DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FTA–2006–26604]

RIN 2132–AA87

Environmental Impact and Related Procedures

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

ACTION: Final rule.

SUMMARY: The Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) issue this final rule that modifies our regulations to make certain changes mandated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). SAFETEA–LU prescribes additional requirements for environmental review and project decisionmaking that are not appropriately reflected in the existing FHWA–FTA joint National Environmental Policy Act (NEPA) procedures. Additionally, this final rule creates certain new categorical exclusions (CE) allowing proposed actions to proceed without an environmental assessment (EA) or environmental impact statement (EIS), and makes other minor changes to the joint procedures in order to improve the description of the procedures or to provide clarification with respect to the interpretation of certain provisions.

DATES: *Effective Date:* April 23, 2009.

FOR FURTHER INFORMATION CONTACT: For the FHWA: Carol Braegelmann, Office of Project Development and Environmental Review (HEPE), (202) 366–1701, or Janet Myers, Office of Chief Counsel (HCC), (202) 366–2019. For FTA: Joseph Ossi, Office of Planning and Environment (TPE), (202) 366–1613, or Christopher Van Wyk, Office of Chief Counsel, (202) 366–1733. Both the FHWA and FTA are located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., EST, for the FHWA, and 9 a.m. to 5:30 p.m., EST, for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144). Section 6002 of SAFETEA–LU created 23 U.S.C. 139, which contains new requirements that the FHWA and FTA must meet in complying with NEPA (42 U.S.C. 4321–4347). In addition to these new requirements, section 6010 of SAFETEA–LU requires the FHWA and FTA to initiate rulemaking to establish, to the extent appropriate, CEs for activities that support the deployment of intelligent transportation infrastructure and systems.

The FHWA and FTA published a notice of proposed rulemaking (NPRM) on August 7, 2007, at 72 FR 44038. The NPRM requested comments on certain changes proposed to codify changes mandated by 23 U.S.C. 139 in the joint NEPA procedures and to eliminate confusion or inconsistencies that could otherwise result. The NPRM also proposed several new CEs for projects that meet the criteria for categorical exclusion from NEPA review. Interested parties were invited to submit comments. The FHWA and FTA also invited interested parties to submit written evidence about particular congestion management activities that they believe qualify as CEs and specific regulatory language that might be used in one or more CEs for these types of projects. That input is being used to develop proposed CEs that will be published for public review and comment. The NPRM also proposed other minor changes to the joint procedures in order to improve the description of the procedures or to provide clarification with respect to the interpretation of certain provisions.

Profile of Respondents

The docket received a total of 15 responses to the NPRM. Out of the 15 responses, 5 were submitted by State Departments of Transportation (DOT), 6 by transit agencies, 3 by trade associations, and 1 by a metropolitan planning organization.

General Comments

Two commenters suggested that the FHWA and FTA replace the terms ''Urban Mass Transportation Administration'' and ''UMTA'' with the terms ''Federal Transit Administration'' and ''FTA'' throughout the entire rule, including the sections where no revisions were proposed. By final rule published on May 9, 2005, the FHWA and FTA already corrected the name of the FTA from its former name, the Urban Mass Transportation Administration (UMTA), in 23 CFR part 771 and 49 CFR part 622. *See,* Environmental Impact and Related Procedures, 70 FR 24468 (May 9, 2005) (codified at 23 CFR part 771 and 49 CFR part 622). The current Code of Federal Regulations and the **Federal Register** are available online from GPO Access, a service of the U.S. Government Printing Office, at *http://www.gpoaccess.gov/index.html*.

Numerous commenters expressed general support for the NPRM, although one commenter expressed concern that a substantial rewrite of the NEPA regulation may be delayed due to this rulemaking, which has a more limited scope. Along those same lines, two commenters suggested that the FHWA and FTA incorporate all mandatory elements of the new review process under 23 U.S.C. 139, but another commenter disagreed and supported the decision not to incorporate all elements as part of this rulemaking. Finally, one commenter suggested that this rulemaking is unnecessary, and that, when the FHWA and FTA decide to propose more significant revisions to 23 CFR part 771, the focus be on eliminating regulation and substituting guidance in its place. The commenter also suggested that inconsistencies between 23 U.S.C. 139 and 23 CFR part 771 would best be remedied by eliminating the regulation.

The FHWA and FTA note the positive comments received and agree with the other commenters that a more substantial revision to the NEPA regulation is desirable. A more limited rulemaking was first necessary to avoid extending any confusion that would arise from conflicts between the NEPA regulation and the new requirements of 23 U.S.C. 139. The FHWA and FTA also believe that eliminating 23 CFR part 771 would take away the regulatory basis for many of the provisions that both agencies use as part of the NEPA process. Substituting guidance in place of these regulations would eliminate a major factor in providing the needed consistency among FHWA and FTA field locations and among applicants. Further, the FHWA and FTA would no longer have the benefit of NEPA provisions with the force of law if guidance were substituted. This would likely hamper efforts to defend environmental litigation claims.

Note that the FHWA and FTA made one change with respect to the phrase ''environmental document,'' which was used in the NPRM but replaced with ''environmental review document(s)'' in the preamble discussion and regulatory text of this final rule. The FHWA and FTA use ''environmental review document(s)'' to include documents such as Section 4(f) evaluations and other documents that would not be

covered by the definition of ''environmental document'' in the Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.10. In two places in the existing regulation, the term ''NEPA document'' was replaced with ''environmental review document'' for consistency with the other references.

Section-by-Section Analysis of Specific Comments

In this preamble, all references to the provisions of 23 CFR part 771 refer to the final rule as presented herein, unless this notice specifically indicates otherwise. No comments were received with respect to 23 CFR 771.101, 771.105, 771.131, and 771.133. The FHWA and FTA have previously removed section 771.135 through the issuance of a final rule on March 12, 2008, creating a new 23 CFR part 774 that deals with Section 4(f) matters.

Section 771.107 Definitions

Several commenters suggested that the terms ''participating agency,'' ''project sponsor,'' and ''cooperating agency'' be defined in part 771. They argue that the terms are used throughout part 771, and a person should not have to go to SAFETEA–LU or elsewhere to look up the definitions. The FHWA and FTA agree that ''participating agency'' and ''project sponsor'' should be defined and have provided the definitions. However, ''cooperating agency'' is defined in the CEQ NEPA regulations at 40 CFR 1508.5 and 1501.6. Because part 771 is supplemental to the CEQ regulation and the FHWA and FTA expect the two regulations to be used together, the FHWA and FTA have not repeated the definition of ''cooperating agency'' in part 771.

One commenter asserted that the stipulation that a lead agency be a direct recipient of Federal funds originated in guidance, not legislation. The commenter specifically notes that FHWA guidance, rather than legislation, requires direct recipients, not sub-recipients, be joint lead agencies with the Administration.[1] The FHWA believes that its interpretation of the intent of the lead agency provision in 23 U.S.C. 139 is appropriate in light of the need to give effect to other statutes, regulations, and policies applicable to the Federal-aid highway program.

