



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Parts 771 and 774

Federal Railroad Administration

49 CFR Part 264

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA-2015-0011]

FHWA RIN 2125-AF60

FRA RIN 2130-AC64

FTA RIN 2132-AB26

Environmental Impacts and Related Procedures

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

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: This SNPRM provides interested parties the opportunity to comment on the proposed revisions to the FHWA and FTA joint regulations implementing the National Environmental Policy Act (NEPA) and Section 4(f) requirements. The FHWA, FRA, and FTA (hereafter referred to as “the Agencies”) propose these revisions after the enactment of the Fixing America’s Surface Transportation (FAST) Act, which requires a rulemaking to address programmatic approaches in environmental reviews and makes other changes to existing law that should be addressed in a rulemaking. In this SNPRM

the Agencies also propose to add FRA to regulations governing environmental impact and related procedures and the parks, recreation areas, wildlife and waterfowl refuges, and historic site, making those regulations FRA's NEPA implementing procedures and FRA's Section 4(f) implementing regulations, respectively. This SNPRM proposes to modify the FHWA/FTA Environmental Impact and Related Procedures due to changes to the environmental review process made by the FAST Act and to modify the Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites regulations due to new exceptions created by the FAST Act. Lastly, the Agencies request comments regarding the current FHWA and FTA definition of "existing operational right-of-way" in their respective categorical exclusion sections. The Agencies seek comments on the proposals in this document.

DATES: The Agencies must receive comments on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE, West Building Ground Floor Room W12-140, Washington, DC 20590-0001.
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE, between 9 a.m. 5 p.m., Monday through Friday, except

Federal holidays. The telephone number is (202) 366-9329.

Instructions: You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For FHWA: Neel Vanikar, Office of Project Delivery and Environmental Review, HEPE, (202) 366-2068, Neel.Vanikar@dot.gov, or Diane Mobley, Office of the Chief Counsel, (202) 366-1366, Diane.Mobley@dot.gov. For FRA: Michael Johnsen, Office of Program Delivery, (202) 493-1310, michael.johnsen@dot.gov, or Christopher Van Nostrand, Office of Chief Counsel, (202) 493-6058, Christopher.Vannostrand@dot.gov. For FTA: Megan Blum, Office of Planning and Environment, (202) 366-0463, Megan.Blum@dot.gov, or Helen Serassio, Office of Chief Counsel, (202) 366-1974, Helen.Serassio@dot.gov. The Agencies are located at 1200 New Jersey Ave., SE., Washington, DC 20590-0001. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On December 4, 2015, President Obama signed into law the FAST Act (Pub. L. 114-94, 129 Stat. 1312). The FAST Act contains new requirements the Agencies must follow to comply with NEPA (42 U.S.C. 4321 et seq.) and Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303). This SNPRM includes proposed changes to 23 CFR part 771 to

address the following issues: (1) section 1304(k) which requires a rulemaking regarding programmatic approaches; (2) certain amendments to 23 U.S.C. 139 made by section 1304; and (3) the section 11503 requirement that the Secretary of Transportation (Secretary) apply, to the greatest extent feasible, the project development procedures described in 23 U.S.C. 139 to railroad projects requiring the Secretary's approval under NEPA (49 U.S.C. 24201(a)). With respect to 23 CFR part 774, the SNPRM includes proposed changes to the Agencies' Section 4(f) procedures to reflect the two new Section 4(f) exceptions created in the FAST Act (sections 1303 and 11502). In addition, FRA also proposes joining 23 CFR part 774.

General Discussion of the Proposals

The following sections of the FAST Act affect 23 CFR parts 771 and 774, and are addressed in this SNPRM:

- Section 1303 amends Section 4(f) to create an exception for certain common post-1945 concrete or steel bridges and culverts;
- Section 1304 revises certain elements of the Agencies' environmental review process at 23 U.S.C. 139;
- Section 1304(k) replaces a rulemaking requirement created by the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405, with a new rulemaking requirement to implement the programmatic approaches provision in 23 U.S.C. 139(b)(3);

- Section 11502 amends Section 4(f) to create a railroad or rail transit line exception when certain conditions are met; and,
- Section 11503 requires the Secretary apply, to the greatest extent feasible, the project development procedures described in 23 U.S.C. 139 to railroad projects requiring the Secretary's approval under NEPA.

SNPRM Rationale

This SNPRM supplements the notice of proposed rulemaking (NPRM) FHWA and FTA issued on November 20, 2015 (November 2015 NPRM) (80 FR 72624, Docket No. FHWA–2015–0011). The November 2015 NPRM proposed changes to the FHWA/FTA Environmental Impact and Related Procedures regulations (23 CFR part 771) and the Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Site regulations (23 CFR part 774). Primarily, FHWA and FTA issued the November 2015 NPRM to address certain changes to the environmental review process imposed by MAP-21.

The comment period for the November 2015 NPRM closed on January 19, 2016. The FHWA and FTA received 14 comment letters for consideration. During the November 2015 NPRM comment period, President Obama signed the FAST Act into law. The FHWA and FTA did not pursue a final rule following the November 2015 NPRM because certain FAST Act provisions affected portions of the regulatory provisions addressed in the November 2015 NPRM and because certain other FAST Act provisions are appropriately addressed in a rulemaking. The Agencies now propose addressing those changes to parts 771 and 774 in this SNPRM.

The Agencies used the proposals in the November 2015 NPRM as the baseline for this SNPRM (e.g., section/paragraph organization and language). All substantive comments received on the November 2015 NPRM and this SNPRM, as well as the appropriate responses to both sets of comments, will be addressed in a final rule should a final rule be issued. The docket contains a redline that captures both the November 2015 NPRM and this SNPRM's changes.

This SNPRM contains proposals satisfying the rulemaking requirements in FAST Act sections 1304(k) and 11503, and addresses changes to 23 U.S.C. 139 (Efficient Environmental Reviews for Project Decisionmaking), 23 U.S.C. 138 (Preservation of Parklands), and 49 U.S.C. 303 (Policy on Lands, Wildlife and Waterfowl Refuges, and Historic Sites) FAST Act sections 1304, 1303, and 11502 made, respectively. The SNPRM also proposes to add FRA to parts 771 and 774.

Applicability of 23 CFR Part 771 to FRA Actions

Section 11503 of the FAST Act requires the Secretary, among other things, to apply, to the greatest extent feasible, the project development procedures described in 23 U.S.C. 139 (Efficient Environmental Reviews for Project Decisionmaking) to railroad projects requiring the Secretary's approval under NEPA. The Secretary must incorporate into FRA regulations and procedures for railroad projects aspects of the 23 U.S.C. 139 project development procedures, or portions thereof, that increase the efficiency of the review of railroad projects consistent with section 11503.

The FRA has determined that applying 23 CFR part 771 to railroad actions is the most efficient way to comply with section 11503. By joining part 771, FRA would not need to develop entirely new NEPA regulations for railroads projects. On June 9, 2016, FRA published a notice in the Federal Register requesting public comment on the application of part 771 to FRA's railroad projects (81 FR 37237, June 9, 2016). The comment period ended on July 11, 2016. The FRA received one comment on this notice from the Association of American Railroads (AAR). The commenter suggested that FRA develop its own regulations rather than adopt 23 CFR part 771 because of perceived difficulties applying certain requirements to freight railroad projects on privately owned infrastructure. While many of the FHWA and FTA actions are sponsored by government entities (e.g., State DOTs), the regulations can be applied to the actions on privately owned railroad infrastructure. This SNPRM proposes certain modifications to 23 CFR part 771 to accommodate railroad projects.

Section 11503 of the FAST Act also required FRA to survey its use of NEPA categorical exclusions (CE) in railroad projects since 2005. On June 2, 2016, FRA published a notice in the Federal Register providing the public with a review of FRA's survey, requesting comments on two new classes of actions that might be appropriate for categorical exclusion, and requesting suggestions for additional categories of activities appropriate for exclusion (81 FR 35437, June 2, 2016) (June Notice). The comment period ended on July 5, 2016. The FRA received comments from the AAR, the Michigan Department of Transportation and the Oregon Department of Transportation which are addressed in the section-by-section analysis below. This SNPRM satisfies the FAST Act

section 11503 requirement that the Secretary publish an NPRM proposing new and existing CEs for railroad projects requiring the Secretary's approval.

The FRA proposes to join the 23 CFR part 774 regulations implementing Section 4(f). FRA determined joining 23 CFR part 774 would further align its environmental review processes with the FHWA and FTA processes. This would create consistency implementing Section 4(f) and provide clarity to FRA's applicants and project sponsors. Additionally, it eliminates FRA's need to update the Section 4(f) sections of its existing Environmental Procedures; if FRA only joined 23 CFR part 771, the part 771 regulations would supersede most, if not all, of FRA's Environmental Procedures, and FRA would still need to revise the Section 4(f) sections. In addition, FRA currently follows 23 CFR part 774 and associated FHWA and FTA guidance as guidance when it applies Section 4(f) to railroad projects and officially joining the regulations would not significantly change FRA's current practice. In the future, DOT may consider proposing a Department-wide rule or updating Department-wide guidance on the implementation of Section 4(f).

This SNPRM would also amend part 264 in title 49 to add a cross reference 23 CFR part 771 and 23 CFR part 774, and the Agencies propose changing the heading to "Environmental Impact and Related Procedures."

