made immediately available through pre-award authority.

FTA appreciates the suggestions made by these commenters. Resilience projects are inherently different from recovery projects, in that there generally needs to be a benefit-cost analysis to determine if the project is reasonable and will in fact protect public transit assets from future damage. Since these projects require FTA approval in advance of incurring costs, pre-award authority will generally not be available for these projects. In addition, FTA generally will not make an entire appropriation available for pre-award authority; however, the amount FTA allocates to a recipient will be available for pre-award authority. In the event a recipient is incurring costs in excess of the pre-award authority FTA has made available, the recipient should contact FTA to discuss the circumstances and the need for a greater amount of pre-award authority.

Another commenter expressed concern that the provision as written would appear to condition pre-award authority on the typical pre-award requirements that projects be on the Transportation Improvement Program/State Transportation Improvement Program (TIP/STIP), have an environmental finding in place, and be included in a grant that is in development. The commenter noted that such requirements are not appropriate in an emergency situation and suggested that the final rule include the statement from FTA’s Allocation Notice that agencies may certify that a project does not result in a substantial functional, locational, or capacity change and therefore does not require inclusion on the TIP/STIP.

The joint FTA/Federal Highway Administration (FHWA) metropolitan and statewide planning rule at 23 CFR 450.324(c)(5) and 450.216(g)(5) provides that emergency relief projects that do not involve substantial functional, locational, or capacity changes are not required to be in the TIP or STIP. Resilience projects – both stand-alone projects and projects completed at the same time as repairs – likely will involve substantial functional, locational, or capacity changes and must be included in the TIP/STIP. The joint FTA/FHWA environmental impact and related procedures rule at 23 CFR part 771 provides that many activities undertaken immediately following an emergency will be categorical exclusions. FTA and FHWA issued a final rule on February 19, 2013 (78 FR 11593, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03494.pdf>), providing that emergency repairs funded under 49 U.S.C. 5324 are categorically excluded (CE), absent unusual circumstances. Further, the rule provides that the repair, reconstruction, restoration, retrofitting, or replacement of any transit facility is categorically excluded if the transit facility is in operation or under construction when damaged, and the action (1) occurs within the existing right-of-way and substantially conforms to the preexisting design, function, and location, and (2) work is commenced within two years of the declared emergency or disaster. It is important to note that the availability of a categorical exclusion for emergency relief projects does not exempt the applicability of other environmental requirements. FTA recommends that any grant applicant that is concerned that a project may not clearly qualify for the categorical exclusion contact the appropriate FTA Regional Office for assistance in determining the appropriate environmental review process and level of documentation necessary before incurring costs for property acquisition, demolition, construction, and acquisition of

vehicles, equipment, or construction materials. Project sponsors should consult with FTA directly on approaches to meeting any requirements that FTA does not determine are exempt. The existing rules ensure that recipients can undertake emergency response activities immediately after a disaster with some assurance that they will not violate Federal planning and environmental requirements. Consequently, FTA does not believe it is necessary to include similar provisions in the Emergency Relief rule.

Several commenters addressed FTA's request for comments regarding the phrase "forecast with some certainty to hit the affected area" with respect to pre-award authority for storms that can be predicted. Three commenters expressed dissatisfaction with the proposed language, but differed in their alternative suggestions. Two commenters suggested adopting current FEMA standards for defining the beginning of an emergency, including FEMA Policy FP 010-4. One commenter suggested that pre-award authority should be linked to an agency's documented disaster preparedness plan, noting that the plans for different disasters require different time periods. Finally, two commenters approved of the phrase suggested by FTA, with one commenter noting that it provides for maximum flexibility for future emergencies.

In response to comments and for consistency with FEMA, FTA is amending this section. FTA is electing not to adopt FEMA's Policy FP 010-4 in its entirety, as it is subject to revision every three years. Instead, we have conferred with FEMA regarding their practice and reviewed FEMA's regulation for requests for emergency declarations at 44 CFR 206.35, and are amending the text as follows: For expected weather events, the Governor must declare a state of emergency and request concurrence by the Secretary of Transportation or make a request to the President for an emergency declaration, in

advance or anticipation of the impact of an incident that threatens such damage as could result in a major disaster, and take action under State law to direct execution of the State emergency plan. In addition, the emergency operations and emergency protective measures activities must be required in anticipation of the event. Adopting this text provides affected recipients with certainty as to when FTA will fund emergency protective measures, evacuations, and other activities, and aligns FTA's regulation with FEMA's.

Finally, FTA notes that recipients may use section 5311 and section 5307 formula funds in response to a disaster or emergency. Importantly, if section 5324 emergency relief funds are or become available, the formula funds may not be replenished from section 5324 funds. However, a recipient may find that use of formula funds is the best course of action. In this case, pre-award authority exists from the first day of the incident period, in an amount up to the amount of formula funds available to that recipient. FTA is adding text to this section of the rule to reflect this.

#### Section 602.13 Eligible Activities

Five entities commented on this section. Commenters were supportive of FTA's decision to allow replacement of damaged assets with new assets. One commenter suggested FTA should clarify that design standards include applicable building codes and general standards of care and best practices for the industry. FTA believes that applicable building codes and best practices are captured in the policy statement that projects should be rebuilt/repaired/replaced to a state of good repair.

One commenter suggested that FTA consider allowing a certain percentage of resilience elements in a grant for emergency repairs, and another commenter stated that

FTA should allocate resilience funds as soon as possible in order to allow integrated resilience measures to be funded through dollars allocated for repair. FTA agrees in concept that notification of the availability of funds for resilience projects should be made as soon as possible. However, since the funding for the Emergency Relief (ER) program is subject to congressional appropriations each fiscal year, it is not appropriate to specify that level of detail in the ER rule. Resilience projects are an eligible expense; however, it is likely that the availability of funding for resilience projects may be on a case-by-case basis, and not necessarily for all emergencies or disasters.

One commenter suggested that because bus systems necessarily operate on streets and roads, there should be some eligibility in the FTA Emergency Relief Program for “transit streets” and “transit bridges.” The commenter acknowledged that these roads and bridges fall under the jurisdiction of a different agency. FTA’s Emergency Relief program allows FTA to fund capital projects to repair the facilities of a public transportation system. To the extent a bus rapid transit (BRT) system operates on a separated fixed guideway, the guideway would be eligible for ER funding if damaged, in the same way a rail fixed guideway would be eligible for ER funding. However, if the BRT system operates on streets shared with other motor vehicles, damage to the street would not be an eligible expense for FTA’s Emergency Relief Program. Repairs to the street or bridge may, however, be eligible for FEMA or FHWA ER funding.

One commenter suggested that FTA be clear that repair or replacement of spare parts held in the normal course of business and damaged or destroyed are an eligible expense. FTA is amending the rule to reflect that replacement of spare parts is eligible for reimbursement. The commenter also noted that some damages could be latent, and the

full impact of a disaster may not be known for months or years, and that these damages should be eligible under the Emergency Relief program. Certainly in the case of some disasters, there will be latent damage. Any repairs or replacements would be eligible under the rule as drafted.