One commenter expressed concern regarding the definition of ''Administration.'' The concern is that, if FTA were to assign responsibility for CE determinations to a State in accordance with SAFETEA–LU section 6004 (codified at 23 U.S.C. 326), then a transit agency in that State would be forced to obtain project approvals not from FTA but from a State agency, probably the State DOT, that may be unfamiliar with the transit agency's programs. FTA agrees and will continue to provide CE determinations for any transit agency that prefers to continue working with FTA. FTA will provide affected transit agencies an opportunity to comment on this issue during the development of any section 6004 Memorandum of Understanding (MOU) to which FTA is party. If FTA were to sign a section 6004 MOU, that MOU would explicitly exclude the projects of any transit agency that prefers to work with FTA. However, the State DOT is the grant recipient for several FTA programs, the largest of which is the Non-Urbanized Area Formula Program, and these State-administered transit programs would be the primary candidates for assignment of CE approvals by FTA to the State. The definition of ''Administration'' is consistent with FTA's position on its assignment of CE responsibilities to States, as outlined above. Section 8 of the FHWA's ''Questions and Answers on the Implementation of SAFETEA–LU Section 6004 (State Assumption of Responsibility for Categorical Exclusions),'' which is located at *http://www.fhwa.dot.gov/hep/6004qa.htm*, addresses transit-related considerations in more detail.

The regulation refers to ''federally-recognized Indian tribal governmental units'' in paragraphs (f), (h), and (i) of section 771.107, and in paragraph (c)(3) of section 771.109. This terminology is being used because it is consistent with the definition of ''agency'' in 23 U.S.C. 139(a)(1). The change is intended to provide internal consistency within part 771 in the references to Native American tribes and consistency between part 771 and 23 U.S.C. 139. It is not intended to differentiate the references to Native American tribes in part 771 from other references to Native American tribes in other regulations or executive orders.

Section 771.109 Applicability and Responsibilities

Several commenters stated that when a State DOT passes FHWA funds through to a turnpike authority or to a local or tribal governmental unit, the sub-recipient of the FHWA funds should be the joint lead agency with the FHWA and should be responsible for, among other things, the environmental review documents and mitigation commitments. As explained above, the FHWA and FTA believe that it is appropriate to require the direct recipients of Federal funds to be responsible for adherence to Federal requirements. For the FHWA, the direct recipient typically is the State DOT. This interpretation is consistent with FHWA statutes, regulations, and policy. The local or tribal governmental unit or turnpike authority may also be a joint lead agency, but is not required to be. The FHWA and FTA have issued ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006, which discusses the provisions regarding lead agencies in greater detail.[2] The FHWA expects the role of the State DOT, as a funding agency, to be similar to the oversight role played by the FHWA. The State DOT would be responsible for the content of the environmental review documents and for fulfilling mitigation commitments in the same way that the FHWA is responsible, but the State DOT may not have the same day-to-day role that it has when the project is one that the State DOT has planned and is developing.

One commenter asserted that the FHWA and FTA should define ''lead agency'' so that the lead agency maintains maximum control over participating and cooperating agencies. The commenter said that the lead agency should have the authority to set deadlines and schedules and to decide which agencies to include in the review process. The FHWA and FTA have not changed the regulatory language in response to this comment. The lead agencies have the authority to set schedules and deadlines in accordance with 23 U.S.C. 139 and other applicable laws. When 23 U.S.C. 139 applies, the law clearly requires that all agencies with an interest be invited to participate. However, the lead agencies are responsible for the coordination plan, which can specify the nature and timing of the interaction with the participating agencies (including any cooperating agencies) and can provide the vehicle by which the lead agencies exercise control over the interaction with other agencies. As the coordination plan is being developed, the lead agencies should consult with the participating agencies on the

[1] Section 774.14 of this final rule defines ''Administration'' as ''FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law''. All references to the ''Administration'' in the preamble to this final rule are consistent with this definition.

[2] The final guidance is available at *http://www.fhwa.dot.gov* or in hard copy upon request.

identification of milestones in the NEPA process at which agency interaction would occur, and on the nature of that interaction. Such consultation is appropriate because key elements of the coordination plan may set expectations that require a commitment of resources by the participating agencies. The previously referenced FHWA and FTA guidance, ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006, discusses participating agencies and coordination plans in greater detail.

Section 771.111 Early Coordination, Public Involvement, and Project Development

One commenter pointed out that the NPRM would give two sections of the regulation the same name. Our intent was not to change any of the existing section headings. The error has been corrected in the final rule.

Several commenters pointed out that the regulatory provisions on linking the transportation planning and NEPA processes that appear in 23 CFR 450.212 and 450.318 apply as much to these environmental impact procedures in part 771 as to the planning procedures in 23 CFR part 450. These commenters suggested that section 771.111 directly address the use of planning information and results in environmental review documents. The FHWA and FTA decline to reiterate the provisions of sections 450.212 and 450.318 in this rule. Not only would such reiteration be redundant, but it would require the insertion of major, new regulatory text that has not been subjected to review and comment. The FHWA and FTA have added in paragraph (a)(2) of section 771.111 a more explicit reference to the relevant sections of the planning regulations. A reference has also been added to paragraph (b) of section 771.123.

One commenter noted that sections 771.109 and 771.111 appear to encourage almost any public agency to become a lead agency. The FHWA and FTA disagree. The proposed language conforms to 23 U.S.C. 139 and the CEQ regulations, which specify which agencies may be joint lead agencies.

One commenter suggested that the sentences dealing with cooperating agencies in paragraph (c) of section 771.111 belong more appropriately in section 771.109. The FHWA and FTA do not agree. Section 771.109 deals with the roles and responsibilities of the lead agencies, applicants, and project sponsors, *i.e.*, the primary agencies involved in advancing the project. Section 771.111 addresses the coordination of the lead agencies with other agencies, including participating and cooperating agencies, and the public. The sentences in paragraph (c) of section 771.111 regarding cooperating agencies are appropriately located in the section discussing coordination.

One commenter suggested that the FHWA and FTA amend paragraph (c) of section 771.111, a paragraph to which no changes were proposed in the NPRM, to reflect that State, local, and tribal governmental units can now be joint lead agencies with the Administration. The commenter offered the following proposed language for paragraph (c) of section 771.111: ''When FHWA and FTA are involved in the development of joint projects, or when FHWA or FTA acts as a joint lead agency with another Federal agency, any state or local governmental entity, or a federally-recognized Indian tribe, a mutually acceptable process will be established on a case-by-case basis.'' The FHWA and FTA disagree with this comment and decline to accept the commenter's proposed language. Paragraph (c) of section 771.111 is intended to apply only when both the FHWA and FTA are involved in the development of a project or when the FHWA or FTA acts as a joint lead agency with another ''Federal agency,'' as defined in the CEQ regulation at 40 CFR 1508.12. The provisions of paragraph (c) in section 771.111 are intended to provide a smooth environmental review process despite programmatic differences between the FHWA and FTA or differences between part 771 and another Federal agency's NEPA procedures. It is neither necessary nor desirable to expand the range of entities covered by paragraph (c) of section 771.111 to include entities that are not Federal agencies. When the FHWA or FTA is the only Federal lead agency, the procedures detailed in 23 U.S.C. 139 (as applicable) and 23 CFR part 771 apply and reconciliation of those procedures with any other agency's NEPA procedures is not necessary.

