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**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 773**

**Federal Railroad Administration**

**49 CFR Part 264**

**Federal Transit Administration**

**49 CFR Part 622**

**[Docket No. FHWA-2013-0022]**

**FHWA RIN 2125-AF50**

**FRA RIN 2130-AC45**

**FTA RIN 2132-AB15**

**Surface Transportation Project Delivery Program Application Requirements**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the application requirements for the Surface Transportation Project Delivery Program (Program). This rulemaking is prompted by enactment of the Moving Ahead for Progress in the 21st Century Act (MAP-21), which converted the Surface Transportation Project Delivery Pilot Program into a permanent program, allowed any State to apply for the Program, created a renewal process for Program participation, and expanded the scope of the Secretary's responsibilities that may be assigned and assumed under the Program to environmental review

responsibilities for railroad, public transportation, and multimodal projects, in addition to highway projects.

**DATES:** Effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Owen Lindauer, Office of Project Delivery and Environmental Review, (202) 366-2655, or Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001. For FRA: David Valenstein, Office of Railroad Policy and Development, (202) 493-6368, or Zeb Schorr, Office of Chief Counsel, (202) 493-6072. For FTA: Adam Stephenson, Office of Planning and Environment, (202) 366-5183, or Nancy Ellen Zusman, Office of Chief Counsel, (312) 353-2577. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), 109 Pub. L. 59, 119 Stat. 1144, 1868-1872, codified at section 327 of title 23 United States Code (U.S.C.), established a pilot program allowing the Secretary of Transportation (Secretary) to assign and for certain States to assume the Federal responsibilities for the review of highway projects under the National Environmental Policy Act of 1969 (NEPA) and responsibilities for environmental review, consultation, or other actions required under any Federal environmental law pertaining to the review. The pilot program was limited to five States

and was set to expire on September 30, 2012. Pursuant to 23 U.S.C. 327(b)(2), FHWA promulgated regulations in part 773 of title 23 of the Code of Federal Regulations (CFR), which set forth the information that States must submit as part of their applications to participate in the pilot program (72 FR 6470, Feb. 12, 2007).

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 must meet. Section 1313 of MAP-21 amended 23 U.S.C. 327, by: (1) converting the pilot program into a permanent program (Program); (2) removing the five-State limit; (3) expanding the scope of assignment and assumption for the Secretary's responsibilities to include railroad, public transportation, and multimodal projects; and (4) allowing a renewal option for Program participation. Section 1313 also amended 23 U.S.C. 327(b)(2) by requiring the Secretary to amend—within 270 days from the date of MAP-21's enactment (October 1, 2012)—the regulations concerning the information required in a State's application to participate in the Program. This final rule amends these regulations consistent with the changes in MAP-21.

### **Notice of Proposed Rulemaking**

On August 30, 2013 (78 FR 53712), FHWA, FRA, and FTA (referred throughout this document as the Agencies) published a Notice of Proposed Rulemaking (NPRM) in which the Agencies proposed amendments to 23 CFR part 773 to account for the changes in the Program made by section 1313 of MAP-21. The Agencies' proposed amendments were limited to the application requirements and termination.

The public comment period closed on October 29, 2013. The Agencies considered all comments received when developing this final rule.

## **Summary of Comments and Responses**

The Agencies received comments from a total of 17 entities, which included 7 State departments of transportation (State DOT) (Alaska DOT, California DOT, Florida DOT, Georgia DOT, Texas DOT, Virginia DOT, and Washington State DOT), 4 professional associations (the American Association of State Highway and Transportation Officials, the American Road and Transportation Builders Association, the Association of American Railroads, and the American Public Transportation Association), 3 public interest groups (the Natural Resource Defense Council, the Southern Environmental Law Center, and Transportation for America), 2 transit agencies (the Los Angeles County Metropolitan Transit Authority and the Metropolitan Transit Authority of New York), and 1 metropolitan planning organization (the San Diego Association of Governments). These entities provided over 100 comments that supported the proposed rule, proposed modifications to the proposed rule, or requested further clarifications. The submitted comments have been organized by theme or topic.