Regarding the eligibility of formula and other funds available to the recipient to be used in conjunction with Emergency Relief funds to make substantial changes or improvements to an affected transit asset during the course of an Emergency Relief project, one commenter asked whether formula and other funds could be used as the local match. With the exception of CDBG funds as described above, Federal funds may not be used to match Emergency Relief funds. Affected recipients may use their FTA formula funds to augment their ER funds in order to pay for activities not eligible under the Emergency Relief Program, but may not use formula funds to match ER grants.

FTA requested comment on the extent of the benefit-cost analysis that is appropriate to justify emergency repairs, permanent repairs, and resilience projects, and did not include any regulatory text regarding these analyses in the interim final rule. In response, one commenter had a list of specific suggestions: (1) projects to restore existing assets and services should be exempt from benefit-cost analysis; (2) wherever possible, FTA should provide standard values to be used in the preparation of benefit-cost analysis to improve comparability across projects and reduce guesswork; (3) the benefit-cost analysis should not be overly onerous, should not require applicants to hire consultants, and should involve mutually supportive interaction between the applicant and FTA; (4) the benefit-cost analysis should recognize transit network benefits and social benefits, including the high-value benefit of network redundancy; and (5) FTA should consider

adopting the broad approach to benefits found in the FEMA Hazard Mitigation programs, rather than the narrow criteria present in the FHWA Emergency Response program.

Another commenter recognized the need for benefit-cost analysis, but recommended allowing agencies to use internally-developed processes for evaluating project benefits when identifying resilience measures internally. The commenter further urged that if FTA intends to use benefit-cost analysis to compare resilience projects across properties and allocate funding on that basis, agencies should be able to consider benefits of a project to the transit system as a whole, not merely the line segment where the project will occur. Finally, the commenter suggested that broad economic impacts should also be considered in a benefit-cost analysis to compare projects across agencies, and allowances should be made for regional cost differences in the development of a nation-wide methodology.

A third commenter suggested that the loss of function costs should include economic loss based on the financial status of transit agencies' riders. A fourth commenter also noted that the cost element of a benefit-cost analysis for resilience projects should incorporate the full indirect costs associated with a partial or complete transit system shut-down.

Two commenters suggested that the level of risk analysis performed on a project cost estimate should vary with the type of project, so that routine activities would require minimal review while more complex projects would require deeper risk analysis.

FTA appreciates the comments, and will consider the comments as FTA develops guidance for benefit-cost analyses under this program. FTA is choosing not to include regulatory text related to benefit-cost analysis at this time, as we agree that the

submission of a benefit-cost analysis to FTA will usually not be necessary for emergency or permanent repairs. Resilience projects will generally require the completion of some form of benefit-cost analysis, and any future notices of funding availability will specify whether FTA requires a benefit-cost analysis. If a benefit-cost analysis is required for a particular situation, FTA's process will be consistent with OMB Circular A-94. FTA notes that FEMA has developed a rigorous benefit-cost analysis methodology, which FTA considered in developing its procedures for evaluating proposed resilience projects in its recent notice of funding availability for Hurricane Sandy resilience projects (78 FR 78486, Dec. 26, 2013, <http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30867.pdf>).

#### Section 602.15 Grant Requirements

Five commenters addressed the provisions in this section, focusing on FTA's case-by-case determination of the 45-day inapplicability of FTA's grant requirements, the requirements for Executive Order 11988 floodplain analysis, and the absence of applicability of labor protections for the Emergency Relief Program.

As stated in the preamble to the interim final rule, FTA may determine the inapplicability of certain requirements associated with public transportation programs as necessary and appropriate for emergency repairs, permanent repairs, and emergency operating expenses that are incurred within 45 days of the emergency or major disaster, or longer as determined by FTA. This 45-day period is consistent with FTA's charter rule at 49 CFR 604.2(f), which provides that the charter rule does not apply to a recipient for actions directly responding to an emergency or major disaster. If FTA determines that any requirement does not apply, this determination shall apply to all eligible activities

undertaken with funds authorized under 49 U.S.C. 5324 within the 45-day period, as well as funds authorized under 49 U.S.C. 5307 and 5311 and used for eligible emergency relief activities.

Several commenters stated that the 45-day waiver of the grant requirements was insufficient to provide for effective planning and the reality of disaster response. One commenter said that the Administrator should be given more explicit authority to increase the 45-day waiver period as necessary, commensurate with the intensity of the event and the restoration of normal operating service. Another commenter suggested that, while the 45-day waiver period may be sufficient in many circumstances, FTA should prospectively waive certain requirements for a longer period, and should be as flexible as possible in its implementation of the usual FTA requirements. One commenter recommended a 180-day waiver of normal FTA grant requirements and procurement rules. Two commenters suggested that FTA should be as flexible as possible with regard to procurement requirements, with one commenter recommending that procurement rules should be waived for all emergency work and permanent repairs, and that the use of pre-existing contracts, including those not procured through Federal methods, should be acknowledged and permitted. The commenter also noted that “exigent circumstances” – a justification for sole source procurements allowed in the common grant rule – might last for several years due to the need to stage work in a way that minimizes the adverse impact to customers.

FTA believes that 45 days is sufficient as a starting point for a broad inapplicability of certain FTA requirements, and that the rule provides sufficient flexibility to permit the Administrator to increase that time period as he or she deems necessary. We note that

FTA provided a 90-day period after Hurricane Sandy in which certain FTA requirements were relaxed, and this was ample time for most circumstances. As stated in the preamble to the interim final rule, FTA also establishes an emergency relief docket each year, by which affected recipients may request waivers from FTA requirements. See 49 CFR part 601, subpart D.

The common grant rule (49 CFR 18.36) provides that noncompetitive procurement is permitted only when one of a specific set of circumstances applies. One of those circumstances is “the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.” Certainly in the first 45 days after a major disaster, affected recipients will need to respond quickly, and the public exigency circumstance will generally apply. However, in FTA’s view, while some permanent repairs will be completed soon after the emergency or disaster, many permanent repairs will be planned many months in advance and there will be ample time for competitive solicitations. Public exigency – by definition “urgency” – is not a circumstance that will last “for several years.” FTA expects agencies to stage permanent repair work subsequent to an emergency or major disaster in the same manner they stage their regular, ongoing maintenance and repair work in a way that minimizes adverse impacts to customers.

Regarding the application of Executive Order (E.O.) 11988, Floodplain Management, one commenter noted that the floodplain management provisions should not be applied to ferry projects, which inherently will almost always be placed in a floodplain (an area subject to a one percent or greater chance of flooding in any given year, also known as a special flood hazard area). Two commenters requested that FTA streamline the E.O.

11988 analysis procedures whenever possible, for example by allowing recipients to group and discuss similar repair and resilience projects that would likely result in similar conclusions and findings regarding floodplain impacts, or by allowing agencies to perform the E.O. 11988 analysis concurrently with FTA project development. Three commenters discussed the impracticability of relocating certain transit infrastructure outside of floodplain boundaries, and one commenter suggested that FTA should incorporate into the final rule, text from the preamble stating that elevating structures within the floodplain is not a necessary precondition to funding. In addition, this commenter recommended that FTA specify that only practical measures to mitigate future damage are required, i.e., measures whose costs are not disproportionate to the protection they provide. One commenter suggested that FTA use other official sources of information in addition to FEMA, including the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Army Corps of Engineers, when determining appropriate flood elevations, and that FTA post the current sources of information to its website.