Also, in order to make clear that paragraph (c) of section 771.111 applies in any instance in which both the FHWA and FTA are involved in the development of a project and not to some more limited range of ''joint projects,'' the FHWA and FTA have changed paragraph (c) of section 771.111 in the final rule to read as follows: ''When both FHWA and FTA are involved in the development of a project, or when FHWA or FTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.''

One commenter requested that the FHWA and FTA change ''may'' to ''should'' in paragraph (c)(3) of section 771.109 and paragraph (d) of section 771.111, where the rule discusses early agency coordination and public involvement activities. The commenter suggested that the FHWA and FTA make it clear that EAs and EISs require opportunities for agency and public involvement. The FHWA and FTA did not adopt this comment and the NPRM wording is retained in the final rule. In paragraph (c)(2) of section 771.109, the rule discusses the ability of the Administration to extend joint lead agency status to entities that do not qualify as mandatory joint lead agencies under 23 U.S.C. 139(c). The authority to invite other entities to serve as joint lead agencies is derived from the CEQ regulation (40 CFR 1501.5 and 1506.2), and is expressed in that regulation as a discretionary action. The FHWA and FTA believe that the decision whether to confer joint lead agency status on an entity has many potential implications and, thus, it should remain discretionary so that the Administration and any mandatory joint lead agency can exercise their judgment on a case-by-case basis. In paragraph (d) of section 771.111, the rule distinguishes between those situations where the lead agencies must invite another agency to be a participating or cooperating agency and those situations where such invitations are discretionary. The distinctions in the rule mirror those contained in 23 U.S.C. 139 and in the CEQ regulation (40 CFR 1501.6 and 1508.5). The FHWA and FTA guidance, ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006, discusses cooperating and participating agencies in greater detail.

Two commenters requested that paragraph (d) of section 771.111 indicate that the requirement to invite interested agencies to participate applies only to an EIS for which the Notice of Intent (NOI) appeared in the **Federal Register** after SAFETEA–LU enactment on August 10, 2005. The FHWA and FTA are not making the requested change because such a statement would not be accurate. At the discretion of the FHWA and FTA, the environmental review process outlined in 23 U.S.C. 139 may be applied to EAs or CEs, or to projects initiated prior to SAFETEA–LU enactment under certain circumstances when the project is re-scoped or reassessed. The FHWA and FTA carefully chose the language in paragraph (d) of section 771.111 to cover those cases as well as the cases offered by the commenter. Details are

provided in the FHWA/FTA guidance on 23 U.S.C. 139 titled ''SAFETEA–LU Environmental Review Process Final Guidance,'' November 15, 2006, which is available at *http://www.fhwa.dot.gov* or in hard copy upon request.

Two commenters suggest that the word ''entitled'' in footnote 4 to the proposed paragraph (d) of section 771.111 be corrected to ''titled,'' reflecting the use of ''titled'' elsewhere in the proposed regulatory text. No difference in meaning was intended, and the suggested change has been made for stylistic consistency.

Although the NPRM did not propose to change the last sentence of paragraph (d) of section 711.111, two commenters requested that the FHWA and FTA define or reference the definition of the phrase ''agencies with jurisdiction by law.'' The phrase ''jurisdiction by law'' is defined in the CEQ regulation at 40 CFR 1508.15. Because 23 CFR part 771 supplements the CEQ regulation and because the FHWA and FTA expect 23 CFR part 771 to be used together with the CEQ regulation, the definition of ''jurisdiction by law'' is not repeated here. Additional guidance can be found in the ''Forty Most Frequently Asked Questions Concerning CEQ's National Environmental Policy Act Regulations'' (March 23, 1981); the memorandum for the heads of Federal agencies entitled ''Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act'' and its Attachment I, ''Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status'' (January 30, 2002); and the memorandum for heads of Federal agencies entitled ''Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act'' (July 28, 1999). These documents can be obtained from the CEQ Web site at *http://www.nepa.gov/regs/guidance.html*.

Two commenters requested that the FHWA and FTA add a footnote referencing the FHWA/FTA ''Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources,'' dated December 13, 2005, to section 771.111. The FHWA and FTA issued a Section 4(f) final rule (23 CFR part 774) on March 12, 2008, at 73 FR 13367, that also addresses *de minimis* impact determinations and should be included in the footnote. The logical location for the footnote that the commenters requested is paragraph (h)(2)(viii) of section 771.111. The FHWA and FTA have added a new footnote 5 to the regulatory text of paragraph (h)(2)(viii) of section 771.111 in response to these comments.

Section 771.113 Timing of Administration Activities

One commenter requested the FHWA and FTA consider further revisions to paragraph (a) of section 771.113 to increase flexibility on actions that can be taken during the NEPA process. Because the scope of this rulemaking is limited to making required changes resulting from law and making minor clarifications to the existing regulations, the FHWA and FTA decline to deliberate the more substantive changes requested by this comment at this time. The FHWA and FTA will consider requests for additional, substantive changes in a future rulemaking.

Commenters suggested that the first sentence of paragraph (a) of section 771.113 should, for internal consistency, refer to the ''work necessary to complete a FONSI [Finding of No Significant Impact] or ROD [Record of Decision]'' rather than a ''FONSI or EIS.'' The suggested change has been made and the regulation now references the decision documents in both cases.

The list of exceptions to the limitation on actions presented in paragraph (a) of section 771.113 has grown so that the paragraph is no longer understandable. FHWA and FTA concluded that the provision should be reorganized for clarity and to accommodate the addition of new exceptions pursuant to SAFETEA–LU. Accordingly, FHWA and FTA have added a new paragraph (d) to section 771.113 to list the exceptions, and to reference related FHWA regulations that apply only to the FHWA program. The new exceptions are the acquisition of railroad right-of-way in accordance with 49 U.S.C. 5324(c) and the acquisition of transit rolling stock in accordance with 49 U.S.C. 5309(h)(6), which provisions were added or modified by SAFETEA–LU. The exceptions for hardship and protective acquisition of right-of-way remain and are also listed in paragraph (d) of section 771.113.

Section 771.115 Classes of Actions

The only revision made by the final rule is to replace the word ''cumulative'' with the word ''cumulatively'' in order to fix a grammatical error.

Section 771.117 Categorical Exclusions

The FHWA and FTA received some general support for adding a CE for Intelligent Transportation Systems (ITS) activities. One commenter expressed support for adding activities that support the deployment of ITS to the list of CEs in paragraph 771.117(c)(21) but expressed concern that the proposed CE was written too narrowly. The commenter specifically mentioned transit passenger information technology and transit security systems as possibly not covered by the new CE. In accordance with section 6010 of SAFETEA–LU, the FHWA and FTA worded the proposed CE for ITS to conform as closely as possible to the statutory definitions in SAFETEA–LU section 5310. Nevertheless, the FHWA and FTA agree that the description of ITS purposes mentioned in the proposed CE in the NPRM, *i.e.*, to improve efficiency or safety, is not intended to exclude ITS activities that have security purposes or that provide passenger convenience. Therefore, to avoid potential misinterpretation, the FHWA and FTA have added the security and passenger convenience to the purposes that may be served by an ITS system that qualifies as a CE.