Section-by-Section Discussion of the Proposals

NEPA Regulation Changes (Part 771)

General

There are two general proposals to note. First, the Agencies propose to list the Agencies in alphabetical order (e.g., “FHWA, FRA, and FTA”) whenever it is necessary to list all three agencies. This change would apply throughout the regulation. Second, the Agencies propose “final EIS” as the acronym for “final environmental impact statement” (instead of “FEIS”) throughout 23 CFR part 771 to provide consistency.

Section 771.101 Purpose

The Agencies propose to modify this section to add the appropriate references to FRA and railroad projects, which would allow FRA to use part 771 as its procedures for implementing NEPA. The Agencies also propose updating the list of references in the last sentence to remove MAP-21 section 1319 because it was codified at 23 U.S.C. 139(n) and 49 U.S.C. 304a, and to add FAST Act section 1304.

Section 771.105 Policy

Through the November 2015 NPRM, FHWA and FTA proposed several revisions to 23 CFR part 771 to satisfy the programmatic approaches rulemaking requirement created by MAP-21, section 1305. To satisfy the programmatic approaches rulemaking requirement created by FAST Act, section 1304(k), the Agencies propose revising paragraph (b), originally proposed in the November 2015 NPRM, by including the parenthetical “(including the requirements found at 23 U.S.C. 139(b))” after the words “environmental requirements.”

The Agencies also propose a non-substantive change to paragraph (e)(2) in the first sentence to correct a typo (“fo” to “of”).

The Agencies are proposing to revise § 771.105 to directly address 23 U.S.C. 139(d)(8)-Single NEPA Document, which requires the Agencies develop a single NEPA document that can be used for all Federal permits and reviews for a project to the maximum extent practicable and consistent with Federal law. The Agencies propose revising paragraph (a) by replacing “to the fullest extent possible” with “to the maximum extent practicable and consistent with Federal law” to reflect 23 U.S.C. 139(d)(8) language. The policy statement applies broadly to the environmental review process and specifically encourages all environmental reviews and requirements (including permits) be addressed in a single process and environmental review document.

Section 771.107 Definitions

The Agencies propose to modify three definitions to add FRA’s railroad projects. Specifically, the Agencies propose adding “railroad” projects, “FRA,” and “rulemakings” to the list of examples of major Federal actions in the definition of “Action,” and the Agencies propose adding “FRA” in all locations where FHWA and FTA are listed in the definition of “Administration.” The Agencies also propose similar changes to the definition of “Administration action” by adding “FRA” approval, and “rulemakings” to the list of activities needing Agency approval.

Section 771.109 Applicability and Responsibilities

In paragraph (a)(1), the Agencies propose to clarify that the part 771 regulations and the Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500-1508) apply where one of the Agencies exercises sufficient control to condition an approval, not

just a “permit or project approval,” by including “other” prior to “approvals” (i.e., “...condition the permit, project, or other approvals”). The Agencies are proposing this change to accommodate FRA’s potential actions related to its safety programs.

The Agencies are not proposing to modify paragraph (a)(3) to specifically address when the regulations would apply to FRA projects. The FRA would apply these regulations to projects initiated (through publishing a notice of intent for an environmental impact statement or determining to initiate an environmental assessment) after the Agencies issue a final rule, if one is issued. Until such time, FRA will continue to follow its Procedures for Considering Environmental Impacts (Environmental Procedures) (64 FR 28545, May 26, 1999, updated 78 FR 2713, Jan. 14, 2013). However, as required by the FAST Act, FRA will also follow the project development procedures described in 23 U.S.C. 139 for its railroad projects initiated after December 4, 2015 unless the project is subject to a funding arrangement under title 49, U.S.C. the Secretary approved before December 4, 2015.

In paragraph (b)(1), the Agencies propose to add “FRA” as an agency that will assure implementation of committed mitigation measures by including the mitigation measures by reference in the grant agreement, followed by reviews of design and construction inspections.

In paragraph (c)(2), FRA added reference to FRA’s financial assistance programs.

In paragraph (c)(7), the Agencies propose several revisions to reflect changes to participating agencies’ responsibilities under section 1304 of the FAST Act, codified at

23 U.S.C. 139(c)(6), (d)(9), (f)(4), and (g)(1). Section 139(c)(6)(C) requires the lead agency consider and respond to comments within a participating agency's special expertise or jurisdiction. Similarly, section 139(d)(9) requires participating agencies to provide comments, responses, studies, or methodologies within the agency's special expertise or jurisdiction, and to use the process to address its environmental issues of concern. Section 139(f)(4)(A)(ii) mandates participating agencies limit their agency's comments to the subject matter areas within their agency's special expertise or jurisdiction, to the maximum extent practicable and consistent with Federal law. Lastly, section 139(g)(1)(B) now requires the coordination plan that the lead agency develops under 23 U.S.C. 139 include a schedule, which must receive participating agency concurrence.

In response to these changes to 23 U.S.C. 139, the Agencies propose adding that participating agencies are responsible for providing input within their agency's special expertise or jurisdiction and providing concurrence on the schedule that now must be included in the coordination plan. The Agencies propose paragraph (c)(7) reads as set out in the regulatory text below. The Agencies interpret the proposed language "providing input, as appropriate" to include the requirement at 23 U.S.C. 139(d)(9) that participating agencies' input include "comments, responses, studies, or methodologies on those areas within the special expertise or jurisdiction of the agency" and, therefore, did not specifically list those activities in this paragraph or elsewhere in the regulation. The Agencies determined that listing those four specific activities is unnecessarily limiting

and could lead a project sponsor to believe an unlisted method of providing input is not permitted.

The Agencies further propose adding a new paragraph (e), which describes FRA's requirements for third party contracting where the project sponsor is a private entity and there is no qualified applicant as defined in § 771.107. In that situation, FRA proposes to require third party contracting for all EISs and may also require them for EAs. When using a third party contract, the project sponsor retains a contractor to assist FRA in conducting the environmental review, and the contractor works under the direction, supervision and control of FRA. A third party contracting structure would be memorialized in a memorandum of understanding among FRA, the contractor, and the project sponsor. This paragraph is intended to ensure compliance with FRA's responsibilities for EIS preparation in the CEQ implementing regulations at 40 CFR 1506.5(c).

The Agencies propose an associated change to the beginning of paragraph (b)(6), which addresses the role of a project sponsor that is a private entity. The proposed change reads, "Subject to paragraph (e)."

Section 771.111 Early Coordination, Public Involvement, and Project Development

The Agencies propose several additions to § 771.111 to reflect various FAST Act changes to 23 U.S.C. 139. To reflect planning and environmental tools not previously listed, the Agencies propose adding references to 23 U.S.C. 139(f) (Purpose and need; alternatives analysis) and 23 U.S.C. 169 (Development of programmatic mitigation

plans) to the list in paragraph (a)(2)(i). Section 139(f)(4)(E) of title 23 U.S.C. establishes a new process for reducing duplication between the planning and NEPA evaluation of alternatives processes by eliminating planning alternatives from detailed consideration under NEPA when certain conditions are met. Section 169 of title 23 U.S.C. includes an optional framework for creating programmatic mitigation plans during the transportation planning process, and gives substantial weight to programmatic mitigation plans in the environmental review process. Note that a recent final rule (81 FR 34049, May 27, 2016; Docket No. FHWA-2013-0037) modified 23 CFR part 450, which implements 23 U.S.C. 168 and 169. Please visit the docket for more information regarding specific changes to the planning and environmental linkages processes. The Agencies also added “as applicable” to paragraph (a)(2)(i) to acknowledge the three Agencies may have different processes or requirements authorized by statute among themselves. For example, 23 U.S.C. 139 applies to FRA, but 23 U.S.C. 168 does not.

The Agencies propose adding the requirement that a lead agency, in consultation with participating agencies, will develop an environmental checklist, as appropriate, to assist in resource and agency identification to the end of paragraph (a)(3) to reflect the new environmental checklist language found at 23 U.S.C. 139(e)(5). The Agencies interpret the statutory language in 23 U.S.C. 139(e)(5)(A) (“The lead agency for a project...shall develop, as appropriate, a checklist to help project sponsors identify potential natural, cultural, and historic resources...”) as providing flexibility through the phrase “as appropriate.” The Agencies are, therefore, proposing “will develop an environmental checklist, as appropriate” to reflect the statutory flexibility that allows lead

agencies, including project sponsors, to develop environmental checklists when needed to facilitate the environmental process.

The Agencies propose renumbering existing paragraph (b) as (b)(1) and adding a new paragraph (b)(2). Proposed paragraph (b)(2) would state that for projects to be evaluated with an EIS, the Administration will respond in writing to a project sponsor's formal project notification within 45 days of receipt. This to respond to the new "review of application" paragraph at 23 U.S.C. 139(e)(3), which builds off the existing project notification process established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users (SAFETEA-LU). The Agencies identify EISs in the proposed language because the procedures outlined in 23 U.S.C. 139 are "applicable to all projects for which an [EIS] is prepared under [NEPA]" (23 U.S.C. 139(b)(1)). The Agencies may apply the section 139 procedures to other classes of projects on a case-by-case basis but section 139 is only required for EISs, and the Agencies want to underscore that fact.

In paragraph (c), the Agencies propose adding that a project sponsor may request the Secretary to designate the lead Federal agency when project elements fall within multiple DOT agencies' expertise. This addition responds to 23 U.S.C. 139(e)(4), but adds clarity regarding the provision's applicability. In most instances, the Agencies expect project sponsors will continue to contact FHWA, FRA, or FTA to determine the Federal lead agency, as is current practice.