While it is true that ferry facilities will almost always be located in a floodplain, there are actions that ferry operators can take to mitigate or prevent damage to ferry terminals and maintenance facilities, as well as the ferries themselves, in the event of a flood. Further, the Executive Order does not give FTA the discretion to exempt ferries or any other transit system from the E.O. requirements. FTA reminds recipients that while Hurricane Sandy brought a renewed focus to the effects of building in floodplains, E.O. 11988 was signed in 1977, and the analysis required by that Executive Order is not new. U.S. DOT and FTA have published guidance on floodplain management (see

[http://www.fta.dot.gov/12347\\_2237.html](http://www.fta.dot.gov/12347_2237.html)) and FTA expects to provide updated guidance as part of an emergency relief guidance document. Generally, FTA has no objection to recipients “streamlining” the E.O. 11988 analysis procedures as long as the recipients’ actions are consistent with the Executive Order and the DOT guidance. As to the practicality of measures to mitigate future damage within a floodplain, the E.O. discusses the “practicability” of alternative site locations and actions to “minimize” potential harm when the only practicable alternative is siting in the floodplain. The U.S. DOT Order for Floodplain Management and Protection (see <http://isddc.dot.gov/OLPFiles/DOT/007652.pdf>), published in 1979, defines “practicable” as “capable of being done within natural, social, and economic constraints.” FTA believes the E.O. and the U.S. DOT Order contemplate the sort of benefit-cost analysis suggested by the commenter, and that it will not be practicable to relocate certain transit infrastructure to non-floodplain areas. As for the suggestion that FTA use other official sources of information for determining appropriate flood elevations, the Executive Order, as amended by E.O. 12148, vests the authority for this function in FEMA. However, as stated in the preamble to the interim final rule, if FEMA data is mutually determined by FTA and the recipient to be unavailable or insufficiently detailed, other Federal, State, or local data may be used as the “best available information” in accordance with E.O. 11988.

In the preamble to the interim final rule, we explained that recipients would also consider the best available data on sea-level rise, storm surge, scouring and erosion before rebuilding in order to comply with the requirements of E.O. 11988. This text was inadvertently left out of the regulatory text, and we have included it in this final rule at

section 602.15(d)(6). FTA believes including this requirement in the regulatory text is desirable to clarify that this type of data should be reviewed when determining whether a project is located within a floodplain.

Finally, two commenters urged FTA to include labor protections codified at 49 U.S.C. 5333(b) as grant requirements for the Emergency Relief program. In support of their position, the commenters pointed to the history of labor protections in the Federal transit program, the scope of work to be completed as a result of Hurricane Sandy, and the provision in the ER statute that permits the Secretary to set grant terms and conditions the Secretary determines are necessary.

The Emergency Relief program is not included in the list of programs to which 49 U.S.C. 5333(b) applies, nor does the text of 49 U.S.C. 5324 reference section 5333(b) or the requirements of any other section of chapter 53. Therefore, Congress did not expressly include labor protections as a grant condition for emergency relief grants. Certification of grants by the Department of Labor adds additional time to the grant process, and in an emergency situation, the timing of grant award is often critical, especially for smaller transit agencies that do not have the resources to respond to a disaster and then wait for reimbursement.

FTA understands the concerns raised by the commenters, especially in circumstances such as Hurricane Sandy, with a multi-billion dollar supplemental appropriation and the likelihood that it will take several years to complete repairs. But it is important to note that the final rule will apply to all future emergencies and major disasters, not just Hurricane Sandy response. Hurricane Sandy was the greatest transit disaster in history, and therefore is far from typical. FTA has requested a modest \$25 million annual

appropriation from Congress in order to provide funding for transit agencies that experience damage as a result of an emergency or major disaster.

One of the commenters acknowledged that labor protections are not required under the Emergency Relief Program, argued that Congress did not prohibit the application of labor protections, and asserted that FTA has the authority to apply labor protections if those protections are deemed necessary. FTA agrees with this commenter, and, given that each disaster is unique, the statutory flexibility to establish grant terms and conditions allows FTA to address the applicability of labor protections to each emergency or disaster on a case-by-case basis. For the above reasons, FTA declines to include specific regulatory text related to this issue.

#### Section 602.17, Application Procedures

Five commenters submitted comments addressing provisions of this section.

Commenters suggested that six weeks is insufficient time for the preparation of damage assessment reports, and recommended that FTA adopt a 60-day time period for damage assessment reports consistent with FEMA practice. Commenters also noted that damage assessment is an iterative process, as assets that initially appear undamaged may later require repair. In addition, commenters suggested that it is unreasonable to expect initial damage assessment reports to include permanent repairs and recommended resilience projects, which may not be fully identified until after the initial response period.

While the six week damage assessment report is consistent with the FHWA emergency relief rule, FTA acknowledges that transit systems, particularly rail transit systems, can be more complex, and therefore, FTA is amending the rule to allow 60 days

for submission of an initial damage assessment report. As with the interim final rule, this time period is qualified by the phrase, “unless unusual circumstances prevail,” which allows FTA and affected recipients to take more time if needed. In addition, FTA is adding a provision permitting an affected recipient to submit an updated damage assessment report as appropriate, as when latent damage becomes known.

One commenter requested clarification regarding the coordination of damage assessment reports for both FTA and FEMA. The commenter asked whether the agency would be required to file duplicate reports with both agencies; how conflicts between FTA and FEMA guidance and regulations would be resolved; and whether FTA or FEMA would be designated as the lead agency in terms of agency response. The commenter also requested that FTA include a sample damage assessment report as an appendix to Part 602, or as an attachment to the FTA/FEMA MOU to reflect the information required of recipients of both agencies.

The rule requires coordination with FEMA when appropriate because FTA does not want affected recipients to duplicate efforts after an emergency or major disaster. Until FTA has a regular annual appropriation for the Emergency Relief Program, affected recipients will have to apply to FEMA for reimbursement of emergency relief expenses unless there is a specific appropriation for FTA, as there was with Hurricane Sandy. Alternatively, recipients may use FTA section 5307 or section 5311 formula funds to address an emergency, but those funds may not be “replenished” from the FTA Emergency Relief Program, FEMA, or any other Federal source of funds. Generally, affected recipients will not be required to file damage assessment reports with both FTA and FEMA, but working with both agencies prior to a specific appropriation should help

to streamline the process in the event FTA receives funding. If FTA has funds, FTA will be the lead agency for disaster response. If FTA does not have funds, FEMA will be the lead agency, and FTA will provide technical assistance to affected recipients. Damage assessment reports will vary widely depending on the nature of the emergency or disaster, as well as the size of the affected recipient and the types of service it provides, so FTA declines to provide a sample as a part of this rulemaking. FTA may develop one or more sample damage assessment reports as part of its guidance for the Emergency Relief Program.