The same commenter also proposed that additional security projects, that cannot be characterized as ITS projects, such as the construction of a communications center, should also be categorically excluded if it is located on existing transportation right-of-way. The FHWA and FTA have not acted on this suggestion because many security projects, if appropriately sited, would be covered by existing CEs, and a future rulemaking that considers this proposal would have the benefit of more experience with such projects.

The commenter also suggested that the Department of Homeland Security (DHS) and the U.S. Department of Transportation (U.S. DOT) should have a single list of CEs for transportation security projects. The FHWA and FTA have not acted on this suggestion. The NEPA regulations of the CEQ require each Federal agency to have its own implementing procedures specific to its program. As a result, DHS and the two U.S. DOT agencies [FTA and FHWA] have their own separate NEPA procedures.

One commenter suggested the specific mention of ''radio communications systems'' in the CE for ITS activities. In response, FHWA and FTA have added ''radio communications systems'' to the ITS examples included in the regulatory text.

One commenter suggested that the new CE for ITS equipment should provide specific examples of transit-related ITS projects. The list might include items such as automatic vehicle locators, automated passenger counters, computer-aided dispatching systems, radio communication equipment, and

security equipment including cameras in facilities and on buses. The FHWA and FTA agree that the commenter's list gives prime examples of ITS projects that would be covered by the new CE and have added the examples to the regulatory language of this new CE.

The NPRM announced that the FHWA and FTA might designate one or more new CEs for projects that reduce transportation system congestion. The NPRM invited comments on this proposed designation. The FHWA and FTA received eight comments, some supporting the designation of a CE, and some expressing concerns. As noted below, the FHWA and FTA plan to publish a Supplemental Notice of Proposed Rulemaking (SNPRM) so that the public has the benefit of commenting on the actual proposed language for such a CE before the agencies decide whether to finalize it in regulation.

Several commenters expressed support for a new CE. Some indicated that the conversion of existing high occupancy vehicle (HOV) or general-purpose highway lanes into high occupancy/toll (HOT) lanes [3] or standard toll lanes can be accomplished with minimal construction activity beyond the existing highway facility and should qualify as a CE. Two commenters proposed wording for a new CE that would read: ''Conversion of an existing general use lane to an HOV/HOT [High Occupancy Vehicle/High Occupancy Toll] or other toll lane and/or other value pricing concept, along with supporting improvements which require no or minimal right-of-way (less than 1 acre) and result in less than 1 acre of impact to aquatic resource.''

A few commenters expressed concerns regarding the potential some congestion reduction projects might have for adverse environmental impacts that might not meet CE criteria, especially where congestion reduction elements are part of a larger project. Some of those commenters viewed this risk as a basis for limiting the scope of a designated CE. Several commenters correctly noted that where congestion management measures are component parts of larger projects, the characteristics of the larger project often drive the appropriate class of action under NEPA. Two commenters expressed equity concerns about the impact of toll charges on low-income drivers.

After carefully considering all of the comments on this topic, the FHWA and FTA have decided that public comment on the actual language of a CE would be beneficial prior to finalizing it. Thus, the FHWA and FTA will publish an SNPRM that includes language for a specific CE on projects that reduce congestion on the nation's highways. After receiving public comment, the FHWA and FTA would then finalize a CE, if appropriate, with another final rule at that time.

This decision to defer action on this CE until after further public comment in no way limits the ability of the FHWA or FTA to use their authority under 23 CFR 771.117(c) and (d) to determine that congestion management projects meet CE criteria. The FHWA and FTA will continue to utilize that authority for appropriate congestion management projects.[4]

One commenter appears to have misinterpreted the revised CE at paragraph (c)(5) of section 771.117, which has to do with the transfer of Federal lands. The misunderstanding may result from the term ''Federal lands pursuant to 23 U.S.C. 107(d) or 317.'' The cited statutory provisions refer to lands ''owned by the United States.'' The term does not include real property owned by a State or transit agency in which there is Federal financial interest resulting from the use of FHWA or FTA financial assistance to purchase the land. These lands are not ''Federal lands'' within the meaning of this CE.

Two commenters requested a wording change in paragraph (d)(12)(ii) of section 771.117. One commenter wished to emphasize that, at the time of a protective acquisition, it usually is not known whether a property actually will be required for a project. The second commenter stated that the proposed change would provide funding recipients with flexibility. Specifically, both commenters requested a word change in the first sentence from ''is'' to ''may be.'' The FHWA and FTA agree that the change would be helpful and have changed the first sentence of paragraph (d)(12)(ii) of section 771.117 to ''Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site.''

Three commenters proposed removing the last sentence of the description of a protective acquisition that would qualify as a CE. The proposal would allow protective acquisitions solely to avoid increases in the cost of real estate. Another commenter proposed that land acquisition solely to control the cost of right-of-way be allowed under the following conditions: (1) That the use of the acquired property not be changed prior to completion of the NEPA review of the project that would use the property; (2) that the acquisition not prejudice the consideration of alternatives to the project that would use the property; and (3) that the requirements of the Uniform Relocation Act be followed in acquiring the property. The suggested revisions would permit protective acquisitions based on economic reasons alone. The regulation presently permits consideration of cost as an element of justification, but not as the sole reason for a protective acquisition. The proposed changes, which would substantially alter existing limitations in the FHWA and FTA acquisition programs, have not been subjected to review and comment. For that reason, the FHWA and FTA decline to make the suggested revisions. Another commenter opposed the CEs for protective and hardship acquisitions. This commenter said that the project sponsor should be working with the local governmental entity that regulates land use to preserve the transportation corridor through overlay zoning or other land use controls under State or local jurisdiction. The commenter felt that no land should be purchased prior to completion of the NEPA review of the project that would use the land. The FHWA and FTA disagree. These exceptions are allowed under the

[3] An HOV lane, sometimes called a carpool lane, is a lane reserved for the use of carpools, vanpools and buses. HOV lanes usually are located next to the regular, unrestricted (''general purpose'') lanes. HOV lanes enable those who carpool or ride the bus to bypass the traffic in the adjacent, unrestricted lanes. HOT lanes are limited-access, normally barrier-separated highway lanes that provide free or reduced cost access to qualifying HOVs and also provide access to other paying vehicles not meeting passenger occupancy requirements. By using price and occupancy restrictions to manage the number of vehicles traveling on them, HOT lanes maintain volumes consistent with non-congested levels of service during peak travel periods. HOT lanes utilize sophisticated electronic toll collection and traffic information systems that also make variable, real-time toll pricing of non-HOV vehicles possible. For more detailed information on HOV lanes, see *http://ops.fhwa.dot.gov/freewaymgmt/hov.htm* and on HOT lanes, see *http://www.itsdocs.fhwa.dot.gov//JPODOCS/REPTS_TE//13668.html.*

[4] Not all congestion relief projects authorized under Federal law involve a discretionary decision or approval by the FHWA or FTA. If there is no discretionary decision, then NEPA does not apply. For example, the conversion of an HOV lane to a HOT lane pursuant to 23 U.S.C. 166(b)(4) does not, in and of itself, require approval by the FHWA. However, if the project also involves Federal-aid highway funding, the modification of prior FHWA-State agreements affecting the facility, or some other type of action that does require a discretionary FHWA action, then NEPA would apply. For further information on the role of the FHWA in HOV-to-HOT conversion projects, see Federal-aid Highway Program Guidance on High Occupancy Vehicle (HOV) Lanes, June 2008, Federal Highway Administration at *http://www.fhwa.dot.gov/operations/hovguide01.htm.*

existing regulation and are intended for limited use when an extenuating circumstance exists, such as imminent development or hardship on the existing owner. The land-use methods proposed by the commenter would not accomplish the purposes served by the present regulation.