### General

Two State DOTs and one professional association indicated that the proposed rule was overly prescriptive and could limit States' flexibility. The commenters suggested re-writing the rule to streamline processes and reduce cost by removing language that is not specifically required for compliance with the statute. One State DOT stated that requiring States to identify each project for which a Draft Environmental Impact Statement (DEIS) has been issued and a Final Environmental Impact Statement (FEIS) is pending, discuss State procedures to guide the fulfillment of environmental review responsibilities, discuss changes in management that the State will make to provide

additional staff and training, discuss how the State will verify legal sufficiency for the documents it produces, and describe in the application staff positions that will be dedicated to fulfill the environmental review responsibilities assumed, exceeds legal requirements and will add unnecessary time and cost.

Section 327(b)(2) of title 23 U.S.C., directs the Secretary to issue regulations on the information required to be contained in any application of a State to participate in the Program including, at a minimum: (1) the projects or classes of projects that the Agencies may assign; (2) verification of the financial resources necessary to carry out the authority; and (3) evidence of the notice and solicitation of public comment by the States relating to participation of the State in the Program. This provision provides the Secretary with the authority and sufficient discretion to establish the requirements for the Program's application process. The information items listed in the statute describe the minimum information that the Secretary could request. In FHWA's experience with the pilot program, the additional information requested in the application regulations was necessary to properly evaluate the capacity and capability of the State to assume the Secretary's environmental review responsibilities. The Agencies have determined that the requirements adopted through this regulation balance the goal to provide flexibility to the States with the need to provide sufficient information for the Agencies to determine that States can meet the environmental review requirements and responsibilities that the Agencies would assign under the Program.

Two State DOTs requested the Agencies reconsider making assignment and assumption of environmental review for highway projects a precondition for assignment and assumption of environmental review for railroad, public transportation, and

multimodal projects. One State DOT indicated that States may be more interested in pursuing assignment and assumption of environmental review for railroad, public transportation, and multimodal projects instead of highway projects. This State DOT asked for clarification on whether this requirement could be satisfied with the assignment and assumption of highway projects qualifying for categorical exclusion pursuant to 23 U.S.C. 326. One State DOT requested clarification that FHWA would not have authority and oversight over the actions of other Operating Administrations.

Section 327(a)(2)(B) specifically establishes that the assignment and assumption of the Secretary's environmental review responsibilities for railroad, public transportation, and multimodal projects is available only if the State has been assigned and has assumed the Secretary's NEPA responsibilities with respect to one or more highway projects. The NEPA review responsibilities for the highway projects must be assigned and assumed under this Program. Assignment and assumption pursuant to 23 U.S.C. 326 for highway projects qualifying for categorical exclusions does not meet this statutory requirement. Assignment and assumption of the environmental review of railroad, public transportation, or multimodal projects that are under the jurisdiction of FRA or FTA does not transfer jurisdiction over the projects to FHWA, but would rather assign that authority to the State directly from FRA or FTA.

One State DOT requested information on the timeframe required for the application review and approval process. The commenter recommended that field offices (Divisions and Regions) provide support to the States in the preparation of the application and that the approval be reserved to Headquarters offices.

The Agencies do not have sufficient experience processing applications for the

Program to determine what would be a reasonable timeframe for application review and approval. The timeframe required likely will depend on the details of each application, such as the scope of environmental responsibilities being sought, need for multiple exchanges for additional information, amount of materials included, and other factors. Continuous communication between the State and the Agencies during the application preparation process will reduce the needed time for review.

One professional association stated that the Agencies should have a centralized clearinghouse to provide information on the different arrangements allowed under the Program. The commenter indicated that this would allow States to see what worked and did not work in the Program.

The Agencies appreciate this recommendation and will consider this comment in implementing the Program as they continually seek ways to strengthen the Program.