One commenter suggested that, in the interest of efficiency, FTA should not require production of documents, such as disaster declarations, that are a matter of public record. Another commenter requested that as many documents as possible be kept on file and subject to the triennial review or other audit rather than attached in the Transportation Electronic Award Management system (TEAM), including the damage assessment, copy of the disaster declaration, insurance policies, and agreements with other federal agencies. A third commenter suggested that large transit agencies be afforded the discretion to choose and submit those documents that best reflect the impact of the emergency or disaster on the agency's operations.

FTA concurs with the suggestion that publicly available documents not be included in the damage assessment report, and is striking the language requiring a copy of the Governor's or President's declaration of emergency or disaster. If not uploaded into FTA's electronic grant management system, supporting documents need to be provided to FTA by other means, such as email or in-person. Simply having the documents available is not sufficient, as in many cases FTA will need to become familiar with

insurance policies, damage assessments, and agreements with other federal agencies. Therefore, FTA must have copies of those documents as early in the response period as possible. As with the interim final rule, the language of the final rule states, “as appropriate, the damage assessment report should include ...” This allows some latitude to affected recipients to submit the most appropriate documentation.

In the interim final rule, FTA requested comments regarding whether applications for Emergency Relief funds should incorporate requirements of Section 1315(b) of MAP-21, which requires a periodic evaluation to determine whether there are reasonable alternatives to roads, highways, or bridges that have repeatedly required repair or reconstruction in the past as a result of emergencies or major disasters, but did not include at that time any regulatory language. Three entities responded to this request. Two commenters stated that such an analysis would be inappropriate in the context of emergency repairs. One of the commenters noted that this requirement would significantly increase the volume of necessary documentation without adding significant value to the evaluation process. The other commenter noted that compliance with Section 1315(b) provisions would be time-consuming for transit agencies, though the commenter admitted that there should be some mechanism in place to prohibit eligibility for inherently faulty projects, and proposed that alternatively, such projects could be eligible for FEMA’s hazard mitigation program. The remaining commenter stated that any evaluation of prior repeated damage should require the applicant to explain whether the current design or proposed redesign more effectively protects against future damage.

After analyzing the comments, FTA has decided to include regulatory language concerning the evaluation of alternatives. Although not included in the IFR, this

regulatory language tracks closely both to what FTA requested comment on in the IFR and the comments the agency received and is, therefore, a clear logical outgrowth of the IFR. FTA agrees with commenters that an evaluation is not appropriate in the context of emergency repairs. For other projects, though, today's final rule requires an evaluation of alternatives for infrastructure that has previously required repair or reconstruction as a result of emergencies or major disasters could easily be included in the damage assessment report. Therefore, FTA is adding a new paragraph to section 602.17. As part of the damage assessment report, applicants must include an evaluation of reasonable alternatives, including change of location and addition of resilience/mitigation elements, for any damaged transit facility that has been previously repaired or reconstructed as a result of an emergency or major disaster. If none of a transit agency's damaged assets were previously damaged in an emergency or disaster, the damage assessment report would include that simple statement.

**Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

A. Executive Orders 12866 and 13563

This action is a significant regulatory action within the meaning of Executive Order 12866 and is significant within the meaning of Department of Transportation regulatory policies and procedures because of substantial congressional, State and local government, and public interest. Those interests include restoring public transportation service as quickly as possible after an emergency or major disaster, the receipt of Federal financial support for repairing and replacing public transportation investments damaged or destroyed by emergencies and major disasters as expeditiously as possible, and the

receipt of Federal financial support for emergency operations before, during and after emergencies and major disasters.

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. FTA does not know precisely how grants to various entities (i.e., transfer payments) would be affected by the rule. Since the rule may affect transfer payments totaling more than \$100 million annually, FTA has determined that this is an “economically significant” rule under Executive Order 12866. This determination is based on the Disaster Relief Appropriations Act of 2013 (Pub.L. 113-2), which appropriated \$10.9 billion to FTA to provide assistance to public transportation systems impacted by Hurricane Sandy, and the potential for a major disaster to occur in the future.

The Obama Administration’s budget requests included \$25 million for each of fiscal years 2013 and 2014 for the Emergency Relief program, and the authorization in 49 U.S.C. 5338(f) is for “such sums as are necessary to carry out section 5324.” Congress did not appropriate any funds for the Emergency Relief Program in the 2014 Consolidated Appropriations Act (Pub. L. 113-76). Hurricane Sandy was an extraordinary event resulting in historic damage to public transportation systems. While it is impossible to predict how much funding Congress might appropriate for the Emergency Relief Program for extraordinary events such as Hurricane Sandy, in a typical

year without an extraordinary event such as Hurricane Sandy, FTA does not expect this rule to have an economic impact greater than \$100 million.

Eligible projects under the statute and the rule include emergency operating expenses, as well as capital projects to protect, repair, reconstruct or replace public transportation equipment and facilities. In this rule, FTA has given “protection” of assets two distinct meanings: emergency protective measures taken immediately before, during, or after an emergency to protect assets from damage or further damage, and resilience projects that protect against future disasters. FTA’s policy, as stated in section 602.7 of this rule, is to assist recipients and subrecipients in restoring public transportation service and in repairing and reconstructing public transportation assets to a state of good repair as expeditiously as possible following an emergency or major disaster. In conjunction with repair and reconstruction activities, recipients may include projects that increase the resilience of affected public transportation systems to protect the systems from the effects of future emergencies and major disasters. Inherent in this policy is a prioritization of emergency operating expenses and emergency recovery and response projects over projects that protect against future emergencies. This prioritization could impact the funds available for resilience projects.

Through the Emergency Relief Program, FTA will reimburse States and local governmental authorities for eligible operating and capital costs incurred as a result of an emergency or major disaster. MAP-21 generally prescribes the criteria and types of projects eligible for emergency relief grants, and FTA has exercised limited discretion in this rulemaking to implement the statute.

#### B. Need for Regulation

This final rule will carry out a new Public Transportation Emergency Relief Program, codified at 49 U.S.C. 5324 and authorized by MAP-21. The Disaster Relief Appropriations Act of 2013 required FTA to issue an interim rule and today's action makes minor changes in response to comments and finalizes the rulemaking. This rule applies not only to Hurricane Sandy, but to future emergencies and disasters that public transportation systems may experience.

### C. Regulatory Evaluation

#### 1. Overview

The Public Transportation Emergency Relief Program makes funding available to public transportation agencies impacted by emergencies and major disasters. The rule provides that these agencies may apply for funding in order to reimburse the costs incurred as a result of the emergency or major disaster.

#### 2. Covered Entities

Affected recipients that will apply for funding under the Emergency Relief Program are public bodies and agencies (transit authorities and other state and local public bodies and agencies thereof) including states, municipalities, other political subdivisions of states; and public agencies and instrumentalities of one or more states that provide public transportation services. Private non-profit entities that provide public transportation service are eligible subrecipients.