Many commenters proposed additional changes to the CE for, and description of, hardship and protective acquisition. The FHWA and FTA did not propose, and are not making, any additional changes to the CE for hardship and protective acquisition. The description of the terms hardship and protective acquisition formerly appeared in footnotes and now have been moved, verbatim, into the regulatory text, with the one very minor exception discussed above. This change in the placement of the text on these CEs was made at the request of the Office of the **Federal Register** to conform with current standards for the format of regulations.

Several commenters expressed support for the proposal to add a CE for the acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c). Since the time that FTA proposed this provision in the NPRM, FTA has become aware of the need to review a project sponsor's plans to purchase right-of-way under this CE to ensure that the statutory provision is implemented properly. Further, the CE concerns early purchase of right-of-way and is therefore similar to the CE for a hardship or protective purchase. The railroad right-of-way CE logically belongs in the same part of the CE regulation as the other early purchase CE. As a result, FTA has decided to list the CE for the acquisition of pre-existing railroad right-of-way in paragraph (d) of section 771.117.

One commenter suggested that the FHWA and FTA consider a new CE for transit projects that alleviate urban congestion, such as bus rapid transit (BRT) operating on current bus routes or on new routes that are well-integrated into the transit network and have minimal negative impacts. The FHWA and FTA are not adding the proposed CE because BRT projects located on existing streets with stations on sidewalks or other public right-of-way would be covered by existing CEs which take into account that there are no unusual circumstances indicating that a significant impact could ensue. Once the FHWA and FTA have a larger body of experience with a greater variety of BRT projects, we will consider updating our regulations as necessary.

One commenter suggested that rehabilitation of an existing transit station should be moved from the list of examples in paragraph (d) of section 771.117 that require documentation to show that the project's design or siting is proper and that no unusual circumstances exist, to the list of automatic CEs in paragraph (c) of section 771.117 that require no documentation other than a project description to show that the CE applies. The FHWA and FTA note that many such transit stations in older subway systems are on or are eligible for the National Register of Historic Places, or have elements such as antique tile walls that so qualify. Therefore, the FHWA and FTA believe that it is appropriate to require documentation that addresses not only the CE requirements but also any Section 106 or Section 4(f) implications of the rehabilitation. Therefore, transit station rehabilitation will remain in the list of CE examples in paragraph (d) of section 771.117. The FHWA and FTA may reconsider this decision in a future rulemaking when the suggested revision, which may be of high public interest, will be subject to an opportunity for public comment.

One commenter proposed that the CE lists be expanded to include transit activities that became eligible for FTA funding after 1987, when the last major revision of 23 CFR part 771 occurred. The CEs suggested include preventive maintenance, as defined in Federal transit law, ADA-required transit services, and park-and-ride lots not located on the fringe of a transportation corridor. The comment also recommended moving certain CEs in the list of examples in paragraph (d) of section 771.117 requiring documentation to show that the CE conditions are met, to the list of automatic CEs in paragraph (c) of section 771.117. FTA agrees with this comment in concept, but has not acted on it in this rulemaking. Although the regulation would be cleaner if it explicitly listed all of the activities that FTA commonly funds that qualify as CEs, the commenter correctly points out that these activities are generally covered by paragraph (d) of section 771.117. FTA did not provide substantiation of the proposed CEs in the NPRM, and as a result, the proposed CEs have not been subjected to public review and comment. The FHWA and FTA believe another, more comprehensive rulemaking would be necessary to address the proposed changes.

One commenter suggested a number of changes to section 771.117, which governs categorical exclusions. One suggestion was that the FHWA and FTA abandon the creation of new categories of CEs in favor of allowing recipients to determine whether a project qualifies for CE status. The law places responsibility for NEPA compliance on the Secretary of Transportation and the agencies under the Secretary. The change requested by the commenter exceeds the two agencies' [FHWA and FTA] legal authority.

One commenter suggested that the FHWA and FTA add a CE for a situation where a project affects an isolated wetland that is not within the regulatory jurisdiction of the U.S. Army Corps of Engineers. The applicability of other Federal laws, such as the Clean Water Act, is a consideration in determining the NEPA class of action, but it is only one of many considerations. Thus, the FHWA and FTA believe that establishing criteria under only one Federal law would not be appropriate and would not elicit consideration of the full magnitude and context of an action in accordance with NEPA.

The same commenter suggested that the FHWA and FTA require the agencies to establish a deadline for CE completion. The FHWA and FTA believe that good project management practices include having and working towards a project schedule. However, the FHWA and FTA do not believe that embedding a deadline requirement in the regulation governing CEs is an appropriate mechanism to achieve that goal. A deadline could not be set without considering all of the individual project situations that factor into developing an appropriate schedule. Agencies are currently free to set and work towards a deadline. Further, any establishment of a deadline that would be binding on other Federal agencies must be accomplished through congressional action.

Finally, the commenter indicated that the FHWA and FTA should create a preference for CEs over EAs and provide other clarifications concerning when a CE should be used instead of an EA. The FHWA and FTA disagree with the commenter. The present regulations in section 771.117 provide an appropriate definition of what constitutes a CE and the standards for determining whether a project qualifies as a CE. Sections 771.117 and 771.119, when read together with the CEQ regulation, define when an EA should be performed. The determination of the NEPA class of action applicable to a project is made based on the facts of the project, not the preference for one process or the other.

Through an oversight, the NPRM failed to include asterisks at the end of the amendatory language for section 771.117. The FHWA and FTA did not, however, intend to delete paragraph (e)

of section 771.117, and the paragraph will remain unchanged by this final rule. The asterisks have been added to the amendatory language of this final rule to denote this.

Section 771.119 Environmental Assessments

One commenter suggested that the FHWA and FTA explicitly encourage the use of the environmental review procedures detailed in 23 U.S.C. 139 for EA projects. The FHWA and FTA agree that many of the procedures contained in 23 U.S.C. 139 could be beneficial to a project. Funding recipients may request the use of participating agency designations, scheduling, and other procedures similar to those established in 23 U.S.C. 139 on any project. Consequently, the FHWA and FTA continue to believe that the application of the 23 U.S.C. 139 procedures to non-EIS projects is best determined on a case-by-case basis.

Two commenters objected to the proposed deletion of the sentence in the existing regulation that applies only to FTA projects and that allows an applicant to make an EA available for public review and comment before FTA has reviewed and approved the EA for public inspection. The commenters suggested that the required FTA approval would delay projects unnecessarily. FTA disagrees. In FTA's experience, the release of an EA without an FTA review often results in an incomplete or insufficient document that fails to elicit meaningful public and interagency comment for NEPA purposes and cannot support a FONSI by FTA. This situation causes delays and duplication of effort when the EA must be corrected, re-advertised, and re-released for public comment. For an adequate EA, the time required for an FTA approval would generally be the same whether that review precedes the release of the EA or precedes the issuance of a FONSI. As proposed in the NPRM, FTA is deleting the sentence that formerly permitted an applicant to release an EA without FTA approval.