The Agencies propose building on the existing language regarding cooperating and participating agency invitations in paragraph (d) by adding timing language for those agencies' identification. The Agencies would require that the lead agencies identify participating agencies within 45 days from publication of the notice of intent at the end of paragraph (d) to address the new requirement to identify participating agencies within 45 days at 23 U.S.C. 139(d)(2).

The Agencies propose adding a reference to FRA programs to paragraph (i) and its subordinate paragraphs, clarifying that FRA is adopting the approach that applicants in FTA's capital assistance programs use to engage the public. The Agencies also propose to add a reference to "the scope of the NEPA analysis" as an issue that the public or agencies might comment on during the 30-day period following the publication of a Notice of Intent.

Additionally, the Agencies propose replacing "NEPA documents" with "environmental documents" in paragraph (i)(3) to be consistent with 40 CFR 1508.10. CEQ uses the term "environmental document" to refer to EIS, EA, finding of no significant impact, and record of decision documents broadly, which also is the Agencies' intent in paragraph (i)(3).

The Agencies propose to add FRA's contact information to paragraph (j).

Section 771.113 Timing of Administration Activities

In paragraph (a), the Agencies propose to add the word "environmental" before the word "studies" for consistency with the term's use in the regulation.

The Agencies propose to add paragraph (d)(4), which would create an FRA-specific exemption to the paragraph (a)(1) prohibition on proceeding with final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction until the NEPA process is complete. The proposal is consistent with FRA policy and allows FRA to make certain case-by-case exceptions for the purchase of railroad components or materials that can be used in other projects or resold. This is not a blanket exemption, and FRA would make case-by-case determinations based on the information available at the time to ensure such activities would not improperly influence the outcome of the NEPA process.

Section 771.115 Classes of Actions

In paragraph (a)(4), the Agencies propose to change “highway facility” to “transportation right-of-way” for consistency in this section and across modes. This change is not meant to change the meaning of the term.

The Agencies propose to add paragraph (a)(6), which would provide examples of FRA actions it finds normally require an EIS. Under this proposal, FRA would typically prepare an EIS for “new construction of major railroad lines or facilities (e.g., terminal passenger stations, freight transfer yards, or railroad equipment maintenance facilities) that will not be located within an existing transportation right-of-way.” These examples are generally consistent with FRA’s existing NEPA procedures and also the examples of FHWA and FTA actions normally requiring an EIS.

In paragraph (b), the Agencies propose to add a reference to FRA's CEs in section 771.116.

Section 771.116 FRA Categorical Exclusions

The Agencies propose to add a new § 771.116. Although the Agencies collectively propose to add this section, the development of the proposed CEs for each Agency is based on each Agency's particular mission and programs, unique experiences, and existing lists of CEs. As a result, this section focuses on FRA's proposed CEs. One commenter suggests that DOT have one uniform set of CEs and identified specific FHWA CEs that FRA should adopt for its railroad projects. Typically, DOT operating administrations (OA) identify categories of actions appropriate for categorical exclusion based on the individual OA's experience. The FRA has identified and substantiated this proposed list of CEs based on its experience with these categories of actions. However, since many of the FHWA, FRA, and FTA actions are often similar, the actions may be covered in each OA's CE list but with appropriate differences reflecting the experiences of the OAs. Additionally, 49 U.S.C. 304 authorizes the use by one OA of another OA's CE in certain multimodal situations.

Paragraph (a) of this section proposes to adopt the current text of §§ 771.117(a) and 771.118(a), as modified to apply to FRA. This proposed paragraph would define a CE as an action meeting the definition in the CEQ regulation and, based on FRA's past experience, does not involve significant environmental impacts. Paragraph (b) of this section proposes to describe the circumstances FRA would use to determine whether an

activity, normally meeting the requirements of a CE, would require further environmental study. The FRA's proposal to adopt the FTA and FHWA list of unusual circumstances addresses a comment recommending FRA redraft its existing list of circumstances requiring further environmental study (Environmental Procedures, section 4(e)). Proposed paragraph (b) clearly articulates the circumstances requiring further environmental study for FRA's railroad projects and provides consistency with FHWA and FTA.

One commenter suggests FRA identify a subset of CEs that require documentation and those that do not need "further NEPA approvals by FRA." The FRA understands this comment as a suggestion to adopt a "(c)" and "(d)" list similar to those used by FHWA and FTA. The FRA considered this approach but does not propose to distinguish between different classes of CEs and will instead continue to use one comprehensive list and decide the appropriate standards for documentation on a project-by-project basis.

Paragraph (c) of this section proposes to include the activities for categorical exclusion. The proposed list of activities in paragraph (c) is based on the CEs identified in FRA's Environmental Procedures, including those CEs added in 2013. Since 2013, FRA has conducted an internal review of its CEs to ensure their continued appropriate use and usefulness. Based on FRA's internal review and the comments received on the June Notice, paragraph (c) of this section proposes to make minor edits to several of the existing CEs; to eliminate unnecessary or duplicative CEs; and to add two new CEs.

Support for FRA's proposals is included in a CE substantiation document. The CE substantiation document relies on internal FRA expert opinion, FRA's experience managing projects and other activities related to railroad safety and infrastructure development, and FRA's review of similar CEs used by other DOT OAs and other Federal agencies (often referred to as "comparative benchmarking"). For additional information, including a description of the CEs FRA proposes to eliminate, please see the CE substantiation document, which FRA has included in the docket for public review. The following discussion focuses on the proposed new CEs and those FRA proposes to modify.

Paragraph (c) proposes no changes to the following CEs (as compared to FRA's current Procedures for Considering Environmental Impacts): paragraph (c)(2) covering personnel actions; paragraph (c)(6) covering rulemakings issued under section 17 of the Noise Control Act of 1972; paragraph (c)(8) covering hearings, meetings, or public affairs activities; paragraph (c)(16) covering alterations to existing facilities, locomotives, stations, and rail cars to make them accessible for the elderly and persons with disabilities; paragraph (c)(19) covering the installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency; paragraph (c)(22) covering the assembly or construction of facilities or stations; and paragraph (c)(23) covering track and track structure maintenance and improvements.

Proposed paragraph (c)(1) provides a CE addressing administrative procurements, contracts for personal services, and training. Proposed paragraph (c)(3) modifies an existing FRA CE by adding “training” to the list of covered activities.

Proposed paragraph (c)(3) provides a CE addressing planning or design activities that do not commit FRA to a particular course of action affecting the environment. Proposed paragraph (c)(3) is a modification of an existing FRA CE as it eliminates the limitation that the planning or design activity must be funded through FRA’s financial assistance or FRA’s own procurement process.

Proposed paragraph (c)(4) provides a CE addressing localized geotechnical and other investigations that provide information for preliminary design and for environmental analyses and permitting purposes, such as: drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys. This proposed CE covers investigations and surveys that inform environmental analyses and preliminary engineering for rail projects. These activities include geotechnical, geophysical, and other subsurface investigations, pedestrian and ground disturbing archaeological surveys and testing to determine eligibility for the National Register of Historic Places, and wetland surveys for purposes of wetland delineation or jurisdictional determinations. In FRA’s experience, the impacts of these activities are generally minor in nature and any impacts are localized to the investigation or survey sites. This CE is consistent with existing FHWA and FTA CEs at 23 CFR 771.117(c)(24) and 23 CFR 771.118(c)(16), respectively. FRA identified these

activities as potentially appropriate for categorical exclusion in the June Notice. The FRA received one comment supporting this CE.

Proposed paragraph (c)(5) provides a CE addressing internal orders, policies, and procedures that FRA is not required to publish in the Federal Register under the Administrative Procedure Act, 5 U.S.C. 552(a)(1). This proposed CE is similar to an existing FRA CE. However, proposed paragraph (c)(5) would add “policies” to the list of activities covered by the CE.

Proposed paragraph (c)(7) provides a CE addressing the provision of financial assistance for a project where the financial assistance would fund a completed activity. For example, FRA may be involved in projects where an applicant requests financial assistance to refinance a loan. In that case, the agency’s decision is merely a financial transaction that would not itself lead to any environmental impacts. The FRA identified these activities as potentially being appropriate for categorical exclusion in the June Notice. FRA received one comment supporting this CE.

Proposed paragraph (c)(9) provides a CE addressing maintenance or repair of existing railroad equipment. The proposed CE is a modified version of an existing FRA CE. Specifically, paragraph (c)(9) would move the phrase “existing railroad facilities” to the beginning of the CE. This clarifies that the list including equipment; track and bridge structures; and electrification, communication, signaling or security facilities are non-exclusive examples of existing railroad facilities. Paragraph (c)(9) would also clarify the scope of the CE to include “repair” activities. In FRA’s experience, the scope of the

potential impacts resulting from repair activities is generally similar to those that might occur during routine maintenance. The primary difference between the two is that unlike maintenance, repair activities may not occur on a regular or reoccurring basis. Paragraph (c)(9) would also remove the definition of maintenance because it is unnecessary. One commenter suggests modifying paragraph (c)(9) to add a reference to right-of-way in the definition of “maintenance.” However, this modification is unnecessary since FRA’s proposal would eliminate the definition of maintenance.