As this rule implements a new program, FTA can only estimate the number of transit agencies that might apply for Emergency Relief funds. Notably, emergencies and major disasters can happen at any place and at any time, in rural, small urbanized as well as large urbanized areas, so any FTA recipient may be affected by this rule.

### 3. Eligible and Ineligible Activities

As stated previously, FTA has exercised limited discretion in interpreting 49 U.S.C. 5324, which defines the eligible activities for the Emergency Relief Program. It is necessary, however, to provide more detail than what the statute provides regarding eligible activities. FTA turned to its sister agency, the Federal Highway Administration (FHWA), for definitions, eligible activities, and process, as FHWA has had an emergency relief rule for many years (23 CFR part 668). FTA also looked at eligible activities under the Stafford Act in order to ensure that affected recipients would be able to apply for all of their emergency needs from FTA, thus allowing for a streamlined application and reimbursement process.

#### A. Eligible Expenses

Emergency operations, emergency protective measures, emergency repairs, permanent repairs and resilience projects, as those terms are defined in section 602.5 of this rule, are eligible for emergency relief funding.

FTA's goal is to ensure that all projects eligible under relevant sections of the Stafford Act, including sections 403 (Essential Assistance), 406 (Repair, Restoration and Replacement of Damaged Facilities) and 419 (Emergency Public Transportation), will be eligible under FTA's Emergency Relief Program. Actions taken by public transportation agencies to protect assets in advance of a serious weather event can have substantial financial benefits. For example, moving rolling stock to higher ground to protect it from storm surges can save millions of dollars. Further, actions taken during a weather event and in its immediate aftermath, including debris removal and dewatering, can prevent

further damage to public transportation assets. It is in FTA's and the Federal taxpayer's interest to reimburse the cost of these activities.

Public transportation agencies are an integral part of the communities they serve, and these agencies will often assist with evacuations, rescue operations, and transportation of utility workers and other first responders, often without regard to the expense of those services. In addition, reestablishing public transportation service after an emergency or major disaster may cause a public transportation agency to incur extraordinary costs that are not in the agency's budget.

Temporary and permanent repairs undertaken after an emergency or major disaster assist the transit agency with restoring service and bringing the repaired or replaced facilities into a state of good repair. Temporary repairs may be necessary to restore service, and these repairs should, when feasible, be undertaken in such a way as to reduce the cost of permanent repairs. Bringing facilities and equipment into a state of good repair has both quantifiable and non-quantifiable benefits. Systems that are in a state of good repair are more efficient, more reliable, and more attractive to transit riders. Public transportation systems that are in a state of good repair have fewer breakdowns, and it is often less expensive to keep equipment and facilities in a state of good repair than it is to undertake heavy maintenance projects to keep a system running.

Resilience projects to address vulnerabilities to a public transportation facility or system due to the potential future recurrence of emergencies or major disasters have long-term financial benefits. Rebuilding with materials that can withstand weather events, rebuilding in a different location, or adding protective features to a facility or system can prevent the facility or system from experiencing similar damage in the future.

These benefits are not only monetary; the ability to restore service in a timelier manner subsequent to an emergency or major disaster, when the facility or system has not sustained serious damage because it was strengthened by a resilience project, helps to restore the community to normalcy more quickly.

Finally, there is a benefit to the public transportation agencies when they can go to FTA for reimbursement of their emergency expenses. Under FEMA's Public Assistance Program a public transportation agency is a subgrantee and therefore receives its funding through the grantee, the State, with which many public transportation agencies do not have an ongoing funding relationship. Therefore, even after Federal obligation of the funds, it can take time before the funds are received by the public transportation agency. The establishment of FTA's Public Transportation Emergency Relief Program should expedite reimbursement to public transportation agencies, resulting in a benefit for these agencies.

#### B. Ineligible Expenses

The purpose of the Emergency Relief Program is to provide Federal assistance for extraordinary costs resulting from an emergency or major disaster. The Emergency Relief Program should not be a substitute for good management of assets, nor should it be used for minor emergencies that do not cause serious damage. Therefore, heavy maintenance activities are not an eligible expense. In addition, any projects funded by another Federal agency, insurance policies, or already in an FTA grant are not eligible. FTA Emergency Relief funds should supplement, not supplant, these other sources of funds. Revenue losses due to service disruptions are not eligible expenses. The ineligibility of these expenses will help to ensure good stewardship of public

transportation assets, and will ensure that FTA is not using Emergency Relief funds to pay for a project or activity that has another funding source. Some transit agencies may experience significant revenue losses due to service disruptions; however, this is something for which transit agencies can plan, and for which they can be insured. The benefit of not covering these expenses is that more funds will be available for the eligible activities.

### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FTA has evaluated the effects of this final rule on small entities and has determined the final rule will not have a significant economic impact on a substantial number of small entities. Recipients of Emergency Relief Program funds are generally States and local governmental authorities. The only burden placed upon local governments by this rule is the paperwork burden associated with the application process, which is addressed in the Paperwork Reduction Act section. FTA has sought to minimize the paperwork burdens of the rule. For this reason, FTA certifies that this action will not have a significant economic impact on a substantial number of small entities.

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

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The Federal share for grants made under the Emergency Relief Program is up to 80 percent, and the Secretary may waive all or part of the non-Federal share. This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$143.1 million or more in any one year (2 U.S.C. 1532).

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

This final rule has been analyzed in accordance with the principles and criteria established by Executive Order 13132, and FTA has determined that this final rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this final rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

### **Executive Order 12372 (Intergovernmental Review)**

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this final rule.

### **Paperwork Reduction Act**

On February 6, 2013, in compliance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and the Office of Management and Budget (OMB) implementing regulation at 5 CFR 1320.13, FTA received emergency approval from OMB for an Information Collection for funds appropriated by the Disaster Relief Appropriations Act (Information Collection number 2132-0575). In compliance with the PRA and OMB implementing regulation at 5 CFR 1320.8(d), FTA sought longer-term approval from OMB for this Information Collection. On August 28, 2013, OMB approved FTA's request for an information collection for the Emergency Relief Program. The modifications to the regulations in this final rule do not modify this collection. Insurance information is included in the project budget as well as the quarterly milestone/progress reports. FTA estimated that it would take recipients approximately 50 hours to develop a damage assessment report, and the addition of an evaluation of

alternatives for only those assets that have previously experienced damage as a result of a disaster or emergency will not appreciably change that estimate. The approval for this information collection will expire on August 31, 2016.

### **National Environmental Policy Act**

The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), requires Federal agencies to analyze the potential environmental effects of their proposed actions either through a Categorical Exclusion, an Environmental Assessment or an Environmental Impact Statement. This final rule is categorically excluded under FTA's NEPA implementing procedures at 23 CFR 771.118(c)(4), which covers planning and administrative activities that do not involve or lead directly to construction, such as the promulgation of rules, regulations and directives. FTA has determined that no unusual circumstances exist and that this Categorical Exclusion is applicable.

### **Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)**

Executive Order 12898 and U.S. DOT Order 5610.2(a) (91 FR 27534, May 10, 2012), require DOT agencies to make environmental justice 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 all 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. FTA has developed a program circular addressing environmental justice in transit projects, C 4703.1, Environmental Justice Policy Guidance for Federal Transit Administration Recipients, 77 FR 42077, July 17, 2012 (available online at [www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html)).