One State DOT stated that the NPRM did not contain adequate clarification on responsibilities associated with litigation. The commenter sought clarification on whether the Federal Government could reimburse legal fees incurred by a State. The commenter asked: (1) whether the State was responsible for any legal fees associated with lawsuits based on Federal legal authorities assumed under the Program; (2) if this was the case, what were the limits to a State's exposure, if any; (3) whether there was a distinction between attorney's fees and any other legal fees related to a legal challenge; (4) what were "reasonable" attorney's fees and "eligible activities;" (5) whether all legal costs are "eligible activities" and all legal fees are fully reimbursable if potential plaintiffs successfully argue that NEPA has been violated; (6) whether reimbursement would come from the Surface Transportation Program under 23 U.S.C. 104(b)(2) or from

the Equal Access to Justice Act (28 U.S.C. 2412(d)(1)(A)); (7) whether there is a cap on reimbursement if the funds come from the Equal Access to Justice Act; and (8) whether there is any other cap on reimbursement of legal fees. Another State DOT wanted clarification on whether subsequent rulemaking was likely to offer direction on litigation responsibilities.

Questions on litigation responsibilities and details relate to the implementation of the Program whereas this regulation addresses the application process for the Program. Although these comments fall outside the scope of this regulation, the Agencies want to clarify that the Equal Access to Justice Act does not establish a source of funds for the compensation of the opposing party's fees and costs. The Equal Access to Justice Act is the statutory vehicle authorizing this arrangement, not the source of the funds.

One State DOT stated that the NPRM did not contain adequate clarification on the auditing and monitoring requirements of the Program. Another State DOT requested clarification on how the Agencies would develop auditing and monitoring reports, what information the Agencies will require the States to produce and in what timeframes, and what level of State resource commitment will be needed for these reports.

These comments fall outside of the scope of this regulation, which focuses only on the application process. Information on auditing and monitoring expectations and detailed information on timeframes and commitment of resources relate to the implementation of the Program.

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

### **Section 773.101—Purpose.**

The Agencies did not receive any comments on this section and, therefore did not

make any changes to the regulatory language.

**Section 773.103—Definitions.**

One professional association agreed with the definition of “class of projects,” which included “any defined group” of projects. The commenter indicated that this definition provided flexibility to States to specify a set of projects. One professional association agreed with the definition of “Federal environmental law,” which included Executive Orders such as Executive Order 12898.

The Agencies are adopting the definitions of “class of projects” and “Federal environmental law” as proposed by the NPRM. In addition, the Agencies are adopting the definitions of all other terms proposed in the NPRM that did not receive any comments.

Highways

One State DOT requested that the definition of “highway projects” be expanded to include maintenance activities.

The Agencies have made changes to the definition of “highway projects” to better align it with the term “project” in 23 U.S.C. 101(a)(18) and avoid limiting the assignment only to construction of highway, bridges, or tunnels. “Highway project” is now defined as “any undertaking that is eligible for financial assistance under title 23 U.S.C. and for which the Federal Highway Administration has primary responsibility.” This would cover, for example, transportation alternative projects such as trails and environmental mitigation projects. Maintenance activities are not eligible for Federal-aid highway funds. Preventative maintenance may be an eligible activity (see <http://www.fhwa.dot.gov/preservation/100804.cfm>). The Agencies believe that the

specific mention of preventive maintenance is not needed since this regulation does not address or change program eligibility.

### Multimodal project

Two State DOTs and one professional association indicated that the definition of “multimodal project” was overly broad. In particular, they objected to the inclusion of projects that only required the “special expertise” of another Operating Administration within U.S. Department of Transportation (DOT). The commenters propose limiting the definition to those projects that require the approval of two or more Operating Administrations.