Proposed paragraph (c)(10) provides a CE addressing the emergency repair or replacement of an essential rail facility damaged by a natural disaster or catastrophic failure. This proposed CE is similar to an existing FRA CE; however, proposed paragraph (c)(10) would clarify that repairs following an emergency are also covered by the CE; define repair and replacement to include reconstruction, restoration, or retrofitting; clarify that when conducting the repair and replacement, the rail facility may be upgraded as necessary to meet existing codes and standards; remove the unnecessary limitation that the CE apply only to “temporary” replacements; and remove the reference to the immediacy of the repairs in relation to the disaster or catastrophic failure. One commenter suggests that FRA adopt the “emergency repairs” CE applied by FHWA and FTA at 23 CFR 771.117(c)(9) and 23 CFR 771.118(c)(11), respectively. In this SNPRM, FRA proposes modifications to its existing emergency repair CE, including the incorporation of relevant language and concepts from 23 CFR 771.117(c)(9) and 23 CFR 771.118(c)(11).

Proposed paragraph (c)(11) provides a CE addressing operating assistance to a railroad to continue existing service or an increase in service to meet demand. This proposed CE is similar to an existing FRA CE. The existing CE applies if the assistance will not result in a change in the impact or effect to the environment whereas proposed paragraph (c)(11) would modify the CE to focus on whether the project would result in significant changes to traffic density. The FRA finds focusing on change in traffic density for a CE covering operating assistance is more appropriate than the current imprecise limitation that the assistance will not result in a change in the effect on the environment.

One commenter suggests revising proposed paragraph (c)(12) by removing the word “minor” before “rail line additions,” adding the phrase “or within existing right-of-way,” and modifying the CE’s limitations by adding the requirement that the project can be constructed in less than 6 months and substantially within the existing right-of-way, and will not have additional significant environmental impacts beyond the existing rail yard or existing right-of-way. The FRA will not adopt the suggested change to remove “minor” because FRA cannot substantiate such an expansion of the CE. However, FRA proposes to adopt the suggested phrase “or within existing right-of-way” since it is consistent with the current scope of the CE and appropriately limits construction to within the existing right-of-way. The FRA also proposes to keep its existing limitations (i.e., “[the] additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.”) which are consistent with

FRA's experience with railroad projects rather than adopt the commenter's suggestion which unnecessarily narrows the applicability of the CE.

Proposed paragraph (c)(13) provides a CE addressing the acquisition, transfer and right to use real property and certain railroad infrastructure. The proposed CE would modify an existing version of this FRA CE by eliminating the reference to "existing railroad equipment" because acquisition of equipment would be covered by the CE proposed in paragraph (c)(18). Proposed paragraph (c)(13) also would allow the acquisition of "real property." The FRA proposes this addition because acquisition alone does not impact the environment. In addition, the proposed CE would move the phrase "existing railroad facilities" to the beginning of the CE to clarify that the list including equipment; track and bridge structures; and electrification, communication, signaling or security facilities are non-exclusive examples of existing railroad facilities. This is also consistent with the proposed structure of paragraph (c)(9). The proposed paragraph (c)(13) would also add "transfer" to the list of covered activities to accommodate potential FRA involvement in the transfer of real property or existing railroad facilities. This is consistent with an FTA CE at 23 CFR 771.118(c)(6).

Proposed paragraph (c)(14) provides a CE addressing research, development, and demonstration activities. This proposed CE is similar to an existing FRA CE. However, proposed paragraph (c)(14) would expand the scope of the existing CE to include research, development, and demonstration activities beyond the development of signal, communication, or train control systems. While in the past this CE was almost

exclusively used for the testing of train control systems, including Positive Train Control, FRA funds other research, development, and demonstration activities similar in scope, but involving different rail systems or infrastructure, are also appropriate for categorical exclusion.

Proposed paragraph (c)(15) provides a CE addressing the promulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, and discretionary approvals. This proposed CE is similar to an existing FRA CE; however, proposed paragraph (c)(15) would add the waiver or modification of existing regulatory requirements and discretionary approvals, and remove the limitation that these activities be related to railroad safety. This proposed CE would retain the existing limitation for increases in environmental impacts and would not be used if FRA finds the activity would significantly increase emissions of air or water pollutants or noise. However, FRA proposes striking the clause in the existing CE reading “or increased traffic congestion in any mode of transportation.”

Proposed paragraph (c)(17) provides a CE addressing rehabilitation, reconstruction, removal, construction, or replacement of bridges. This proposed CE is similar to an existing FRA CE but adds “removal” of bridges to the scope of covered activities. The FRA finds it is sometimes necessary to remove old railroad bridges without simultaneously building a new bridge. In those cases, the removal of the bridge is not substantially different than construction, rehabilitation, or replacement activities

and would have similar types of impacts. The FRA is also proposing minor edits to the existing FRA CE for clarity.

Proposed paragraph (c)(18) addresses acquisition, rehabilitation, transfer, or maintenance of vehicles or equipment. The proposed CE is similar to an existing FRA CE but moves the examples of vehicles and equipment to precede the CE's proposed limitation. The FRA also proposes to focus the CE's limitation on whether the activity significantly alters the traffic density characteristics of an existing rail line rather than whether the activity causes a substantial increase in the use of infrastructure within the existing right-of-way. This proposed change will create consistency with other FRA CEs.

Proposed paragraph (c)(20) provides a CE addressing environmental restoration, remediation and pollution prevention activities. This proposed CE is similar to an existing FRA CE. However, proposed paragraph (c)(20) would remove the limitation that activities occur "in or proximate to existing and former railroad track, infrastructure, stations, or facilities." In many cases, environmental restoration and natural resource management activities do not occur in close proximity to existing or former railroad track, infrastructure, stations, or facilities. Instead, these activities—including mitigation—must frequently be located to optimize the ecological value or benefit of the activity and are sited in consultation with, or at the direction of, various permitting agencies.

One commenter suggests FRA adopt a number of existing FHWA CEs from the “(c)-list” with minor modifications to accommodate railroad projects. Most of the activities covered by the identified FHWA CEs are already included in one or more of FRA’s proposed CEs. With respect to the FHWA CEs identified by the commenter, the activities described in § 771.117(c)(7) (landscaping) and § 771.117(c)(6) (installation of noise barriers or alternations to existing publically owned buildings to provide for noise reduction) are included in the non-exclusive list of activities in proposed paragraph (c)(20); the activities described in § 771.117(c)(8)) (installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devises where no substantial land acquisition or traffic disruption will occur) and § 771.117(c)(27) (highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of the section) are included in proposed paragraph (c)(19); the activities described in § 771.117(c)(14)) (bus and rail car rehabilitation), § 771.117(c)(17) (the purchase of vehicles where the use of the vehicles can be accommodated by existing facilities or new facilities which themselves are within a CE), and § 771.117(c)(19) (purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site) are covered by proposed FRA CE paragraph (c)(18); the activities described in § 771.117(c)(18) (track and rail bed maintenance and improvements when carried out within the existing right-of-way) are covered by proposed paragraph (c)(22); and the activities described in § 771.117(c)(28) (bridge rehabilitation, reconstruction, or

replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of the section) are covered by proposed paragraph (c)(17).

The same commenter also suggests FRA adopt § 771.117(c)(2) (approval of utility installations along or across a transportation facility). At this time and based on FRA's experience, FRA does not have a sufficient need for a CE addressing utility installations. To the extent utility work is being completed as part of an FRA action, the work is typically incidental to a railroad project and as such is generally analyzed in an environmental document (which may be a CE if appropriate) for that project. The commenter also suggests FRA adopt § 771.117(d)(1) (modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g. parking, weaving, turning, climbing)). The FRA is proposing CEs similar in scope but directly applicable to railroad projects (e.g., proposed paragraphs (c)(9) and (22)).

One commenter suggests FRA modify paragraph (c)(16) to allow alterations to existing facilities, locomotives, stations, and rail cars even where the alterations are not for the purpose of making them accessible for the elderly and persons with disabilities. This modification would change the scope of the CE FRA added in 2013 based on FRA's experience with projects intended to improve accessibility. However, FRA notes that these same activities may be covered by another FRA CE (e.g., proposed paragraph (c)(18)).

One commenter suggests FRA adopt one FHWA “(d)-list” CE modified slightly to accommodate railroad projects. Specifically, the commenter suggests FRA adopt § 771.117(d)(8) (construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic). These activities are included in proposed paragraph (c)(21).

One commenter asks FRA to address the authority provided by MAP-21 section 1308 and FAST Act section 1315 allowing State DOTs to enter into agreements with FHWA to make CE determinations on FHWA’s behalf. The FRA does not have the legal authority to participate in this program and will therefore not include it in this section. The same commenter suggests that FRA address 49 U.S.C. 304, Application of Categorical Exclusions for Multimodal Projects. That section does not create new CEs but rather sets up a process by which OAs can use the CEs of another OA under certain multimodal project circumstances. Since this process applies to all OAs, not just the Agencies, it is appropriately addressed by separate guidance, likely issued by DOT’s Office of the Secretary, and not in this SNPRM.

One commenter also asked that FRA apply its CEs less strictly and exercise more flexibility in considering which projects qualify as a CE. The FRA will continue to review each FRA action on an individual basis to ensure the action meets the definition of one or more FRA CEs and does not involve circumstances requiring further

environmental study. Where there are unusual circumstances present, FRA will, in cooperation with the applicant, conduct appropriate environmental studies to determine whether application of the CE is still proper.

Two commenters supported the CEs FRA proposed in the June Notice. The FRA appreciates the commenters' support.