FTA evaluated this rulemaking under the Executive Order and the DOT Order. FTA determined that the establishment of procedures governing the implementation of FTA's Public Transportation Emergency Relief Program will not cause disproportionately high and adverse effects on minority or low income populations. The rule simply defines the eligibility criteria and outlines the process to apply for assistance under the program.

At the time FTA considers an application for emergency relief, FTA has an independent obligation to conduct an evaluation of the proposed action under the applicable environmental justice (EJ) Orders and guidance as part of the environmental review process. The adoption of this rule does not affect the scope or outcome of any EJ evaluation. 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. This rule does not affect the ability of affected populations to raise any concerns about potential EJ effects at the time FTA considers a grant application. For these reasons, FTA determined no further EJ analysis is needed and no mitigation is required in connection with this rulemaking.

**Executive Order 12630 (Taking of Private Property)**

This action will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Executive Order 12988 (Civil Justice Reform)**

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

**Executive Order 13045 (Protection of Children)**

FTA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FTA certifies that this final rule will not cause an environmental risk to health or safety that may disproportionately affect children.

**Executive Order 13175 (Tribal Consultation)**

FTA has analyzed this action under Executive Order 13175 (Nov. 6, 2000), and believes that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal summary impact statement is not required.

**Executive Order 13211 (Energy Effects)**

FTA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). FTA has determined that it is not a significant energy action under that order since 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.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review

U.S. DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

### **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 set forth in the heading of this document can be used to cross-reference this action with the Unified Agenda.

### **List of Subjects in 49 CFR Part 602**

Disaster assistance, Grant programs, Mass transportation, Transportation.

Therese McMillan  
Acting Administrator

For the reasons set forth in the preamble, FTA amends Chapter VI of Title 49, Code of Federal Regulations, by revising part 602 to read as follows:

### **PART 602 – EMERGENCY RELIEF**

Sec.

602.1	Purpose.
602.3	Applicability.
602.5	Definitions.
602.7	Policy.
602.9	Federal share.
602.11	Pre-award authority.

- 602.13 Eligible activities.
- 602.15 Grant requirements.
- 602.17 Application procedures.

Authority: 49 U.S.C. 5324 and 5334; 49 CFR 1.91.

**§ 602.1 Purpose.**

This part establishes the procedures and eligibility requirements for the administration of emergency relief funds for emergency public transportation services, and the protection, replacement, repair or reconstruction of public transportation equipment and facilities which are found to have suffered or are in danger of suffering serious damage resulting from a natural disaster affecting a wide area or a catastrophic failure from an external cause.

**§ 602.3 Applicability.**

This part applies to entities that provide public transportation services and that are impacted by emergencies and major disasters.

**§ 602.5 Definitions.**

The following definitions apply to this part:

Affected recipient. A recipient or subrecipient that operates public transportation service in an area impacted by an emergency or major disaster.

Applicant. An entity that operates or allocates funds to an entity to operate public transportation service and that applies for a grant under 49 U.S.C. 5324.

Building. For insurance purposes, a structure with two or more outside rigid walls and a fully secured roof, that is affixed to a permanent site. This includes manufactured or

modular office trailers that are built on a permanent chassis, transported to a site in one or more sections, and affixed to a permanent foundation.

Catastrophic failure. The sudden failure of a major element or segment of the public transportation system due to an external cause. The failure must not be primarily attributable to gradual and progressive deterioration, lack of proper maintenance or a design flaw.

Contents coverage. For insurance purposes, contents are personal property within a building, including fixtures, machinery, equipment and supplies. In addition to the costs to repair or replace, contents insurance coverage shall include the cost of debris removal and the reasonable cost of removal of contents to minimize damage.

Emergency. A natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm or landslide) or a catastrophic failure from any external cause, as a result of which:

- (1) The Governor of a State has declared an emergency and the Secretary of Transportation has concurred; or
- (2) The President has declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

Emergency operations. The net project cost of temporary service that is outside the scope of an affected recipient's normal operations, including but not limited to: evacuations; rescue operations; bus, ferry, or rail service to replace inoperable service or to detour around damaged areas; additional service to accommodate an influx of passengers or evacuees; returning evacuees to their homes after the disaster or emergency; and the net

project costs related to reestablishing, expanding, or relocating public transportation service before, during, or after an emergency or major disaster.

Emergency protective measures. (1) Projects undertaken immediately before, during or following the emergency or major disaster for the purpose of protecting public health and safety or for protecting property. Such projects:

(i) Eliminate or lessen immediate threats to public health or safety; or  
(ii) Eliminate or lessen immediate threats of significant damage or additional damage to an affected recipient's property through measures that are cost effective.

(2) Examples of such projects include, but are not limited to:

(i) Moving rolling stock in order to protect it from damage, e.g., to higher ground in order to protect it from storm surges;

(ii) Emergency communications;

(iii) Security measures;

(iv) Sandbagging;

(v) Bracing/shoring damaged structures;

(vi) Debris removal;

(vii) Dewatering; and

(viii) Removal of health and safety hazards.

Emergency repairs. Capital projects undertaken following the emergency or major disaster, until such time as permanent repairs can be undertaken, for the purpose of:

(1) Minimizing the extent of the damage,

(2) Restoring service, or

(3) Ensuring service can continue to be provided until permanent repairs are made.

External cause. An outside force or phenomenon that is separate from the damaged element and not primarily the result of existing conditions.

Heavy maintenance. Work usually done by a recipient or subrecipient in repairing damage normally expected from seasonal and occasionally unusual natural conditions or occurrences, such as routine snow removal, debris removal from seasonal thunderstorms, or heavy repairs necessitated by excessive deferred maintenance. This may include work required as a direct result of a disaster, but which can reasonably be accommodated by a recipient or subrecipient's routine maintenance, emergency or contingency program.

Incident period. The time interval during which the emergency-causing incident occurs. FTA will not approve pre-award authority for projects unless the damage to be alleviated resulted from the emergency-causing incident during the incident period or was incurred in anticipation of that incident. For each Stafford Act incident, FTA will adopt the incident period established by FEMA.

Major disaster. Any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby. 42 U.S.C. 5122.

Net project cost. The part of a project that reasonably cannot be financed from revenues. 49 U.S.C. 5302.

Permanent repairs. Capital projects undertaken following the emergency or major disaster for the purpose of repairing, replacing or reconstructing seriously damaged public transportation system elements, including rolling stock, equipment, facilities and infrastructure, as necessary to restore the elements to a state of good repair.

Recipient. An entity that operates public transportation service and receives Federal transit funds directly from FTA.

Resilience. The ability to anticipate, prepare for, and adapt to changing conditions and withstand, respond to, and recover rapidly from disruptions such as significant multi-hazard threats with minimum damage to social well-being, the economy, and the environment.

Resilience project. A project designed and built to address existing and future vulnerabilities to a public transportation facility or system due to a probable occurrence or recurrence of an emergency or major disaster in the geographic area in which the public transportation system is located, and which may include the consideration of projected changes in development patterns, demographics, or climate change and extreme weather patterns. A resilience project may be a stand-alone project or may be completed at the same time as permanent repairs.