The Agencies have made changes throughout the regulation that address the assignment of environmental review responsibilities associated with multimodal projects, which make it unnecessary to define the term “multimodal project.” These changes take into account the multiple scenarios that could lead to the development of a multimodal project. For example, in paragraphs 773.105(b) and 773.109(d) the Agencies clarify that a State may retain the environmental review responsibilities of the assigning Agency even when a project becomes a multimodal project late in the project development process. A project would not automatically revert to the assigning Operating Administration with the introduction of a multimodal element. The State, however, would need to work with other Operating Administrations as appropriate (for example, establishing cooperating agency, lead agency, or joint lead agency relationships). The Agencies have also added a new paragraph 773.109(d)(1) that allows States to request assignment for discrete multimodal projects. This approach would be useful when the State knows that the project will be a multimodal project from its outset. Additionally,

the Agencies have added a new paragraph 773.109(d)(2) that allows a State to request, at the same time it requests assignment from one Agency, the environmental review responsibilities from either of the other two Agencies. This programmatic approach would be useful when the State is willing to take on the FHWA, FTA, and FRA's combined environmental review responsibilities for the multimodal project even when it does not know the specific multimodal projects.

### State

One transit agency recommended the expansion of the definition of "State" to allow for the delegation of environmental review responsibilities assumed by a State agency to a transit authority if the State agency finds that the transit authority is capable of carrying out those responsibilities. The transit agency recognized that under the proposed definition of "State," a transit authority under its own board of directors would not be able to request assignment and assumption of environmental review responsibilities for proposed public transportation projects. The transit agency argued that transit agencies are most familiar with the environmental impacts that arise from transit, railroad, and multimodal projects they have designed (and will operate) and therefore are best equipped to perform NEPA responsibilities for public transportation projects.

Section 327 authorizes the assignment and assumption of the Secretary's environmental review responsibilities to States. The Governor of the State is required to execute the agreement, particularly in those situations where the responsibilities assigned and assumed are beyond those related to highway projects. 23 U.S.C. 327(c)(1). This requirement indicates that the Governor must have the authority to bind the State agency

to the terms of the agreement and only State agencies under the direct jurisdiction of the Governor (or the mayor in the case of the District of Columbia) may participate in the Program. Nothing in NEPA, other environmental laws, or this Program authorizes the delegation or reassignment of environmental review responsibilities from the State to other entities. However, this does not prohibit other entities, like transit agencies that are not under the authority of the Governor, to develop studies, comment on environmental documents, and provide information that would support a proposed project and assist the responsible agency to perform its assumed environmental review responsibilities. For highway and public transportation projects, public agencies that are project sponsors may prepare environmental documents in accordance with 23 U.S.C. 139(c)(3). In fact, a project sponsor that is a State or local governmental entity receiving funds under 23 U.S.C. or 49 U.S.C. chapter 53 must be a joint lead agency for the NEPA process under 23 U.S.C. 139(c)(3), and would need to work with the State agency that has assumed the environmental review responsibilities for the transit project under this program.

**Section 773.105—Eligibility.**

Applicants

The Agencies have modified paragraph (a)(1)(v) to clarify that a State is expected to have sufficient financial resources and personnel resources to assume the responsibilities being sought. The Agencies have added the phrase “and personnel” to the sentence. This clarification was made to better align with the statutory provision in section 327(b)(4)(B) establishing that the Secretary may approve the application if “the Secretary determines that the State has the capability, including financial and personnel, to assume the responsibility.”

One State DOT, one professional association, and two public interest groups recommended the elimination of proposed section 773.105(a)(3), establishing that the State DOT is the only agency that can assume the Secretary's environmental review responsibilities for railroad projects. The entities argued that removing this requirement and making eligible State agencies that oversee railroad projects within the State would provide valued flexibility, particularly for those States that have such statewide agencies (such as Virginia). The commenters indicated that the proposed regulations provided this flexibility to State agencies that oversee State public transportation projects and therefore should extend to those that oversee State railroad projects. One metropolitan planning organization opined that there was no identifiable benefit in assigning FRA-funded projects to the State DOT.

The Agencies have deleted proposed paragraph 773.105(a)(3). The final rule will allow any State agency to apply for and assume the Secretary's environmental review responsibilities with respect to railroad projects as long as the agency meets the criteria established in section 773.103 for a State. For example, the agency must be under the direct jurisdiction of the Governor, must be responsible for implementing railroad projects, and cannot be a State-owned corporation.

One professional association concurred with the requirement that the State DOT be the only entity within the State eligible to request assignment of environmental review responsibilities for highway projects because that agency is the entity responsible for administering the Federal-aid highway program within the State. The commenter also concurred with the allowance for any entity of the State to be eligible for environmental review responsibilities related to public transportation projects.

