



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA–2012-0007]

FHWA RIN 2125-AF48

FTA RIN 2132-AB05

Environmental Impact and Related Procedures

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This NPRM provides interested parties with the opportunity to comment on proposed changes to the Federal Highway Administration (FHWA) and the Federal Transit Administration's (FTA) joint procedures that implement the National Environmental Policy Act (NEPA). The revisions are prompted by enactment of the Moving Ahead for Progress in the 21st Century Act (MAP-21). This NPRM proposes to add new categorical exclusions for projects within an existing operational right-of-way and projects receiving limited Federal funding, as described in MAP-21. The Agencies seek comments on the proposals contained in this document.

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

ADDRESSES: To ensure that 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. and 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: Kreig Larson, Office of Project Delivery and Environmental Review (HEPE), (202) 366-2056, or Jomar Maldonado, Office of the Chief Counsel (HCC), (202) 366-1373, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC, 20590-0001. For FTA: Megan Blum, Office of Planning and Environment (TPE), (202) 366-0463, or Dana Nifosi, Office of Chief Counsel (TCC), (202) 366-4011. 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 July 6, 2012, President Obama signed into law MAP-21 (Pub. L. 112-141, 126

Stat. 405), which contains new requirements that the Secretary of Transportation must meet. Sections 1316 and 1317 require the Secretary to promulgate regulations designating two types of actions as categorically excluded under 23 CFR 771.117(c) from the requirement under 40 CFR 1508.4 to prepare an environmental assessment (EA) or environmental impact statement (EIS): (1) any project (as defined in 23 U.S.C. 101(a)) within an existing operational right-of-way and (2) any project that receives less than \$5,000,000 of Federal funds or with a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost. Since MAP-21's enactment, FTA established 23 CFR 771.118 and is therefore proposing to designate the two new categorical exclusions in section 771.118(c). The FHWA and FTA, hereafter referred to as the "Agencies," are carrying out this rulemaking on behalf of the Secretary.

General Discussion of the Proposals

This NPRM proposes to revise 23 CFR 771.117(c) and 23 CFR 771.118(c) by designating new categorical exclusion (CE) provisions mandated by Congress under sections 1316 and 1317 of MAP-21. The Council on Environmental Quality's (CEQ) guidance, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (75 FR 75628, December 6, 2010), makes recommendations on procedures for establishing CEs in accordance with section 1507.3 of the CEQ NEPA implementing regulations. The CEQ guidance clarifies that the establishment and use of CEs called for by statute are governed by the terms of the specific legislation and subsequent interpretation by the agencies charged with the implementation of the statute (75 FR at 75631 (Footnote 6)). Sections 1316 and 1317 of

MAP-21 describe the actions and projects that must be the subject of a rulemaking to categorically exclude those actions and projects from further NEPA analysis when there are no unusual circumstances, and this NPRM focuses on the Agencies' implementation and interpretations of those provisions. The Agencies are proposing two CEs that use the statutory language provided under sections 1316 and 1317 along with some clarifying language where the Agencies believe such language is needed to achieve the overall purposes of sections 1316 and 1317, or to avoid confusion in program administration.

Actions that are within the scope of designated CEs in 23 CFR 771.117(c) and 771.118(c) normally do not require any further NEPA analysis by the Agencies. Such actions only need a record in the project file that confirms the action fits the description of the CE and, in accordance with 23 CFR 771.117(b) and 771.118(b), that no unusual circumstances exist that require environmental studies to determine whether the CE classification is proper or whether further NEPA analysis and documentation is necessary. Examples of unusual circumstances – which are similar to extraordinary circumstances in the CEQ NEPA implementing regulations – include significant environmental impacts, substantial controversy on environmental grounds, significant impacts on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act (NHPA), or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action (23 CFR 771.117(b)(1)-(4); 23 CFR 771.118(b)(1)-(4)).

For the use of the proposed CEs, as for the use of any CE, the action must also comply with NEPA requirements relating to connected actions and segmentation (see, e.g., 40 CFR 1508.25, and 23 CFR 771.111(f)). The Agencies recognize that projects

cannot be improperly segmented. The action must have independent utility, connect logical termini when applicable (i.e., linear facilities), and not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. In addition, even though a CE may apply to a proposed action, thereby satisfying NEPA requirements, all other requirements applicable to the activity under other Federal and State laws and regulations still apply, such as the Clean Water Act, Clean Air Act, NHPA, and the Endangered Species Act. Some of these requirements may require the collection and analysis of information, or coordination and consultation efforts that are independent of the Agencies' NEPA CE determination. Also, some of these requirements may involve actions by other Federal agencies (e.g., approvals or issuance of permits) that could trigger a different level of NEPA analysis for those Federal agencies. These requirements must be met before the action proceeds regardless of the availability of a CE for the transportation project under 23 CFR part 771.