Section 771.123 Draft Environmental Impact Statements

Several commenters suggested that paragraph (b) of section 771.123 include ''purpose and need'' among the issues to be addressed during the scoping process. The FHWA and FTA agree and have made the suggested change. One of these commenters suggested that this paragraph also assert the primacy of the lead agencies in crafting the purpose and need and in determining the range of alternatives. The FHWA and FTA have not acted on this recommendation because it is appropriately dealt with in guidance. In 2003, CEQ issued a guidance letter, available at: *http://www.nepa.gov/nepa/regs/CEQPurpose2.pdf,* which states: ''In the case of a proposal intended to address transportation needs, joint lead or cooperating agencies should afford substantial deference to the DOT agency's articulation of purpose and need. 49 U.S.C. 101(b)(5).'' The letter recognizes that Federal agencies acting under their own authorizing legislation separate from NEPA may have independent responsibilities and concerns. Section 139 of Title 23, U.S. Code, states that the lead agencies determine the purpose and need and range of alternatives for any environmental document whose preparation is their responsibility. It does not override the statutory responsibilities of other Federal agencies, though it does establish a process that is intended to surface and resolve differences early. The regulatory assertion of primacy suggested by the commenter would not override other Federal laws.

One commenter requested more flexibility or clarification regarding the role of a local agency in the development of an EIS. The FHWA and FTA look to the agencies that are the direct recipients of Federal funding to prepare environmental review documents under the oversight and supervision of the FHWA or FTA, as applicable. For the FHWA, this typically is the State DOT. For FTA, the direct recipient of funding typically is a metropolitan transit agency. In the case of the FHWA, the State DOT may work with local government agencies that are project sponsors, but the State DOT remains responsible to the FHWA for the environmental review documents. The relationship between the State DOT and the local agency in such cases is similar to the relationship between the FHWA and the State DOT. The State DOT must supervise, oversee, and independently evaluate the local agency's preparation of the environmental review documents. A local agency that is not a direct recipient of Federal funds may be a joint lead agency at the discretion of the required lead agencies in accordance with the provisions of 23 U.S.C. 139(c)(2) and the CEQ regulation, and, as a joint lead agency, may prepare the EIS and other environmental review documents in accordance with those provisions.

One commenter suggested that an applicant be required to file a declaration of its intention to build a project with the chief executive of all political subdivisions in which the action is located. The FHWA and FTA believe that the requirements of scoping and of identifying participating agencies and inviting their involvement are adequate in this regard and have not made the suggested change.

FTA received one comment that supported the NPRM's proposal to delete the requirement for a locally preferred alternative report following the draft EIS. The final rule omits that requirement, as it is more appropriately addressed in the regulation that implements FTA's New Starts program at 49 CFR part 611.

FTA also changed the terminology in paragraph (j) of section 771.123 to ''major fixed guideway capital project'' to conform to current law. The new term is defined in Federal transit law at 49 U.S.C. 5309(a)(3).

Section 771.125 Final Environmental Impact Statements

The FHWA and FTA revised paragraph (a) of section 771.125 for consistency with SAFETEA–LU section 6002. In preparing a Final EIS, the responsibilities of the Administration under the former rule are now the responsibility of the lead agencies. The paragraph was revised to reflect this change.

Two commenters suggested that paragraph (c)(1)(vi) of section 771.125 in the NPRM, which provided that issues other than those listed could warrant review of an EIS by the FHWA or FTA headquarters, be deleted because it would lead to more Final EISs being reviewed in the FHWA or FTA headquarters office, resulting in unnecessary delays. The FHWA and FTA have removed the subject paragraph from the final rule, as requested, but for a different reason. The paragraph was redundant because the first sentence of paragraph (c)(1) of section 771.125 accomplishes the same purpose, that of stating the ultimate authority of the FHWA and FTA headquarters offices over the NEPA process. The delegations of the authority to make NEPA decisions to the FHWA and FTA field offices does not absolve the FHWA and FTA Administrators of their responsibilities under NEPA and other environmental laws. The FHWA and FTA headquarters offices, under the direction of each respective Administrator, must retain the authority to review a Final EIS in headquarters before it is signed, whenever the Administrator deems it appropriate. Without the addition of paragraph (c)(1)(vi) of section 771.125, as was proposed in the NPRM, paragraph (c)(1) of section 771.125 remains unchanged.

FTA proposed in the NPRM to delete paragraph (c)(3) of section 771.125 because the requirement was considered perfunctory due to the increase in size of the New Starts program and because the list of reasons in paragraph (c)(1) of section 771.125 already accomplishes this purpose. No comment was received on this proposed change, so the paragraph is deleted in this final rule as proposed in the NPRM.

One commenter suggested that the FHWA and FTA revise the regulation at section 771.125 on Final EISs to require that a Final EIS provide specific permit status information, including the record of coordination and interaction with resource agencies. The FHWA and FTA do not believe such change is warranted. Part 771 supplements the CEQ regulation, which already describes similar requirements. The CEQ requirements include the circulation of the documents (see, *e.g.*, 40 CFR 1502.19), documented responses to comments received (40 CFR 1503.4), and a listing of required Federal permits (40 CFR 1502.25(b)). The FHWA and FTA believe that the CEQ requirements are sufficient and there is no need to replicate them in part 771. To the extent that the commenter calls for more detailed documentation of interactions with resource agencies than presently is required, the FHWA and FTA believe that decision is best made on a case-by-case basis because the usefulness of such detailed information varies by project.

Section 771.127 Record of Decision

The FHWA and FTA made minor stylistic changes in this section.

Section 771.129 Re-evaluations

The FHWA and FTA had proposed to re-order the paragraphs in this section without modification. Upon further reflection, the original order seems preferable because the original regulation addressed the three situations in the sequential order that they occur in the project development process. In responding to the comment on paragraph (a) of section 771.113 discussed above, the FHWA and FTA noticed that the same comment would apply to the original paragraph (c) of section 771.129 (paragraph (a) of section 771.129 in the NPRM). That paragraph referred to ''approval of the EIS, FONSI, or CE designation'' as the completion of the NEPA process, when it should have referred to ''approval of the ROD, FONSI, or CE designation.'' The FHWA and FTA have accordingly changed ''EIS'' to ''ROD'' here as well.

One commenter requested that section 771.129 be further revised to clarify what happens if the CE or FONSI needs updating but the changes do not cause the need for a new or supplemental document. The FHWA and FTA believe paragraph (c) of section 771.129 of the final rule adequately covers this situation and does not need further revision. Under this provision an applicant will contact the Administration to determine if the ROD, CE or FONSI needs updating and the Administration shall decide when the consultations should be documented.

Section 771.130 Supplemental Environmental Impact Statements

In paragraph (a)(2) of section 771.130, the FHWA and FTA corrected a typographical error in the former regulation.

In paragraph (e) of section 771.130, the terminology was changed to conform with current Federal transit law as discussed previously for paragraph (j) of section 771.123.