The Agencies agree and did not make any changes to these requirements.

One professional association indicated that the proposed rule did not explain which entity or entities would be eligible to assume the environmental review responsibilities for multimodal projects. The commenter stated that it was reasonable to infer that a State DOT must obtain assignment for multimodal projects that have highway and/or rail components because the State DOT is the only entity that can obtain assignment for highway and rail projects, but indicated that this point is not clearly made.

The Agencies considered this comment and decided not to prescribe which entity or entities would be eligible to assume environmental review responsibilities for multimodal projects. This allows States maximum flexibility for reaching this decision. There are situations where a single assigned entity could assume all environmental review responsibilities for the multimodal project. There are also situations where a joint lead agency arrangement is appropriate, where each entity maintains responsibility for environmental review of its respective project component. The final rule allows States the flexibility to determine which entity or entities would pursue environmental review assignment on multimodal projects. The lead agency also has the flexibility to involve other State agencies with relevant expertise as cooperating agencies, and States may consider this option.

### Responsibilities

Five State DOTs and two professional associations requested the Agencies remove the requirement for the States to assume all NEPA responsibilities. This would allow States to assume environmental review responsibilities for projects that qualify for particular classes of NEPA designation, such as categorical exclusions (CE) or

environmental assessments/finding of no significant impacts (EA/FONSI) and not Environmental Impact Statements (EIS). Four State DOTs and one professional association suggested that the statutory language allowing for the assignment and assumption of “classes of projects” meant that the assignment and assumption is available for projects fitting a particular NEPA class of action. The commenters stated that this allowance would provide the greatest flexibility to the States, would make the Program more attractive, and would provide for intermediate steps before a State decides to participate in the environmental review of all projects. One public interest group supported the Agencies’ proposal to require the States to assume all NEPA responsibilities. The commenter suggested that the environmental review process would be cumbersome, inefficient, and confusing to the public and decisionmakers if a State were to hand off environmental review responsibilities to the Federal agency after determining that an EIS is more appropriate for a project. The commenter also suggested that a partial assignment of NEPA responsibilities would improperly bias the analysis and outcome for particular projects. The commenter indicated that States would have an incentive to determine that an EA is the proper level of review even when a full EIS review is more appropriate for the project.

After considering these comments, the Agencies have decided to retain the requirement proposed in the NPRM. The Agencies believe that allowing the assignment of only certain NEPA classes of action would be contrary to the purpose of the Program. Such an approach would create ambiguity about the assignment of the responsibility to determine class of action. A partial assignment of only projects that initially meet the criteria for an EA class of action would also negatively influence the objectivity of the

NEPA analysis performed and the finding reached. For example, this type of partial assignment may lead to the underrepresentation of a project's potential for significant impacts as a way to avoid sending the project back to the assigning Agency when the State does not have assignment for EIS responsibilities. It may also lead to overrepresentation of the potential for significant impacts to push projects back to the Agency. For example, one possible EA process outcome is the determination that an EIS is needed and partial assignment by class of action could require transition of the project to an Agency when the Program is intended to assign administration and liability to the State. In retaining the EIS projects, the Secretary would not be advancing one of the underlying objectives of the Program, which is to transfer the benefit of having more control over the environmental review process of projects together with the risks (for example, the litigation risks). Finally, an alternative to this full NEPA assignment Program exists in 23 U.S.C. 326 (assignment of environmental review of highway projects that qualify for CEs). States interested in an assignment of only CE determinations for highway projects or interested in an intermediate step before full NEPA assignment can use that program instead of the Program.

One State DOT requested clarification on whether the State could assume the environmental review responsibilities under laws other than NEPA for projects where the State is not responsible for the NEPA review. In particular, the State DOT asked whether it could assume responsibility for consultation under section 7 of the Endangered Species Act for highway projects that were not assigned to the State for NEPA review.