The first proposed CE, pursuant to section 1316 of MAP-21, will apply to projects, as defined in section 101(a) of title 23, U.S.C., that occur within an existing operational right-of-way. Section 101(a) of title 23, U.S.C., defines "project" to mean "any undertaking eligible for assistance under [title 23]." This definition includes capital transit projects that are eligible for financial assistance under title 23, U.S.C., through the eligibility criteria under the Surface Transportation Program and Congestion Mitigation and Air Quality Improvement Program, which specifically include all capital transit projects eligible for funding under chapter 53 of title 49, U.S.C. It also includes projects carried out under the Federal Lands Highway programs. Section 1316(b) of MAP-21 defines "operational right-of-way" as "all the real property interests acquired for the

construction, operation, or mitigation of a project (as defined in section 101(a) of title 23, U.S.C.), including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway.”

Consistent with this definition, proposed paragraph (c)(22) of 23 CFR 771.117 and proposed paragraph (c)(12) of 23 CFR 771.118 would include conditions that require the action’s scope be within the geographic area previously permanently acquired, needed, and used for the construction, mitigation, operation, and maintenance of an existing transportation facility, which includes any facility eligible for funding under title 23, U.S.C., or chapter 53 of title 49, U.S.C. The geographic area under section 771.117(c)(22) includes the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. The Agencies also propose to include analogous examples of infrastructure common to transit projects, and propose to define the geographic area under section 771.118(c)(12) to include roadway, fixed guideway, culverts, drainage, clear zone, traffic control signage, landscaping, substations, and any park and ride lots with direct access to an existing transit facility. Right-of-way previously acquired that is not being used for the mitigation, operation, or maintenance of an existing transportation facility is not considered to be part of the operational right-of-way. Actions in right-of-way acquired for corridor preservation or future corridor expansion are not eligible if the corridors are not in operational use at the time of the CE application.

For all actions processed under these proposed CEs, the project record would need to demonstrate that it fits within the conditions specified in the proposed CE

language and that no unusual circumstances exist that require environmental studies to determine whether the CE classification is proper or further NEPA analysis and documentation is required (see sections 771.117(b) and 771.118(b)).

The second proposed CE, pursuant to section 1317 of MAP-21, will apply to projects that receive less than \$5,000,000 of Federal funds or with a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost. The proposed paragraph (c)(23) of 23 CFR 771.117 and proposed paragraph (c)(13) of 23 CFR 771.118 would apply to projects that receive funding under title 23, U.S.C., or chapter 53 of title 49, U.S.C., but the Federal funding thresholds include any Federal funding regardless of source. These CEs would apply to projects that only involve Agency funding decisions and actions. These CEs would not be applicable to projects that require other Agency actions (such as Interstate access approvals for FHWA), even if that approval action is for a project with a total project cost that meets the parameters of the CEs. The project record would need to demonstrate that the action fits within one of the funding thresholds for this CE and that no unusual circumstances exist. The project record would also need to demonstrate that the action has independent utility, connects logical termini when applicable (i.e., linear facilities), and does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Section-by-Section Discussion of the Proposals

In General

This NPRM contains four proposed additions to the regulations at 23 CFR part 771. The CEs proposed for sections 771.117(c)(22) and 771.118(c)(12) are identical, as

are the CEs proposed for sections 771.117(c)(23) and 771.118(c)(13). The identical proposals will be described in this preamble together for ease of reading.

Proposed Section 771.117(c)(22) and 771.118(c)(12) Categorical Exclusion

Two new sections would be added to 23 CFR part 771 to implement MAP-21 section 1316: sections 771.117(c)(22) for FHWA and 771.118(c)(12) for FTA. Section 1316 of MAP-21 requires the Secretary to promulgate regulations that designate as categorically excluded projects, as defined in section 101(a) of title 23, U.S.C., occurring within the existing operational right-of-way. Section 101(a) of title 23, U.S.C., defines “project” to mean “any undertaking eligible for assistance under [title 23].” This definition includes transit projects that are eligible for financial assistance under title 23, U.S.C. It also includes projects carried out under the Federal Lands Highway programs.