Section 771.117 FHWA Categorical Exclusions and

Section 771.118 FTA Categorical Exclusions

The Agencies propose to modify paragraph (a) under §§ 771.117 and 771.118 to begin with “CEs” because the Agencies introduce the acronym earlier in the regulation. Additionally, the Agencies propose clarifying in the first sentence of §§ 771.117(a) and 771.118(a) that the actions are based on FHWA’s and FTA’s past experience, respectively. These are non-substantive changes providing clarity to paragraph (a) in both sections.

Following 3 years of implementation, FHWA and FTA request comments regarding the definition of “operational right-of-way” for the CEs located at 23 CFR 771.117(c)(22) and 771.118(c)(12), respectively. As currently defined in the regulation and as discussed in the January 13, 2014, final rule establishing the CEs (see 79 FR 2111-2112), the Agencies attempted to define “operational right-of-way” broadly with few conditions, thereby allowing flexibility in the application of those CEs. The Agencies are soliciting feedback from the public on how operational right-of-way is currently defined in the regulation and request detailed proposals on ways to further clarify the existing

definition. Is the scope of “operational right-of-way” appropriately broad? Should fewer conditions be applied? If so, what conditions? Can the definition be revised to allow for greater flexibility in the application of the CE? If so, how? Please provide specific examples and any data (e.g., cost and benefit information) to help justify your proposal.

Section 771.119 Environmental Assessments

The Agencies propose to add a new paragraph (a)(3) to address, for FRA, situations when a private entity proposes a project that can be analyzed in an EA and there is no applicant as defined in § 771.107. In those situations, this paragraph would give FRA the discretion to require the project sponsor to procure and use a third party contractor, as described in § 771.109(e), to prepare the EA. The Agencies also propose to add a requirement for contractors to execute a conflict of interest disclosure statement similar to the language in paragraph (a)(2) (previously proposed paragraph (a)(ii)), applicable to FTA projects and which FHWA and FTA proposed in the November 2015 NPRM.

The Agencies also propose to clarify in paragraph (d) that an EA must be made available for public inspection at the applicant’s office and at the appropriate Administration field office, or for FRA at Headquarters offices, for 30 days. This does not change any substantive or procedural requirement.

Lastly, the Agencies propose to fix a typo in paragraph (h) by moving the period outside the last parenthesis after “(See 40 CFR 1501.4(e)(2)).”

Section 771.123 Draft Environmental Impact Statements

In paragraphs (a) and existing (b) (proposed paragraph (b)(1), as discussed below), the Agencies propose modifying the existing language in the last sentence of each paragraph to encourage announcing the intent to prepare an EIS by the appropriate means at the State level, as well as the local level.

The Agencies propose renumbering paragraph (b) as paragraph (b)(1) and adding a new paragraph (b)(2) regarding timing of the coordination plan in relation to notice of intent publication. This proposal reflects the changes to 23 U.S.C. 139(g)(1)-coordination plan.

In paragraph (c), the Agencies propose replacing “discuss” with “document” in the second sentence, which more accurately describes the action needing to occur. Additionally, in paragraph (c), the Agencies propose adding language to reflect the FAST Act changes to 23 U.S.C. 139(f)(4) regarding the range of alternatives. The proposed language would fulfill the statutory intent of mandating use of the range of alternatives for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, while directing the reader to the statute for the specific exception requirements. The Agencies propose inserting after the second sentence a statement that the range of alternatives considered for further study shall be used for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, unless the lead and participating agencies agree to modify the alternatives in order to address significant new information and

circumstances or to fulfill NEPA responsibilities in a timely manner, in accordance with 23 U.S.C. 139(f)(4)(B).

Section 771.124 Final Environmental Impact Statement/Record of Decision

The Agencies propose two non-substantive changes in this section. In paragraph (a)(1), the Agencies propose to replace “record of decision” with “ROD” because the term is introduced earlier in the regulation. In paragraph (a)(1)(ii), the Agencies propose deleting “and” after “environmental concerns” because it is awkward and unnecessary.

Additionally, the Agencies propose inserting “pursuant to 40 CFR 1503.4(c)” at the end of the clause “an errata sheet may be attached to the draft statement” in paragraph (a)(3) to provide consistency with 23 CFR 771.125(g).

Section 771.125 Final Environmental Impact Statements

While the Agencies propose to add FRA to part 771, the Agencies are not proposing to change the general requirement in paragraph (c) that the Agencies submit certain Final EISs to the Administration’s Headquarters for prior concurrence. The FRA currently administers its environmental program from Headquarters. If FRA establishes field offices in the future, Headquarters’ prior concurrence for the actions described in paragraph (c) will still be required.

In addition, in paragraph (d) the Agencies propose to replace “grant request” with “request for financial assistance” to clarify that approval of the final EIS does not commit the Administration to provide any future financial assistance (not just grant funding) for the preferred alternative.

Section 771.129 Re-evaluations

In paragraph (c), the Agencies proposed re-inserting the sentence regarding consultations being documented when determined necessary by the Administration, which is existing language in 23 CFR 771.129(c) but was inadvertently deleted when the November 2015 NPRM was published for public review and comment. This is a non-substantive change.

Section 771.131 Emergency Action Procedures

The Agencies propose capitalizing “headquarters” in order to be consistent with other references to Headquarters in the regulation; this is a non-substantive change.

The Agencies also propose to add a reference to FRA’s CE covering the response to emergencies and disasters.

Section 771.139 Limitation on Actions

The Agencies propose modifying the title and text of this section by replacing “actions” with “claims” to address a potential inconsistency with the definition of “Action” in 23 CFR 771.107(b). The Agencies seek to clarify that the limitation is on legal claims arising out of an “Action,” not on an “Action” itself. This is a non-substantive change. Additionally, the Agencies propose adding the word “time” before the word “barred” throughout this section to clarify that this is a time limitation on claims. This is also a non-substantive change.

The Agencies propose modifying this section to clearly describe the different limitations on claims. The Agencies propose to clarify the 150-day limitation is limited to FHWA and FTA. The Agencies also propose to add a sentence immediately following

addressing FRA’s 2-year limitation on claims for railroad projects requiring the approval of the Secretary under NEPA created by section 11503 of the FAST Act (49 U.S.C. 24201(a)(4)). Furthermore, the Agencies would revise the second reference to 150 days in the existing language to broadly refer to the two standards by stating “These time periods do not lengthen any shorter time period...”

The Agencies also propose to delete the footnote in this section to be consistent with the November 2015 NPRM. In that NPRM the Agencies proposed removing references to specific guidance documents, such as the footnote in this section, in order to maximize flexibility of this regulation. The Agencies are currently updating the “SAFETEA-LU Environmental Review Process: Final Guidance,” so the current reference is outdated.

Section 4(f) Regulation Changes (Part 774)

Section 774.3 Section (f) Approvals

As part of the review of regulatory provisions in drafting this SNPRM, the Agencies are proposing to modify the footnote in paragraph (d) to refer the reader to FHWA’s Section 4(f) Programmatic Evaluations webpage (www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp) rather than listing the Section 4(f) programmatic evaluations in the regulation. By providing a webpage, the reader would have access to the most recent list of programmatic evaluations available, and the regulation would stay current whenever the Agencies revise the list of Section 4(f) programmatic evaluations. In addition, the website may be used to provide guidance on

use of the programmatic approaches.

Section 774.13 Exceptions

This section sets forth a number of exceptions to otherwise applicable Section 4(f) requirements. The exceptions are either founded in statute or reflect case law and longstanding practices governing when to apply Section 4(f).

Paragraph (a) is an exception from the Section 4(f) process for projects involving work on a transportation facility that is itself historic. This exception reflects the Agencies' longstanding policy that when a project involves a historic facility that is already dedicated to a transportation purpose and does not adversely affect the historic qualities of that facility, then the project does not "use" the facility within the meaning of Section 4(f). The exception applies to all types of transportation facilities, including elements, structures, and features of a highway, transit, or rail facility.

In the FAST Act, Congress created two new exceptions from Section 4(f) for historic transportation facilities in certain circumstances. The Agencies propose to amend paragraph (a) to incorporate the new exceptions. Specifically, the Agencies propose to incorporate the two new exceptions from the Section 4(f) process for historic transportation facilities by renumbering paragraph (a) as paragraph (a)(3) and adding new paragraphs (a)(1) and (2). The Agencies propose to add to paragraph (a) the introductory phrase "the use of historic transportation facilities in certain circumstances:" to match the other existing exceptions in section 774.13.

The Agencies propose new paragraph (a)(1) to incorporate section 1303 of the FAST Act which exempts from Section 4(f) the use of common concrete and steel

bridges and culverts, built after 1945, that the Advisory Council on Historic Preservation exempted from individual Section 106 review under a Program Comment.¹ The Program Comment applies to bridges lacking distinction, not previously listed or determined eligible for listing on the National Register, and not located in or adjacent to historic districts, and only becomes available in a particular State after the State Department of Transportation, the State Historic Preservation Officer, and the applicable FHWA Division office consult and reach agreement on whether the State has any exceptional bridges that the Program Comment will not cover. While FHWA proposed the Program Comment, it can be used by any Federal agency, including FTA and FRA.

The intent of this new Section 4(f) exception is to eliminate unnecessary Section 4(f) processes for the hundreds of thousands of common “cookie-cutter” bridges constructed after 1945, which are not exceptional, in those States that have reported the results of the consultation required by the Program Comment. To date, 35 States and Puerto Rico have completed this requirement, as reflected on the Bridge Program Comment Excepted Bridges list available at https://www.environment.fhwa.dot.gov/histpres/bridges_list.asp.

The Agencies propose new paragraph (a)(2) to incorporate section 11502 of the FAST Act, which exempts improvements to historic railroad and transit lines and their elements from Section 4(f).