The Agencies have determined that assigning environmental review responsibilities of laws other than NEPA without assigning NEPA is neither appropriate

nor efficient. The purpose of the Program is to allow States to assume all of the environmental review responsibilities associated with a project, starting with the NEPA process. The law establishes that if a State assumes the NEPA environmental review responsibilities, then the State may be able to assume responsibilities associated with other environmental requirements. Assumption of NEPA responsibilities is a precondition of receiving the environmental review responsibilities of other laws. See 23 U.S.C. 327(a)(2)(B) (establishing that assignment of NEPA responsibilities is a precondition of assignment of environmental review, consultation, or other action required under any Federal environmental law). The Agencies would not be able to assign review responsibilities for environmental requirements other than NEPA if they do not assign NEPA responsibilities for a given project.

One State DOT and one professional association supported the Agencies' proposal that would allow assignment of environmental review responsibilities for the highway, railroad, or public transportation components of multimodal projects (identified as option 1 in the NPRM at 78 FR 53712, 53715, Aug. 30, 2013). The commenters stated that the Agencies' proposal is the narrowest interpretation that the regulation should allow. The commenters opposed a narrower interpretation (option 3) that would allow the assignment and assumption of a limited group of multimodal projects (highway-railroad, highway-public transportation, public transportation-railroad, and highway-public transportation-railroad projects) and only in situations where the State has successfully assumed the environmental review responsibilities of all the modes involved. The commenters indicated that this narrower interpretation was too restrictive, would limit the States' abilities to seek streamlining in delivering multimodal projects,

and would create practical difficulties for States that have assumed responsibilities for one mode but not others. The professional association urged the Agencies to give further consideration to option 2, which would allow for the assignment of all the Secretary's environmental review responsibilities for multimodal projects, including those not specifically listed in section 327 (such as review responsibilities for airport and port projects). The commenter argued that the law provided statutory basis for assigning the environmental review responsibilities for any Operating Administration, not just those of the Agencies involved in this rulemaking.

The Agencies have decided to implement option 1, which would allow a State to assume the Secretary's environmental review responsibilities for those elements of a multimodal project that are specifically mentioned in the statute (highway, railroad, and public transportation). The Agencies interpret the addition of multimodal projects in section 327 to mean that the State may retain the environmental review responsibilities of the assigning Agency even when a project becomes a multimodal project later in the project development process. The introduction of a multimodal element to a project does not automatically disqualify the project from assignment. However, the Agencies do not read section 327 as authorizing the assignment of environmental review responsibilities for elements within the purview of Operating Administrations other than FHWA, FRA, and FTA. As a result, the Agencies will retain the language proposed in the rule.

### Projects

Two State DOTs and one professional association objected to the exclusion of projects that cross State lines (transboundary projects) from assignment under the Program. The professional association proposed that at a minimum, the Agencies allow

for assignment of transboundary projects if the States involved have assumed the environmental review responsibilities. One State DOT indicated that the exclusion for transboundary projects should not be automatic and that the Agencies should allow for assignment regardless of whether the neighboring State has assumed the environmental review responsibilities. Another State DOT indicated that there was no reason why a State could not successfully conduct the NEPA process jointly with another State that has assumed NEPA review responsibilities.

The Agencies considered the comments in light of two scenarios: one in which only one State participates in the Program, and a second where all the States involved participate in the Program. The Agencies decided to retain the regulatory restriction for the first scenario because these situations involve administrative and legal difficulties that necessitate special consideration by the Federal Government. For example, in situations where one State participates in the Program and another does not, the State with assignment would have to share lead responsibilities with the assigning Agency with no added benefit since the Agency would retain the lead role, continuing to bear decisionmaking responsibilities and risks. The second scenario also raises administrative and legal difficulties that support the restriction. Disputes between States may necessitate the Secretary's involvement, putting the Secretary in an inappropriate position of becoming an arbiter between two sovereign entities. For these reasons the Agencies have decided to retain the restriction of assignment of projects that cross State boundaries.