Serious damage. Heavy, major or unusual damage to a public transportation facility which severely impairs the safety or usefulness of the facility. Serious damage must be beyond the scope of heavy maintenance.

State. A State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

Subrecipient. An entity that operates public transportation service and receives FTA funding through a recipient.

**§ 602.7 Policy.**

(a) The Emergency Relief Program is intended to aid recipients and subrecipients in restoring public transportation service and in repairing and reconstructing public transportation assets to a state of good repair as expeditiously as possible following an emergency or major disaster.

(b) Emergency relief funds are not intended to supplant other Federal funds for the correction of preexisting, non-disaster related deficiencies.

(c) Following an emergency, affected recipients may include projects that increase the resilience of affected public transportation systems to protect the systems from the effects of future emergencies and major disasters.

(d) The expenditure of emergency relief funds for emergency repair shall be in such a manner so as to reduce, to the greatest extent feasible, the cost of permanent restoration work completed after the emergency or major disaster.

(e) Emergency relief funds, or funds made available under 49 U.S.C. 5307 (Urbanized Area Formula Program) or 49 U.S.C. 5311 (Rural Area Formula Program) awarded for emergency relief purposes shall not duplicate assistance under another Federal program or compensation from insurance or any other source. Partial compensation for a loss by other sources will not preclude FTA emergency relief fund assistance for the part of such loss not compensated otherwise. Any compensation for damages or insurance proceeds for repair or replacement of the public transit equipment

or facility must be used upon receipt to reduce FTA's emergency relief fund participation in the project.

(1) If a recipient receives insurance proceeds that are directly attributable to specific assets, the recipient must:

(i) Apply those proceeds to the cost of replacing or repairing the damaged or destroyed project property; or

(ii) Return to FTA an amount equal to the remaining Federal interest in the lost, damaged, or destroyed project property.

(2) If under the terms of its policy a recipient receives insurance proceeds that are not attributable to specific assets, such as blanket, lump-sum, or unallocated proceeds, FTA, in consultation with the recipient, will determine the portion of such proceeds that the recipient must attribute to transit assets.

(3) Any insurance proceeds not attributable to transit assets may be used for other purposes without obligation to FTA, including as local share for FTA grants.

(f) The Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 et seq.) provides that Federal agencies may not provide any financial assistance for the acquisition, construction, reconstruction, repair, or improvement of a building in a special flood hazard area (100-year flood zone) unless the recipient has first acquired flood insurance to cover the buildings and contents constructed or repaired with Federal funds, in an amount at least equal to the Federal investment (less land cost) or to the maximum limit of coverage made available under the National Flood Insurance Act of 1968, whichever is less.

(1) Transit facilities to which this paragraph (f) applies are buildings located in special flood hazard areas and include but are not limited to maintenance facilities, storage facilities, above-ground stations and terminals, and manufactured or modular office trailers.

(2) Flood insurance is not required for underground subway stations, track, tunnels, ferry docks, or to any transit facilities located outside of a special flood hazard area.

(g) Recipients must obtain and maintain flood insurance on those buildings and contents for which FTA has provided funds.

**§ 602.9 Federal share.**

(a) A grant, contract, or other agreement for emergency operations, emergency protective measures, emergency repairs, permanent repairs and resilience projects under 49 U.S.C. 5324 shall be for up to 80 percent of the net project cost.

(b) A grant made available under 49 U.S.C. 5307 or 49 U.S.C. 5311 to address an emergency shall be for up to 80 percent of the net project cost for capital projects, and up to 50 percent of the net project cost for operations projects.

(c) The FTA Administrator may waive, in whole or part, the non-Federal share required under paragraphs (a) and (b) of this section.

**§ 602.11 Pre-award authority.**

(a) Except as provided in paragraph (c) of this section, pre-award authority for the Emergency Relief Program shall be effective beginning on the first day of the incident period, subject to the appropriation of Emergency Relief Program funds.

(b) Recipients may use section 5307 or section 5311 formula funds to address an emergency, and, except as provided in paragraph (c) of this section, pre-award authority shall be effective beginning on the first day of the incident period of the emergency or major disaster.

(c) For expected weather events, pre-award authority for evacuations and activities to protect public transportation vehicles, equipment and facilities, shall be effective in advance of the event under the following conditions:

- (1) The Governor of a State declares a state of emergency and requests concurrence by the Secretary of Transportation or makes a request to the President for an emergency declaration, in advance or anticipation of the impact of an incident that threatens such damage as could result in a major disaster;
- (2) The Governor takes appropriate action under State law and directs execution of the State emergency plan;
- (3) The activities are required in anticipation of the event; and
- (4) Assistance for a pre-disaster emergency declaration is limited to Emergency Protective Measures and Emergency Operations.

(d) Pre-award authority shall be subject to a maximum amount determined by FTA based on estimates of immediate financial need, preliminary damage assessments, available Emergency Relief funds and other criteria to be determined in response to a particular event.

(e) Pre-award authority is not a legal or implied commitment that the subject project will be approved for FTA assistance or that FTA will obligate Federal funds.

Furthermore, it is not a legal or implied commitment that all activities undertaken by the applicant will be eligible for inclusion in the project(s).

(f) Except as provided in § 602.15, all FTA statutory, procedural, and contractual requirements must be met.

(g) The recipient must take no action that prejudices the legal and administrative findings that the FTA Regional Administrator must make in order to approve a project.

(h) The Federal amount of any future FTA assistance awarded to the recipient for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/non-Federal match ratio at the time the funds are obligated.

(i) When FTA subsequently awards a grant for the project, the Financial Status Report in FTA's electronic grants management system must indicate the use of pre-award authority.

**§ 602.13 Eligible activities.**

(a) An affected recipient may apply for emergency relief funds on behalf of itself as well as affected subrecipients.

(b) Eligible uses of Emergency Relief funds include:

- (1) Emergency operations;
- (2) Emergency protective measures;
- (3) Emergency repairs;
- (4) Permanent repairs;

- (5) Actual engineering and construction costs on approved projects;
  - (6) Repair or replacement of spare parts that are the property of an affected recipient or subrecipient and held in the normal course of business that are damaged or destroyed; and
  - (7) Resilience projects.
- (c) Ineligible uses of Emergency Relief funds include:
- (1) Heavy maintenance;
  - (2) Project costs for which the recipient has received funding from another Federal agency;
  - (3) Project costs for which the recipient has received funding through payments from insurance policies;
  - (4) Except for resilience projects that have been approved in advance, projects that change the function of the original infrastructure;
  - (5) Projects for which funds were obligated in an FTA grant prior to the declared emergency or major disaster;
  - (6) Reimbursements for lost revenue due to service disruptions caused by an emergency or major disaster;
  - (7) Project costs associated with the replacement or replenishment of damaged or lost material that are not the property of the affected recipient and not incorporated into a public transportation system such as stockpiled materials or items awaiting installation; and
  - (8) Other project costs FTA determines are not appropriate for the Emergency Relief Program.