Section 771.139 Limitations on Claims

Three commenters asked for clarification about the applicability of the new limitations on claims provision (23 U.S.C. 139(l); amplified in section 771.139 in the NPRM). Specifically, the commenters asked (1) whether the limitations provision applies to all classes of action (EISs, EAs, and CEs) without regard to whether the projects had used the environmental review process procedures in 23 U.S.C. 139; (2) whether the limitations provision applies to reevaluations (section 771.129) and tiered EISs (paragraph (g) of section 771.111); and (3) whether clarifications could be added to part 771 to foreclose a possible interpretation of section 23 U.S.C. 139 (l)(2) as requiring a supplemental environmental review document each time new information arises. The FHWA and FTA do not believe that any of the three commenters raised issues that require regulatory action at this time. As the FHWA and FTA previously have indicated in guidance (see Question 11 in Appendix E of ''SAFETEA–LU Environmental Review Process: Final Guidance,'' issued November 15, 2006, available at *http://www.fhwa.dot.gov/hep/section6002/index.htm*), the agencies believe that Congress' intent in adopting the limitations on claims provision was to permit it to be applied to any Federal agency decision that is necessary in order for any highway or public transportation capital project to move forward to implementation. This means it can be applied to any project, regardless of its NEPA class of action. In all cases, the decision whether to publish a limitations notice should be made on a case-by-case basis as discussed in Appendix E to the above-referenced final guidance on the implementation of 23 U.S.C. 139.

As described in the above discussion on section 771.129, reevaluations are used to address a variety of circumstances. The limitations provision may be applied to a reevaluation decision, but it would not be needed for the vast majority of reevaluations which simply confirm that there is neither any change in the project nor any new information that requires additional analysis that could affect a prior project decision. The FHWA and FTA also note that when legal challenges to a project otherwise are foreclosed by law, such as by the expiration of a previous limitations notice, the agencies' view is that only the issues specifically addressed in the reevaluation may be challenged. Neither the mere fact a reevaluation is done, nor the act of publishing a limitations notice for the reevaluation, would serve to reopen other issues to judicial review. *See Highland Village Parents Group* v. *U.S. Federal Highway Admin.,* No. 4:07–CV–548, 2008 WL 2462944 (E.D. Tex. June 13, 2008).

In the case of decisions based on a tier 1 EIS, a limitations notice may be issued for those decisions that the agency considers to be final and that the agency does not expect to revisit in tier 2 proceedings, such as elimination of modal alternatives or project corridors, absent significant new information. Particular care is required when making a determination as to which decisions are final and subject to a limitations notice for a tier 1 document. For FHWA notices, pre-publication consultation with headquarters staff is encouraged. (FTA notices are always prepared and reviewed by FTA headquarters staff.)

Finally, the FHWA and FTA agree that SAFETEA–LU did not alter the standards for deciding when a supplemental EA or EIS is required. Section 139(l)(2) of Title 23, U.S. Code, addresses the consideration of new information received after the close of a comment period. That section also makes it clear that a decision based on a supplemental EA or EIS is a separate final agency action and can be the subject of a 180-day notice.

Regulatory Notices

All comments received are available for examination in the docket at *http://www.regulations.gov.* All comments, including a number of comments received after the comment closing date of October 9, 2007, have been fully considered in this final rule.

Executive Order 13132: Federalism

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

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and that impose ''substantial and direct compliance costs'' on such communities. The FHWA and FTA have analyzed this final rule under Executive Order 13175 and believe that this final action 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 impact statement is not required. The FHWA and FTA received no comments on the NPRM from Indian tribal governments.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), the FHWA and FTA must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The FHWA and FTA certify that this final rule will not have a significant economic impact on substantial number of small entities.

National Environmental Policy Act

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

Furthermore, this final action will not have any effect on the quality of the environment under the NEPA and is categorically excludable under the current 23 CFR 771.117(c)(20). This final action is intended to incorporate new statutory requirements into the agencies' regulations and to add new CEs to the NEPA process. Additionally, this final rule seeks to improve the description of the procedures and to provide clarification with respect to the interpretation of certain provisions.

Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under the authority of 49 U.S.C. 5323(b), 49 U.S.C. 5324(c), 23 U.S.C. 139, 23 U.S.C. 325, 23 U.S.C. 326, 23 U.S.C. 327, section 6002 of SAFETEA–LU, and section 6010 of SAFETEA–LU, the last of which required the Secretary of Transportation to initiate rulemaking to establish, as appropriate, CEs for ITS projects. In addition, this NPRM implements changes made by the creation of 23 U.S.C. 139 to the process by which the FHWA and FTA comply with NEPA.

Executive Order 12866 and DOT Regulatory Policies and Procedures

The FHWA and FTA have determined that this action is not considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032).

Executive Order 12866 requires agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' The FHWA and FTA anticipate that the direct economic impact of this rulemaking will be minimal. Some of the changes that this rule makes are requirements mandated in SAFETEA–LU. The FHWA and FTA also consider this rule as a means to clarify the existing regulatory requirements. These changes will not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Paperwork Reduction Act

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

Regulation Identifier Number (RIN)

The U.S. DOT assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

Privacy Act

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

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, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and tribal governments,

in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 12630 (Taking of Private Property)

The FHWA and FTA have analyzed this final rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. The FHWA and FTA do not anticipate that this final rule will effect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13211 (Energy Effects)

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

Executive Order 13045 (Protection of Children)

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

List of Subjects

23 CFR Part 771

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

49 CFR Part 622

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

■ For the reasons set forth in the preamble, amend Chapter I of Title 23 and Chapter VI of Title 49, of the Code of Federal Regulations as set forth below:

Federal Highway Administration

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 1. Revise the authority citation for part 771 to read as follows:

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

■ 2. Revise § 771.101 to read as follows:

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the NEPA regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulation). Together these regulations set forth all FHWA, FTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and public transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, 327, and 49 U.S.C. 303, 5301(e), 5323(b), and 5324(b) and (c).

■ 3. Amend § 771.105 by revising paragraph (a) and its footnote to read as follows:

§ 771.105 Policy.

* * * * *

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental review document required by this regulation.[1]

* * * * *

[1] FHWA and FTA have supplementary guidance on environmental review documents and procedures for their programs. This guidance includes: the FHWA Technical Advisory T6640.8A, October 30, 1987; ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006; Appendix A to 23 CFR part 450 titled ''Linking the Transportation Planning and NEPA Processes''; and ''Transit Noise and Vibration Impact Assessment,'' May 2006. The FHWA and the FTA supplementary guidance, and any updated versions of the guidance, are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7 and on their respective Web sites at *http://www.fhwa.dot.gov* and *http://www.fta.dot.gov,* or in hard copy by request.

■ 4. Amend § 771.107 by revising paragraph (d) and adding paragraphs (f), (g), (h), and (i) to read as follows:

§ 771.107 Definitions.

* * * * *

(d) *Administration.* The FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law.

* * * * *

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

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

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

(i) *Project sponsor.* The Federal, State, local, or federally-recognized Indian tribal governmental unit, or other entity, including any private or public-private entity that seeks an Administration action.

■ 5. Amend § 771.109 by removing the words ''by the Administration'' from paragraph (a)(3) and by revising paragraphs (c) and (d) to read as follows:

§ 771.109 Applicability and responsibilities.