The Agencies interpret the words “improvements to” in section 11502 as

¹ “Program Comment Issue for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges,” 77 FR 68790 (Nov. 16, 2012).

inclusive of the other activities listed in section 11502: maintenance, rehabilitation, or operation of railroad or rail transit lines. For clarity, the Agencies expanded the list of examples of activities that may occur on elements of railroad or rail transit lines that may improve the transportation function of those railroad and rail transit lines. The Agencies believe that preservation, modernization, reconstruction, and replacement of an element of a historic transportation facility are types of “improvements” to railroad and rail transit lines and thus propose to include these activities in the exception. The Agencies further believe that any type of safety improvement to a highway crossing of an active railroad or transit line—whether at grade or grade separated—should be considered an “improvement to” the railroad or transit line by virtue of making travel safer for the public, and thus would be covered by the new exception.

While the Agencies chose not to further define the terms “railroad or rail transit lines or elements thereof” within the regulation text, they view these terms as including all elements related to the historic or current transportation function such as railroad or rail transit track, elevated support structures, rights-of-way, substations, communication devices, and maintenance facilities. The Agencies do not propose to include historic sites unrelated to transportation but located within or adjacent to railroads or rail transit lines, or elements thereof in this exception. Examples of such exclusions include archeological sites unrelated to railroad or rail transit and sites of traditional religious and cultural importance to Indian tribes.

Per section 11502 of the FAST Act, all stations, and certain bridges and tunnels, are not included in the proposed paragraph (a)(2) exception. Specifically, bridges and

tunnels on railroad lines that have been abandoned, as determined by the Surface Transportation Board through the process described in 49 CFR part 1152, are not included in the proposed exception, except for bridges and tunnels on railroads that have been railbanked, as defined in 16 U.S.C. 1247(d) or otherwise preserved for future transportation use. In addition, the Agencies are proposing that bridges and tunnels on rail transit lines that are not in use and over which regular service has never operated are not included in the exception.

The proposed new paragraph (a)(3) reads as set out in the regulatory text below. This paragraph mirrors existing § 774.13(a). The Agencies are not proposing to change the short list of activities: “restoration, rehabilitation, or maintenance” that are included in the existing regulatory text now located under paragraph (a)(3), but the Agencies specifically request that commenters consider whether the list of covered activities should be expanded to mirror the activities included in paragraph (a)(2) which is proposed to read: “maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement.” Under this option, there would still be two important conditions for the exception to apply under paragraph (a)(3): the Agencies must determine through a Section 106 consultation that the work would not adversely affect the historic qualities of the historic transportation facility that cause it to be listed on or eligible for the National Register of Historic Places and the official(s) with jurisdiction must not object to that determination. Having the same list of activities in both subparagraphs is desirable because it would simplify administration of the exception. The Agencies seek comment, including examples, regarding whether the two conditions

in paragraph (a)(3) would adequately protect significant historic transportation facilities in the case of projects to operate, modernize, reconstruct or replace the transportation facility.

Section 774.15 Constructive use determinations

In paragraph (f)(2), the Agencies propose to reorganize the paragraph and to add railroad projects to the sentence referencing the FTA guidelines for transit noise and vibration assessments because FRA has applied FTA criteria to evaluate noise impacts resulting from railroad operations for decades. In addition, the Agencies propose to add a new situation in which a constructive use would not occur. Specifically, the Agencies are proposing to add a reference to high-speed ground transportation projects having moderate noise impacts according to FRA's established high-speed ground transportation noise and vibration guidelines. The FRA first developed these guidelines, available at <https://www.fra.dot.gov/eLib/Details/L04090>, in the late 1990s and they apply to train operations over 90 miles per hour.

Section 774.17 Definitions

In the definition of "Administration" the Agencies propose to add FRA.

In the definition of "CE" the Agencies propose to add a reference to FRA's and FTA's CEs in 23 CFR 771.116 and 23 CFR 771.118, respectively.

49 CFR Part 264—Environmental Impact and Related Procedures

The Agencies propose to amend part 264 in 49 CFR to include references to 23 CFR part 771 and 23 CFR part 774. A cross reference would assist potential FRA applicants, State and Federal agencies, and the public.

RULEMAKING ANALYSES AND NOTICES

Statutory/Legal Authority for this Rulemaking

The Agencies derive explicit authority for this rulemaking action from 49 U.S.C. 322(a), which provides authority to “[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.” The Secretary delegated this authority to prescribe regulations in 49 U.S.C. 322(a) to the Agencies’ Administrators under 49 CFR 1.81(a)(3). The Secretary also delegated authority to the Agencies’ Administrators to implement NEPA and Section 4(f), the statutes implemented by this rule, in 49 CFR 1.81(a)(4) and (5). Moreover, the CEQ regulations that implement NEPA provide at 40 CFR 1507.3 that agencies shall continue to review their policies and NEPA implementing procedures and revise them as necessary to ensure full compliance with the purposes and provisions of NEPA.

Rulemaking Analyses and Notices

The Agencies will consider all comments received before the close of business on the comment closing date indicated above and will make such comments available for examination in the docket (FHWA-2015-0011) at regulations.gov. Comments received after the comment closing date will be filed in the docket and the Agencies will consider them to the extent practicable. In addition to late comments, the Agencies will also continue to file relevant information in the docket as it becomes available after the comment period closing date. Interested persons should continue to examine the docket for new material. The Agencies may publish a final rule at any time after close of the

comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and DOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of U.S. Department of Transportation regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Agencies anticipate that the economic impact of this rulemaking would be minimal. The Agencies do not have specific data to assess the monetary value of the benefits from the proposed changes because such data does not exist and would be difficult to develop. This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

This SNPRM proposes to modify 23 CFR parts 771 and 774 in order to be consistent with changes introduced by MAP-21 and the FAST Act, make the regulation more consistent with the FHWA and FTA practices, and add FRA to parts 771 and 774.

These proposed changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required. The Agencies anticipate that the changes in this SNPRM would enable projects to move more expeditiously through the Federal review process and would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA or Section 4(f) while still ensuring that projects are built in an environmentally responsible manner and consistent with Federal law. The Agencies request comment, including data and information on the experiences of project sponsors, on the likely effects of the changes being proposed.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the Agencies have evaluated the effects of this proposed rule on small entities and anticipate that this action would not 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 proposed revisions are expected to expedite environmental review and thus are anticipated to be less burdensome than any current impact on small business entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the

Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the Agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to ensure 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. The Agencies analyzed this proposed action in accordance with the principles and criteria contained in Executive Order 13132 and determined that it would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The Agencies invite State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments.

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, and determined that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The Agencies have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

The Agencies have determined that this action is not a significant energy action under Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

The DOT's regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities (49 CFR part 17) apply to this program. Accordingly, the Agencies solicit comments on this issue.

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a), 91 FR 27534 (May 10, 2012) (available online at www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, FHWA and FTA have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at www.fhwa.dot.gov/legsregs/directives/orders/664023a.cfm). The FTA also issued an update to its EJ policy, FTA Policy Guidance for Federal Transit Recipients, 77 FR

42077 (July 17, 2012) (available online at http://www.fta.dot.gov/legislation_law/12349_14740.html).

The Agencies have evaluated this proposed rule under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies have determined that the proposed changes to 23 CFR parts 771 and 774, if finalized as proposed, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations.

At the time the Agencies apply the NEPA implementing procedures in 23 CFR part 771, the Agencies would have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance to determine whether the proposed action has the potential for EJ effects. The rule would not affect the scope or outcome of that EJ evaluation. In any instance where there are potential EJ effects resulting from a proposed Agency action covered under any of the NEPA classes of action in 23 CFR part 771, public outreach under the applicable EJ orders and guidance would provide affected populations with the opportunity to raise any concerns about those potential EJ effects. See DOT Order 5610.2(a), FHWA Order 6640.23A, and FTA Policy Guidance for Transit Recipients (available at links above). Indeed, outreach to ensure the effective involvement of minority and low income populations where there is potential for EJ effects is a core aspect of the EJ orders and guidance. For these reasons, the Agencies have determined that no further EJ analysis is needed and no mitigation is required in connection with the proposed revisions to the Agencies' NEPA and Section 4(f) implementing regulations (23 CFR parts 771 and 774).

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing agency procedures (such as this regulation) that supplement the CEQ regulations for implementing NEPA. The changes proposed in this rule are part of those agency procedures, and therefore establishing the proposed changes does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency

NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3.

Regulation Identifier Number

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

List of Subjects

23 CFR Part 771

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

23 CFR Part 774

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Mass transportation, Public lands, Railroads recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

49 CFR Part 264

Environmental impact statements, Environmental review process, Environmental protection, Grant programs—transportation, Programmatic approaches, Railroads, Reporting and recordkeeping requirements.

49 CFR Part 622

Environmental impact statements, Environmental review process, Grant

programs—transportation, Historic preservation, Programmatic approaches, Public lands, Public transportation, Recreation areas, Reporting and recordkeeping requirements, Transit.

Issued in Washington, DC, under authority delegated in 49 CFR 1.85 and 1.91:

Brandye L. Hendrickson,
Acting Administrator,
Federal Highway Administration.

Heath Hall,
Acting Administrator,
Federal Railroad Administration.

Jane Williams,
Acting Administrator,
Federal Transit Administration.