Two State DOTs and one professional association objected to the exclusion of projects located at international borders. The commenters argued that the exclusion

should be limited to projects that cross international borders. The professional association stated that projects located at an international border but located entirely within the United States do not raise the same issues involved with projects that cross an international border. The commenter suggested that projects at international borders could be excluded from the assignment by agreement (through the Memorandum of Understanding (MOU)) rather than through regulation if there are particular issues of concern such as a requirement to obtain consent from a bi-national body.

The Agencies have considered the comments and have decided to retain the regulatory restriction against assignment of projects at international borders. These types of projects could result in transboundary impacts that would require coordination with other Federal agencies, such as the Department of State and the Department of Homeland Security and may require coordination with foreign nations. These types of projects require special consideration to ensure that the interests of the Federal Government (for example, national security and international policy) are represented appropriately. For example, these types of projects deserve special attention to determine how they affect or relate to the U.S. Government's national and international policies or responsibilities pursuant to treaties with other nations. The Agencies have changed the "at" to "adjacent to" for clarity.

Three State DOTs and one professional association stated that the rule should not exclude automatically from assignment and assumption projects designated as high risk projects under 23 U.S.C. 106. One of the State DOTs indicated that Federal law did not exempt high risk projects from NEPA assignment and that FHWA's authority to reject eligibility for projects included in an approved assigned program was not consistent with

the law. The professional association indicated that section 106(c) was intended to address State approvals of plans, specifications, and estimates (design approval) for projects on the Interstate System, and the high risk concept is created in the context of design review and approval, not on environmental review of projects. The professional association and two of the State DOTs opposing this exclusion suggested eliminating the regulatory exclusion and addressing restrictions for such projects through the individual agreements with the States. Another State DOT recommended adding the word “interstate” before “projects” in proposed paragraph 773.105(c)(3) to clarify that high risk projects only apply to projects on the Interstate System.

After considering the comments received, the Agencies have decided to delete this exclusion from the regulation. Section 106(c) of title 23 U.S.C. allows the assignment of the Secretary’s responsibilities with respect to design, plans, specifications, estimates, contract awards, and inspections for highway projects on the National Highway System, including projects on the Interstate System. Section 106(c)(4) states that the Secretary cannot assign any responsibilities with respect to design, plans, specifications, estimates, contract awards, and inspections to a State for projects on the Interstate System if the Secretary determines the project to be in a high risk category. Interstate System projects for which assignment of section 106 responsibilities is not appropriate may be projects where assignment of environmental review responsibilities is not appropriate. However, this is a fact-specific decision that should take into account all the circumstances that lead to the high risk category designation instead of a regulatory exclusion. There may be unique situations where an Interstate System project may fit a high risk category under 23 U.S.C. 106(c)(4) and where assignment under this Program

remains feasible and preferable. Presently, the only national high risk category is for high risk grantees under 49 CFR 18.12. The Agencies believe that the section 327(b)(4) requirement for the Agencies to take into account the State's capability provides sufficient discretion to determine if a high risk grantee may participate in the Program. The negotiation of the agreement would provide the appropriate opportunity to determine the possible exclusion of specific high risk projects in the State. A regulatory exclusion is not needed at this time.

One State DOT and one professional association commented on the authority in proposed paragraph 773.105(d), which would allow the Agencies to exclude projects on a case-by-case basis based on unique circumstances. The professional association recommended the exercise of this authority through the individual agreements to customize the unique circumstances for each State. The State DOT recommended defining these unique circumstances in the individual agreements if not the rule. The commenter indicated that the preamble identified examples but the draft rule did not identify clear parameters that would signal to the State when to coordinate with the Agencies to determine if it may assume the project, or identify a process for making such determinations. The State DOT was concerned that exercising this discretion late in the environmental review process potentially could cause substantial delays in project delivery.

The Agencies have decided to retain the 773.105(d) provision to alert applicants that there may be unique situations where the assigning Agency may withhold or withdraw assignment of environmental review for a particular project after the Agency and State have executed the MOU. However, the Agencies agree that the MOU should

address the circumstances where the assigning Agency may withhold or withdraw assignment, as well as the process for how those particular circumstances would be addressed.