* * * * *

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

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

appropriate environmental review documents.

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

(3) The Administration may invite other Federal, State, local, or federally-recognized Indian tribal governmental units to serve as joint lead agencies in accordance with the CEQ regulation. If the applicant is serving as a joint lead agency under 23 U.S.C. 139(c)(3), then the Administration and the applicant will decide jointly which other agencies to invite to serve as joint lead agencies.

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

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

(6) The role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents.

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

■ 6. Amend § 771.111 by revising paragraphs (a), (b), (c), (d), (h)(1), and (i) and adding paragraphs (h)(2)(vii) and (h)(2)(viii) to read as follows:

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

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental review documents. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental review documents.

(2) The information and results produced by, or in support of, the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR 1502.21 and 23 CFR 450.212 or 450.318.[3]

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

(c) When both the FHWA and FTA are involved in the development of a project, or when the FHWA or FTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.

(d) During the early coordination process, the lead agencies may request other agencies having an interest in the action to participate, and must invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139.[4] Agencies with special expertise may be invited to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

* * * * *

(h) * * *

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

(2) * * *

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

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding, in accordance with 49 U.S.C. 303(d).[5]

* * * * *

(i) Applicants for capital assistance in the FTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental review documents. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided, pursuant to 49 U.S.C. 5323(b).

* * * * *

■ 7. Amend § 771.113 by revising paragraphs (a) introductory text, (a)(2) and (b) and adding paragraph (d) to read as follows:

§ 771.113 Timing of Administration activities.

(a) The lead agencies, in cooperation with the applicant (if not a lead agency), will perform the work necessary to complete a finding of no significant impact (FONSI) or a record of decision (ROD) and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been

[3] On February 14, 2007, FHWA and FTA issued guidance on incorporating products of the planning process into NEPA documents as Appendix A of 23 CFR part 450. This guidance, titled ''Linking the Transportation Planning and NEPA Processes,'' is available on the FHWA Web site at *http://www.fhwa.dot.gov* or in hard copy upon request.

[4] The FHWA and FTA have developed guidance on 23 U.S.C. Section 139 titled ''SAFETEA–LU Environmental Review Process: Final Guidance,'' November 15, 2006, and available at *http://www.fhwa.dot.gov* or in hard copy upon request.

[5] The FHWA and FTA have developed guidance on Section 4(f) de minimis impact findings titled ''Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources,'' December 13, 2005, which is available at *http://www.fhwa.dot.gov* or in hard copy upon request.

completed, except as otherwise provided in law or in paragraph (d) of this section:

* * * * *

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

* * * * *

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

* * * * *

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

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of § 771.117.

(2) Paragraph (d)(13) of § 771.117 contains an exception for the acquisition of pre-existing railroad right-of-way for future transit use in accordance with 49 U.S.C. 5324(c).

(3) FHWA regulations at 23 CFR 710.503 establish conditions for FHWA approval of Federal-aid highway funding for hardship and protective acquisitions.

(4) FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion of NEPA. In paragraphs (b) and (c) of § 710.501, the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ regulations at 40 CFR 1506.1 and other applicable Federal requirements.

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

§ 771.115 [Amended]

■ 8. Amend § 771.115 in paragraph (b) by replacing the word ''cumulative'' with the word ''cumulatively''.

■ 9. Amend § 771.117 as follows:

■ a. In paragraph (a), remove the word ''significnt'' and add the word ''significant'' in its place.

■ b. Revise paragraphs (c)(5) and (d)(12) and add paragraphs (c)(21) and (d)(13) to read as follows:

§ 771.117 Categorical exclusions.

* * * * *

(c) * * *

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

* * * * *

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

* * * * *

(d) * * *

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

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

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

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

* * * * *

■ 10. Amend § 771.119 as follows:

■ a. In paragraph (c), remove the second sentence.

■ b. In paragraph (g), capitalize the word ''administration''.

■ c. Add paragraph (j) to read as follows:

§ 771.119 Environmental assessments.

* * * * *

(j) If the Administration decides to apply 23 U.S.C. 139 to an action involving an EA, then the EA shall be prepared in accordance with the applicable provisions of that statute.

■ 11. Amend § 771.123 by revising paragraphs (a), (b), (c), (d), (i), and (j) to read as follows:

§ 771.123 Draft environmental impact statements.

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

(b) After publication of the Notice of Intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process which may take into account any planning work already accomplished, in accordance with 23 CFR 450.212 or 450.318. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For the FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.111. For FTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c).

* * * * *

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

(j) For major new fixed guideway capital projects proposed for FTA funding, FTA may give approval to begin preliminary engineering on the principal alternative(s) under consideration after circulation of a draft EIS and consideration of comments received. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS or, where appropriate, a supplemental draft EIS.

■ 12. Amend § 771.125 by removing paragraph (c)(3) and revising paragraphs (a)(1) and (e) to read as follows:

§ 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in paragraphs (b) and (d) of § 771.109. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

* * * * *

(e) Approval of the final EIS is not an Administration action as defined in paragraph (c) of § 771.107 and does not commit the Administration to approve any future grant request to fund the preferred alternative.

* * * * *

§ 771.127 [Amended]

■ 13. Amend § 771.127 as follows:

■ a. In paragraph (a), remove the words ''record of decision (ROD)'' and add the word ''ROD'' in their place.

■ b. In paragraph (a), remove the word ''chapter'' and add the word ''title'' in its place.

§ 771.129 [Amended]

■ 14. Amend § 771.129 as follows:

■ a. In paragraph (a), remove the number ''3'' and add the word ''three'' in its place.

■ b. In paragraph (c), remove the word ''EIS'' and add the word ''ROD'' in its place.

■ 15. Amend § 771.130 as follows:

■ a. In paragraph (a)(2), revise the word ''bearings'' to read ''bearing''.

■ b. Revise the first sentence of paragraph (e) to read as follows:

§ 771.130 Supplemental environmental impact statements.

* * * * *

(e) A supplemental draft EIS may be necessary for major new fixed guideway capital projects proposed for FTA funding if there is a substantial change in the level of detail on project impacts during project planning and development. * * *

* * * * *

■ 16. Amend § 771.133 by revising the last sentence to read as follows:

§ 771.133 Compliance with other requirements.

* * * The Administration's approval of an environmental document constitutes its finding of compliance with the report requirements of 23 U.S.C. 128.

■ 17. Add § 771.139 to read as follows:

§ 771.139 Limitations on Actions.

Notices announcing decisions by the Administration or by other Federal agencies on a transportation project may be published in the **Federal Register** indicating that such decisions are final within the meaning of 23 U.S.C. 139(*l*). Claims arising under Federal law seeking judicial review of any such decisions are barred unless filed within 180 days after publication of the notice. This 180-day time period does not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.[6] This provision does not create any right of judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

Federal Transit Administration

Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

■ 18. Revise the authority citation for part 622 to read as follows:

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

Issued in Washington, DC this 17th day of March, 2009.

Jeffrey F. Paniati,

Acting Deputy Administrator, Federal Highway Administration.

Matthew J. Welbes,

Acting Deputy Administrator, Federal Transit Administration.

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