In consideration of the foregoing, the Agencies propose to amend title 23, Code of Federal Regulations parts 771 and 774, and title 49, Code of Federal Regulations parts

264 and 622, as follows:

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; 40 CFR parts 1500 through 1508; 49 CFR 1.81, 1.85, and 1.91; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Public Law 114-94, 129 Stat. 1312, Sections 1314 and 1432.

2. Revise § 771.101 to read as follows:

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), 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, FRA, FTA and Department of Transportation (DOT) requirements under NEPA for the processing of highway, public transportation, and railroad projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, and 327; 49 U.S.C. 303 and 5323(q); Public Law 112-141, 126 Stat. 405, section 1301 as applicable; and Public Law 114-94, 129 Stat. 1312, section 1304.

3. Further amend § 771.105, as proposed to be amended at 80 FR 72624 (November 20, 2015), by removing the introductory text and revising paragraphs (a), (b), and the first sentence in (e)(2) to read as follows:

§ 771.105 Policy.

(a) To the maximum extent practicable and consistent with Federal law, 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

(b) Programmatic approaches be developed for compliance with environmental requirements (including the requirements found at 23 U.S.C. 139(b)), coordination among agencies and/or the public, or to otherwise enhance and accelerate project development.

* * * * *

(e) * * *

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. * * *

* * * * *

¹FHWA, FRA, and FTA have supplementary guidance on environmental documents and procedures for their programs available on the Internet at <http://www.fhwa.dot.gov>, <http://www.fra.dot.gov>, and <http://www.fta.dot.gov>, or in hardcopy by request.

4. Further amend § 771.107, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising the definitions for “Action,” “Administration,” and “Administration action” to read as follows:

§ 771.107 Definitions.

* * * * *

Action. A highway, transit, or railroad project proposed for FHWA, FRA, or FTA funding. It also includes activities such as joint and multiple use permits, changes in access control, rulemakings, etc., which may or may not involve a commitment of Federal funds.

Administration. The FHWA, FRA, or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the FHWA, FRA, or FTA, or a State when the State is functioning as the FHWA, FRA, 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. A reference herein to the FHWA, FRA, or FTA means the State when the State is functioning as the FHWA, FRA, or FTA, respectively 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. Nothing in this definition alters the scope of any delegation or assignment made by FHWA, FRA, or FTA.

Administration action. FHWA, FRA, or FTA approval of the applicant’s request for Federal funds for construction. It also includes approval of activities such as joint and

multiple use permits, changes in access control, rulemakings, etc., which may or may not involve a commitment of Federal funds.

* * * * *

5. Further amend § 771.109, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraphs (a)(1), (b)(1), and (c)(2), (6), and (7) and adding paragraph (e) to read as follows:

§ 771.109 Applicability and responsibilities.

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit, project, or other approvals. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

* * * * *

(b)(1) The applicant, in cooperation with the Administration, is responsible for implementing those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation unless the Administration approves of their deletion or modification in writing. The FHWA will assure that this is accomplished as a part of its stewardship and oversight responsibilities. The FRA and FTA will assure implementation of committed mitigation measures by including the mitigation measures by reference in the grant agreement, followed by reviews of designs and construction inspections.

(c) * * *

(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 or is, or is expected to be, a direct recipient of financial assistance for which FRA is responsible (e.g. Subtitle V of Title 49, U.S. Code) 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.

* * * * *

(6) Subject to paragraph (e) of this section, 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.

(7) A participating agency is responsible for providing input, as appropriate, during the times specified in the coordination plan under 23 U.S.C. 139(g) and within the agency's special expertise or jurisdiction. Participating agencies provide comments, if any, and concurrence on the schedule within the coordination plan.

* * * * *

(e) When FRA is the lead Federal agency, and the project sponsor is a private entity, and there is no applicant acting as a joint-lead agency, FRA shall use a qualified third-party contractor to prepare an EIS. Third-party contracting is a voluntary arrangement whereby the project sponsor retains a contractor to assist in conducting the environmental review under the direction, supervision, and control of the Administration. FRA must oversee the preparation of the EIS and retains ultimate control over the third-

party contractor's work product. FRA may require use of a third-party contractor for preparation of an EA at its discretion. FRA, the project sponsor, and the contractor will enter into a memorandum of understanding (MOU) that outlines at a minimum the conditions and procedures to be followed in carrying out the MOU and the responsibilities of the parties to the MOU.

6. Further amend § 771.111, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraphs (a)(2)(i), (a)(3), (b), (c), (d), (i), and (j) to read as follows:

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

(a) * * *

(2)(i) 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 parts 1500 through 1508, 23 CFR part 450, or 23 U.S.C. sections 139(f), 168, or 169, as applicable.

* * * * *

(3) 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 (see § 771.115) and related environmental laws and requirements and of the need for specific studies and findings that would normally be developed during the environmental review process. A lead agency, in consultation with participating agencies, will develop an environmental checklist, as appropriate, to assist in resource and agency identification.

(b)(1) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

(2) For projects to be evaluated with an EIS, the Administration shall respond to a project sponsor's formal project notification within 45 days of receipt and in writing.

(c) When the FHWA, FRA, or FTA are involved in the development of an action, or when the FHWA, FRA, or FTA act as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis. A project sponsor may request the Secretary to designate the lead Federal agency when project elements fall within multiple DOT agencies' expertise.

(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. Agencies with special expertise may be invited to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies. The lead agencies identify participating agencies within 45 days from publication of the notice of intent.

* * * * *

(i) Applicants for FRA programs or the FTA capital assistance program:

(1) Achieve public participation on proposed actions through activities that engage the public, including public hearings, town meetings, and charrettes, and seeking input from the public through scoping for the environmental review process. Project milestones may be announced to the public using electronic or paper media (e.g., newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For actions requiring

EISs, an early opportunity for public involvement in defining the purpose and need for the action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS.

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

(3) Are encouraged to post and distribute materials related to the environmental review process, including but not limited to, environmental documents (e.g., EAs and EISs), environmental studies (e.g., technical reports), public meeting announcements, and meeting minutes, through publicly-accessible electronic means, including project Web sites. Applicants are encouraged to keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Are encouraged to post all findings of no significant impact (FONSI), combined final environmental impact statement (final EIS)/records of decision (ROD), and RODs on a project Web site until the project is constructed and open for operation.

(j) Information on the FHWA environmental process may be obtained from: FHWA Director, Office of Project Development and Environmental Review, Federal Highway Administration, Washington, DC 20590, or www.fhwa.dot.gov. Information on the FRA environmental process may be obtained from: FRA Chief, Environmental and Corridor Planning Division, Office of Program Delivery, Federal Railroad Administration, Washington, DC 20590, or www.fra.dot.gov. Information on the FTA environmental process may be obtained from: FTA Director, Office of Environmental Programs, Federal Transit Administration, Washington, DC 20590, or www.fta.dot.gov.

7. Further amend § 771.113, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising the second sentence in paragraph (a) and adding paragraph (d)(4) to read as follows:

§ 771.113 Timing of Administration activities.

(a) * * * This work includes drafting environmental documents and completing environmental studies, related engineering studies, agency coordination, and public involvement. * * *

* * * * *

(d) * * *

(4) FRA makes exceptions on a case-by-case basis for purchases of railroad components or materials that can be used for other projects or resold.

8. Further amend § 771.115, as proposed to be amended at 80 FR 72624 (November 20, 2015), by removing the introductory text, revising paragraphs (a) introductory text and (a)(4), adding paragraph (a)(6), and revising paragraph (b) to read as follows:

§ 771.115 Classes of actions.

(a) EIS (Class I). Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally require an EIS:

* * * * *

(4) For FHWA actions, new construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing transportation right-of-way.

* * * * *

(6) For FRA actions, new construction of major railroad lines or facilities (e.g. terminal passenger stations, freight transfer yards, or railroad equipment maintenance facilities) that will not be located within an existing transportation right-of-way.

(b) CE (Class II). Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c) for FHWA actions or pursuant to § 771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d) for FHWA actions or pursuant to § 771.118(d) for FTA actions. FRA's CEs are listed in § 771.116.

* * * * *

9. Add § 771.116 to read as follows:

§ 771.116 FRA categorical exclusions.

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

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

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

(c) Actions that FRA determines fall within the following categories of FRA CEs and that meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after FRA approval. Where there is a project applicant or sponsor, it must submit documentation which demonstrates that the

specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

(1) Administrative procurements (e.g. for general supplies), contracts for personal services, and training.

(2) Personnel actions.

(3) Planning or design activities that do not commit to a particular course of action affecting the environment.

(4) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(5) Internal orders, policies, and procedures not required to be published in the Federal Register under the Administrative Procedure Act, 5 U.S.C. 552(a)(1).

(6) Rulemakings issued under section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916.

(7) Financial assistance to an applicant where the financial assistance funds an action that is already completed, such as refinancing outstanding debt.

(8) Hearings, meetings, or public affairs activities.

(9) Maintenance or repair of existing railroad facilities where the maintenance or repair activities do not change the existing character of the facility, including equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; tunnels; maintenance-of-way and maintenance-of-equipment bases.

(10) Emergency repair or replacement, including reconstruction, restoration, or retrofitting of an essential rail facility damaged by the occurrence of a natural disaster or catastrophic failure. Such repair or replacement may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the rail facility's original construction.

(11) Operating assistance to a railroad to continue existing service or to increase service to meet demand, where the assistance will not significantly alter the traffic density characteristics of existing rail service.

(12) Minor rail line additions, including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards or right-of-way, provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right of way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.