**§ 602.15 Grant requirements.**

(a) Funding available under the Emergency Relief program is subject to the terms and conditions FTA determines are necessary.

(b) The FTA Administrator shall determine the terms and conditions based on the circumstances of a specific emergency or major disaster for which funding is available under the Emergency Relief Program.

(1) In general, projects funded under the Emergency Relief Program shall be subject to the requirements of chapter 53 of title 49, United States Code, as well as cross-cutting requirements, including but not limited to those outlined in FTA's Master Agreement.

(2) The FTA Administrator may determine that certain requirements associated with public transportation programs are inapplicable as necessary and appropriate for emergency repairs, permanent repairs, emergency protective measures and emergency operating expenses that are incurred within 45 days of the emergency or major disaster, or longer as determined by FTA. If the FTA Administrator determines any requirement is inapplicable, the determination shall apply to all eligible activities undertaken with funds authorized under 49 U.S.C. 5324 within the 45-day period, as well as funds authorized under 49 U.S.C. 5307 and 5311 and used for eligible emergency relief activities.

(3) FTA shall publish a notice on its web site and in the emergency relief docket established under 49 CFR part 601 regarding the grant requirements for a particular emergency or major disaster.

(c) In the event an affected recipient or subrecipient believes an FTA requirement limits its ability to respond to the emergency or major disaster, the recipient or subrecipient may request that the requirement be waived in accordance with the

emergency relief docket process as outlined in 49 CFR part 601, subpart D. Applicants should not proceed on projects assuming that requests for such waivers will be granted.

(d) In accordance with Executive Order 11988, Floodplain Management, recipients shall not use grant funds for any activity in an area delineated as a special flood hazard area or equivalent, as labeled in the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps (FIRMs). If there are no alternatives but to locate the action in a floodplain, prior to seeking FTA funding for such action, the recipient shall design or modify its actions in order to minimize potential harm to or within the floodplain.

(1) Except as otherwise provided in this subparagraph, recipients shall use the "best available information" as identified by FEMA, which includes advisory data (such as Advisory Base Flood Elevations (ABFEs)), preliminary and final Flood Insurance Rate Maps, or Flood Insurance Studies (FISs).

(2) If FEMA data is mutually determined by FTA and the recipient to be unavailable or insufficiently detailed, other Federal, State, or local data may be used as "best available information" in accordance with Executive Order 11988.

(3) The final determination on "best available information" shall be used to establish such reconstruction requirements as a project's minimum elevation.

(4) Where higher minimum elevations are required by either State or locally adopted building codes or standards, the higher of the State or local minimums would apply.

(5) A base flood elevation from an interim or preliminary or non-FEMA source may not be used if it is lower than the current FIRM.

(6) Recipients shall also consider the best available data on sea-level rise, storm surge, scouring and erosion before rebuilding.

**§ 602.17 Application procedures.**

(a) As soon as practical after an emergency, major disaster or catastrophic failure, affected recipients shall make a preliminary field survey, working cooperatively with the appropriate FTA Regional Administrator and other governmental agencies with jurisdiction over affected public transportation systems. The preliminary field survey should be coordinated with the Federal Emergency Management Agency, if applicable, to eliminate duplication of effort. The purpose of this survey is to determine the general nature and extent of damage to eligible public transportation systems.

(1) The affected recipient shall prepare a damage assessment report. The purpose of the damage assessment report is to provide a factual basis for the FTA Regional Administrator's finding that serious damage to one or more public transportation systems has been caused by a natural disaster affecting a wide area, or a catastrophic failure. As appropriate, the damage assessment report should include by political subdivision or other generally recognized administrative or geographic boundaries—

- (i) The specific location, type of facility or equipment, nature and extent of damage;
- (ii) The most feasible and practical method of repair or replacement;
- (iii) A preliminary estimate of cost of restoration, replacement, or reconstruction for damaged systems in each jurisdiction.
- (iv) Potential environmental and historic impacts;
- (v) Photographs showing the kinds and extent of damage and sketch maps detailing the damaged areas;
- (vi) Recommended resilience projects to protect equipment and facilities from future emergencies or major disasters; and

(vii) An evaluation of reasonable alternatives, including change of location, addition of resilience/mitigation elements, and any other alternative the recipient considered, for any damaged transit facility that has been previously repaired or reconstructed as a result of an emergency or major disaster.

(2) Unless unusual circumstances prevail, the initial damage assessment report should be prepared within 60 days following the emergency, major disaster, or catastrophic failure. Affected recipients should update damage assessment reports as appropriate.

(3) For large disasters where extensive damage to public transportation systems is readily evident, the FTA Regional Administrator may approve an application for assistance prior to submission of the damage assessment report. In these cases, the applicant shall prepare and submit to the FTA Regional Administrator an abbreviated or preliminary damage assessment report, summarizing eligible repair costs by jurisdiction, after the damage inspections have been completed.

(b) Before funds can be made available, a grant application for emergency relief funds must be made to, and approved by, the appropriate FTA Regional Administrator. The application shall include:

- (1) A copy of the damage assessment report, as appropriate;
- (2) A list of projects, as documented in the damage assessment report, identifying emergency operations, emergency protective measures, and emergency repairs completed as well as permanent repairs needed to repair, reconstruct or replace the seriously damaged or destroyed rolling stock, equipment, facilities, and infrastructure to a state of good repair; and

(3) Supporting documentation showing other sources of funding available, including insurance policies, agreements with other Federal agencies, and any other source of funds available to address the damage resulting from the emergency or major disaster.

(c) Applications for emergency operations must include the dates, hours, number of vehicles, and total fare revenues received for the emergency service. Only net project costs may be reimbursed.

(d) Applicants that receive funding from another Federal agency for operating expenses and also seek funding from FTA for operating expenses must include:

(1) A copy of the agreement with the other Federal agency, including the scope of the agreement, the amount funded, and the dates the other agency funded operating costs; and

(2) The scope of service and dates for which the applicant is seeking FTA funding.

(e) Applicants that receive funding from another Federal agency for emergency or permanent repairs or emergency protective measures and also seek funding from FTA for emergency or permanent repairs or emergency protective measures must include:

(1) A copy of the agreement with the other Federal agency, including the scope of the agreement and the amount funded; and

(2) A list of projects included in the other agency's application or equivalent document.

(f) Applicants are responsible for preparing and submitting a grant application. The FTA regional office may provide technical assistance to the applicant in preparation of a program of projects. This work may involve joint site inspections to view damage and reach tentative agreement on the type of permanent repairs the applicant will undertake.

Project information should be kept to a minimum, but should be sufficient to identify the approved disaster or catastrophe and to permit a determination of the eligibility of proposed work. If the appropriate FTA Regional Administrator determines the damage assessment report is of sufficient detail to meet these criteria, additional project information need not be submitted.

(g) The appropriate FTA Regional Administrator's approval of the grant application constitutes a finding of eligibility under 49 U.S.C. 5324.

[FR Doc. 2014-23806 Filed 10/06/2014 at 8:45 am; Publication Date: 10/07/2014]