“Operational right-of-way” is defined in section 1316(b) of MAP-21 as “all real property interests acquired for the construction, operation, or mitigation of a project (as defined in section 101(a) of title 23, U.S.C.), including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway.” The Agencies are proposing to include regulatory language to clarify the meaning of the statutory definition in the context of the Agencies’ programs. This NPRM proposes to define the “operational right-of-way” as those portions of the existing right-of-way that have been disturbed for an existing transportation facility that is in operational use, including areas that are regularly maintained such as clear zones and landscaping. “Transportation facility” is used in the CE to establish that the existing facility or structure must be related to surface transportation. The use of the phrase is intended to be used in its plain

meaning, and is specifically not intended to be limited to the term “Transportation facilities” as defined in 23 CFR 973.104, which is applicable to the Indian Reservation Roads Program. The proposed language provides that the “operational right-of-way” includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage) and other areas regularly maintained, such as clear zones, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. Under the proposal, “operational right-of-way” would not include portions of the existing right-of-way that are not currently being used or regularly maintained for transportation purposes.

Many of these projects could be categorically excluded under CEs already designated in sections 771.117 and 771.118. Examples of projects that would, absent unusual circumstances, be categorically excluded under existing provisions include construction of bicycle and pedestrian lanes, paths, and facilities, landscaping, track and railbed maintenance and improvements, and installation of traffic control and detector devices. The new CEs (sections 771.117(c)(22) and 771.118(c)(12)), when finalized, could apply to projects that involve a change from one transportation use to another or an increase in facility capacity, if the change does not involve unusual circumstances.

Proposed Sections 771.117(c)(23) and 771.118(c)(13) Categorical Exclusion

The Agencies propose to add new sections 771.117(c)(23) and 771.118(c)(13) to implement MAP-21 section 1317, which requires the Secretary to promulgate regulations that designate as categorically excluded actions receiving limited Federal funds. Specifically, section 1317(1) of MAP-21 provides for the designation of the CE for “any project—(A) that receives less than \$5,000,000 of Federal funds; or (B) with a total

estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.”

The Agencies propose to use the phrase “Federally funded projects” to clarify that the project must receive some amount of Federal funding to be eligible for these CEs. This interpretation is consistent with the title in section 1317, the use of the term “funds” in section 1317(1)(A)-(B), and the statute’s Conference Report indicating Congress intended the CE to cover those actions that receive limited Federal funding (House Report 112-557, 112th Congress, at 598 (June 28, 2012)). This term includes, but is not limited to, projects receiving Federal grants, loans, loan guarantees, lines of credit, and projects receiving funds authorized for the Federal Lands Access Program, the Federal Lands Transportation Program, and the Tribal Transportation Program. The Federal funding thresholds take into account any Federal funding to cover the capital costs of the undertaking regardless of source, but exclude Federal funds for operating costs and expenses that may be provided to the facility.

The Agencies interpret the section 1317(1)(A)-(B) provisions on levels of Federal funding and on estimated project costs as requiring consideration during the NEPA process of whether the projected level of Federal funding and the estimated project cost, as applicable, are reasonably supported by the facts. A change occurring after the NEPA determination, while there is still an FHWA and/or FTA action to be taken, that raises the level of Federal funding beyond the thresholds specified in the CEs will trigger re-evaluation under 23 CFR 771.129 and possible preparation of additional NEPA documentation. Section 771.129(c) requires the “applicant,” as defined in 23 CFR 771.107(f), to consult with the appropriate “Administration,” as defined in 23 CFR

771.107(d), prior to requesting any major approvals or grants (including changes in project plans, specifications, or estimates) to establish whether the CE designation remains valid for the requested Agency action.

The proposed regulatory language includes the phrase “that do not require Administration actions other than funding” to clarify that the CE is limited to situations where the only Agency action involved is funding. “Administration action” is defined in 23 CFR 771.107(c) as the approval by the Agencies of the applicant’s request for Federal funds for construction, and approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment in Federal funds. Expanding the CE to apply to federally funded projects that involve other Agency action, even when the funds are within the limits established by Congress, would be beyond the statutory limits of the CE. For example, a project that would receive Federal funding at or below the specified limits but that also would need an Interstate access approval from FHWA under section 111(a) of title 23, U.S.C., could not be processed as a CE under the proposed rule. Projects requiring Agency action other than Agency funding may still be eligible for a CE determination under other CEs in sections 771.117 or 771.118.

For the use of the proposed CEs, as for the use of any CE, the action must also comply with NEPA requirements relating to connected actions and segmentation (see, e.g., 40 CFR 1508.25, and 23 CFR 771.111(f)).