(13) Acquisition or transfer of real property or existing railroad facilities including: track and bridge structures; electrification, communication, signaling or security facilities; stations; and maintenance of way and maintenance of equipment bases or the right to use such real property and railroad facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties or facilities.

(14) Research, development, or demonstration activities on existing railroad lines or at existing facilities, where such activities do not require the acquisition of a

significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail line or facility, such as advances in signal communication or train control systems, equipment, track, or track structures.

(15) Promulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.

(16) Alterations to existing facilities, locomotives, stations, and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms.

(17) The rehabilitation, reconstruction, removal, or replacement of bridges, the rehabilitation or maintenance of the rail elements of docks or piers for the purposes of intermodal transfers, and the construction of bridges, culverts, or grade separation projects that are predominantly within existing right-of-way and that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, construction or reconstruction of approaches or embankments to bridges, or construction or replacement of short span bridges.

(18) Acquisition (including purchase or lease), rehabilitation, transfer, or maintenance of vehicles or equipment that does not significantly alter the traffic density characteristics of an existing rail line, including locomotives, passenger coaches, freight cars, trainsets, and construction, maintenance or inspection equipment.

(19) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, passenger amenities, benches, signage, sidewalks or trails, equipment enclosures, and fencing, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras.

(20) Environmental restoration, remediation, pollution prevention, and mitigation activities conducted in conformance with applicable laws, regulations and permit requirements, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water oil/water separators, installation of pollution containment systems, slope stabilization, and contaminated soil removal or remediation activities.

(21) Assembly or construction of facilities or stations that are consistent with existing land use and zoning requirements, do not result in a major change in traffic density on existing rail or highway facilities and result in approximately less than ten acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger

platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping.

(22) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, installing, maintaining, or restoring drainage ditches, cleaning ballast, constructing minor curve realignments, improving or replacing interlockings, and the installation or maintenance of ancillary equipment.

10. Revise § 771.117(a) to read as follows:

§ 771.117 FHWA categorical exclusions.

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

* * * * *

11. Revise § 771.118(a) to read as follows:

§ 771.118 FTA categorical exclusions.

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

* * * * *

12. Further amend § 771.119, as proposed to be amended at 80 FR 72624 (November 20, 2015), by redesignating paragraphs (a)(i) and (ii) as paragraphs (a)(1) and (2), adding paragraph (a)(3), and revising paragraphs (d) and (h) to read as follows:

§ 771.119 Environmental assessments.

(a) * * *

(3) For FRA actions: When FRA or the applicant, as joint lead agency, select a contractor to prepare the EA, then the contractor must execute an FRA conflict of interest disclosure statement. In the absence of an applicant, FRA may require private project sponsors to provide a third party contractor to prepare the EA as described in § 771.109(e).

* * * * *

(d) The applicant does not need to circulate the EA for comment but the document must be made available for public inspection at the applicant's office and at the

appropriate Administration field offices or, for FRA at Headquarters, for 30 days and in accordance with paragraphs (e) and (f) of this section. The applicant shall send the notice of availability of the EA, which briefly describes the action and its impacts, to the affected units of Federal, State and local government. The applicant shall also send notice to the State intergovernmental review contacts established under Executive Order 12372.

* * * * *

(h) When the FHWA expects to issue a FONSI for an action described in § 771.115(a), copies of the EA shall be made available for public review (including the affected units of government) for a minimum of 30 days before the Administration makes its final decision (See 40 CFR 1501.4(e)(2)). This public availability shall be announced by a notice similar to a public hearing notice.

* * * * *

13. Further amend § 771.123, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraphs (a), (b) and (c) 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 State or local level.

(b)(1) 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 that may take into account any planning work already accomplished, in accordance with 23 CFR 450.212, 450.318, or any applicable provisions of the CEQ regulations at 40 CFR parts 1500 through 1508. 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. Scoping is normally achieved through public and agency involvement procedures required by § 771.111. 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 State or local level.

(2) The lead agencies must establish a coordination plan, including a schedule, within 90 days of notice of intent publication.

(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 document the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The range of alternatives considered for further study shall be used for all Federal environmental reviews and permit processes, to the maximum extent practicable and consistent with Federal law, unless the lead and participating agencies agree to modify the alternatives in order to address significant new information and circumstances or to fulfill NEPA responsibilities in a timely manner, in

accordance with 23 U.S.C. 139(f)(4)(B). 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.

* * * * *

14. Further amend § 771.124, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraphs (a)(1) introductory text, (a)(1)(ii), and (a)(3) to read as follows:

§ 771.124 Final environmental impact statement/record of decision document.

(a)(1) After circulation of a draft EIS and consideration of comments received, the lead agencies, in cooperation with the applicant (if not a lead agency), shall combine the final EIS and ROD, to the maximum extent practicable, unless:

* * * * *

(ii) There are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts of the proposed action.

* * * * *

(3) If the comments on the draft EIS are minor and confined to factual corrections or explanations that do not warrant additional agency response, an errata sheet may be attached to the draft statement pursuant to 40 CFR 1503.4(c), which together shall then become the combined final EIS/ROD.

* * * * *

15. Further amend § 771.125, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraph (d) to read as follows:

§ 771.125 Final environmental impact statements.

* * * * *

(d) 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 request for financial assistance to fund the preferred alternative.

* * * * *

16. Further amend § 771.129, as proposed to be amended at 80 FR 72624 (November 20, 2015), by revising paragraph (c) to read as follows:

§ 771.129 Re-evaluations.

* * * * *

(c) After the Administration issues a combined final EIS/ROD, ROD, FONSI, or CE designation, the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

17. Revise § 771.131 to read as follows:

§ 771.131 Emergency action procedures.

Responses to some emergencies and disasters are categorically excluded under § 771.117 for FHWA, § 771.118 for FTA, or § 771.116 for FRA. Otherwise, requests for deviations from the procedures in this regulation because of emergency circumstances

(40 CFR 1506.11) shall be referred to the Administration's Headquarters for evaluation and decision after consultation with CEQ.

18. Revise § 771.139 to read as follows:

§ 771.139 Limitations on claims.

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 by FHWA or FTA are time barred unless filed within 150 days after the date of publication of the limitations on claims notice. Claims arising under Federal law seeking judicial review of any such decisions by FRA are time barred unless filed within 2 years after the date of publication of the limitations on claims notice. These time periods do not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed. 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.

**PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL
REFUGES, AND HISTORIC SITES (SECTION 4(f))**

19. Revise the authority citation for part 774 to read as follows:

Authority: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009, Pub. L. 109-59, Aug. 10, 2005, 119 Stat. 1144; 49 CFR 1.81 and 1.91; and, Pub. L. 114-94, 129 Stat. 1312, Sections 1303 and 11502.

20. Amend § 774.3 by revising footnote 1 to read as follows:

§774.3 Section 4(f) approvals.

* * * * *

¹FHWA Section 4(f) Programmatic Evaluations can be found at
www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp.

* * * * *

21. Amend § 774.13 by revising paragraph (a) to read as follows:

§ 774.13 Exceptions.

* * * * *

(a) The use of historic transportation facilities in certain circumstances:

(1) Common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108.

(2) Improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers, including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of elements of such railroad or rail transit lines except for:

(i) Stations;

(ii) Bridges or tunnels on railroad lines that have been abandoned or transit lines not in use over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers; and

(iii) Historic sites unrelated to the railroad or rail transit lines.

(3) Restoration, rehabilitation, or maintenance of other types of historic transportation facilities, if the Administration concludes, as a result of the consultation under 36 CFR 800.5, that:

(i) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register; and

(ii) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(3)(i) of this section.

* * * * *

22. Amend § 774.15 by revising paragraph (f)(2) to read as follows:

§ 774.15 Constructive use determinations.

* * * * *

(f) * * *

(2) For projected noise levels:

(i) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter; or

(ii) The projected operational noise levels of the proposed transit or railroad project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment or the moderate impact criteria in the FRA guidelines for high-speed transportation noise and vibration impact assessment;

* * * * *

23. Amend § 774.17 by revising the definitions for “Administration” and “CE” to read as follows:

§ 774.17 Definitions.

* * * * *

Administration. The FHWA, FRA, or FTA, whichever is approving the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA, FRA, or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

* * * * *

CE. Refers to a Categorical Exclusion, which is an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.116, § 771.117, or § 771.118 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

* * * * *

TITLE 49—Transportation

PART 264—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

24. Revise the authority citation for part 264 to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303; 23 U.S.C. 139; 40 CFR parts 1500 through 1508; 49 CFR 1.81; Pub. L. 112-141, 126 Stat. 405, Section 1319; and Pub. L. 114-94, 129 Stat. 1312, Sections 1432 and 11502.

25. Revise the heading for part 264 to read as set forth above.

26. Revise § 264.101 to read as follows:

§264.101 Procedures for complying with the surface transportation project delivery program application requirements and termination.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and related statutes, regulations, and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as “Section 4(f),” are set forth in part 774 of title 23 of the Code of Federal Regulations. The procedures for complying with the surface transportation project delivery program application requirements and termination are set forth in part 773 of title 23 of the Code of Federal Regulations.

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

27. Revise authority citation for part 622 to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112-141, 126 Stat. 405, Sections 1315, 1316, 1317, 1318, and 1319; and Pub. L. 114-94, 129 Stat. 1312, Sections 1314 and 1432.

[FR Doc. 2017-20565 Filed: 9/27/2017 11:15 am; Publication Date: 9/29/2017]