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at

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

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 nor would it be significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impact of this rulemaking would be minimal. The changes that this rule proposes are requirements mandated by MAP-21 intended to streamline environmental review by making changes in the Agencies' environmental review procedures.

The activities this NPRM proposes to add to 23 CFR 771.117(c)(22) and (c)(23) and 771.118(c)(12) and (c)(13), which are described in section 1316 and 1317, are

inherently limited in their potential to cause significant environmental impacts because the use of the CEs is subject to the unusual circumstances provision in 23 CFR 771.117(b) and 771.118(b). That provision requires appropriate environmental studies, and may result in the reclassification of the proposal for evaluation of the project through an EA or EIS, if the proposal involves potentially significant or significant environmental impacts. 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 proposal would enable projects to move more expeditiously through the Federal review process and would reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA and for ensuring that projects are built in an environmentally responsible manner. The vast majority of FHWA actions presently are determined to be CEs. In a recent survey conducted on CE usage, carried out pursuant to MAP-21 section 1318, responding State departments of transportation reported that 90 percent to 99 percent of their projects qualified for CE determinations. Approximately 90 percent of FTA's actions are within the scope of existing CEs (specifically, sections 771.118(c) and (d)). The Agencies anticipate the percentages may increase with the promulgation of the proposed CEs. The FHWA and FTA are not able to quantify the economic effects of these changes because the types of projects that will be proposed for FHWA and FTA funding and their potential impacts are unknown at this time, particularly given changes to the programs in MAP-21. 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. The proposed revision could streamline environmental review and thus would be less than any current impact on small business entities.

Unfunded Mandates Reform Act of 1995

This 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 assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed action has been analyzed in accordance

with the principles and criteria contained in Executive Order 13132, and the Agencies have determined that this proposed action 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. We invite State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments.

Executive Order 13175 (Tribal Consultation)

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

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding

intergovernmental consultation on Federal programs and activities apply to 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), 77 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, both Agencies have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, the FHWA issued an update to its EJ order, FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at www.fhwa.dot.gov/legregs/directives/orders/664023a.htm). 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 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 new CEs, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. This action proposes to add a provision to the Agencies' NEPA procedures under which they may decide in the future that a project or program does not require the preparation of an EA or EIS. The proposed rule itself has no potential for effects until it is applied to a proposed action requiring approval by the FHWA or FTA.

At the time the Agencies apply the CE proposed by this rulemaking, 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 and the Agencies were to consider applying one of the CEs proposed by this rulemaking, 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 also have determined that no further EJ analysis is needed and no mitigation is required in connection with the designation of the proposed CEs.

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing agency procedures (such as this regulation) that supplement the CEQ

regulations for implementing NEPA. The CEs are one part of those agency procedures, and therefore establishing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), aff'd, 230 F.3d 947, 954-55 (7th Cir. 2000).

Regulation Identification Number

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

List of Subjects

23 CFR Part 771

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

49 CFR Part 622

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

In consideration of the foregoing, the Agencies propose to amend title 23, Code of Federal Regulations part 771 and title 49, Code of Federal Regulations part 622 as follows:

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303, 5301 and 5323; 40 CFR Parts 1500-1508; 49 CFR 1.48(b) and 1.51; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316 and 1317.

2. Amend §771.117 by adding paragraphs (c)(22) and (c)(23) to read as follows:

§ 771.117 FHWA categorical exclusions.

* * * * *

(c) * * *

(22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. The operational right-of-way includes those portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, substations, etc.) and other areas regularly maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled

access highway, or park and ride lots with direct access to an existing transit facility. It does not include portions of the existing right-of-way that are not currently being used or not regularly maintained for transportation purposes.

(23) Federally funded projects that do not require Administration actions other than funding, and:

(i) That receive less than \$5,000,000 of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

* * * * *

3. Amend §771.118 by adding paragraphs (c)(12) and (c)(13) to read as follows:

§ 771.118 FTA categorical exclusions.

* * * * *

(c) * * *

(12) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. The operational right-of-way includes those portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, substations, etc.) and other areas regularly maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, or park and ride lots with direct access to an existing transit facility. It does not include portions of the existing right-of-way that are not currently being used or

not regularly maintained for transportation purposes.

(13) Federally funded projects that do not require Administration actions other than funding, and:

(i) That receive less than \$5,000,000 of Federal funds; or

(ii) With a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

* * * * *

Title 49—Transportation

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

4. The authority citation for part 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303, 5301 and 5323; 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.51; and Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316 and 1317.

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