**Section 773.107—Pre-application requirements.**

Coordination meeting

Three State DOTs commented on the requirement for a pre-application coordination meeting in paragraph 773.107(a). One of the State DOTs stated that this is a given and does not need to be prescribed in regulation. Another of the State DOTs indicated that the Agencies should simply require coordination prior to developing and submitting the application. The State DOT indicated that informal contact may be more appropriate in some circumstances than a single, formal meeting, and the requirement for a meeting would reduce the ability of the State and applicable Agency to find coordination mechanisms that are most convenient and effective for the circumstances. Another of the State DOTs recommended that the coordination meeting include representatives from offices above the FHWA Division Office to ensure consistency around the country.

The purpose of the meeting requirement is to ensure that coordination has taken place before the State takes the step of seeking public comment on its application. The required meeting is not meant to be the only coordination point between the State applying for assignment and the relevant Agencies. It is meant to define the minimum coordination requirement prior to public notice of the application, to ensure efficient and effective use of resources of the State applying for assignment and the relevant Agencies. The regulation does not prescribe the form, manner, and timing of the meeting other than

to indicate that it must occur prior to the State's publication of the application for public comment. This allows the State and the applicable Agency the flexibility to identify what coordination mechanisms are most convenient and effective for their circumstances. The Agencies have made edits to clarify that the Headquarters representatives of the appropriate Agency must participate in the required coordination meeting.

#### Public comment on the State's application

One State DOT indicated that the use of the phrase "appropriate State public notice laws" in paragraph 773.107(b) is likely to cause confusion because most States do not have a public notice law that specifically prescribes the public notice requirements for this type of action. The commenter recommended revision to the proposed rule to require publication of a notice of the application's availability in the State's periodical equivalent to the Federal Register, with instructions on how to access the full application on the State's Web site. The commenter indicated that posting the entire application on the State's Web site would satisfy the requirement to publish the complete application listed in section 327(b)(3)(B).

Section 327(b)(3)(B) requires that the State provide notice and solicit comment on the application "in accordance with the appropriate public notice law of the State." The States are in the best position to interpret their State public notice laws and determine what constitutes appropriate statewide notification under those laws. As a result, the Agencies have decided to retain the proposed language.

One State DOT stated that the proposed rule's requirement to seek the views from "other State agencies, tribal agencies, and Federal agencies that may have consultation or approval responsibilities associated with the project(s) within State boundaries" exceeded

legal requirements and would add unnecessary time and cost.

Section 327(b)(2) authorizes the Secretary to issue regulations on the information required to be contained in any application of a State to participate in the Program including, at a minimum, (1) the projects or classes of projects that the Agencies may assign, (2) verification of the financial resources necessary to carry out the authority, and (3) evidence of the notice and solicitation of public comment by the States relating to participation of the State in the Program. This provision provides the Secretary the authority and sufficient discretion to establish the requirements for the Program's application process. The Agencies believe that the views of other State, tribal, and Federal agencies that may have environmental consultation or approval responsibilities are important factors in evaluating the request for assignment. These entities may have worked with the State before and may provide information relevant to the Agencies' decision whether to assign the Secretary's responsibilities or information that could assist in the development of the agreement.

One transit agency and one professional association expressed support for the requirement of requesting comments from recipients of Federal financial assistance under chapter 53 of title 49, U.S.C. The commenters recommended the Agencies give considerable weight and deference to these opinions in making assignment decisions with regard to the Secretary's environmental review responsibilities associated with public transportation projects. The transit agency suggested that the procedures allow for transit authorities to opt-out of the assignment on a programmatic basis instead of a project-by-project basis. The professional association supported the opt-out process for transit authorities but recommended this be available on a programmatic and project-by-project

basis. Both commenters requested that the assignment documents, including the MOU, clearly and unambiguously identify the excluded projects. One metropolitan planning organization expressed concerns with the availability of the assignment for FTA and/or FRA-funded projects. The commenter indicated that as a direct recipient of FTA funds, the metropolitan planning organization works directly with FTA to complete projects. The commenter opined that there was no identifiable benefit in assigning FTA-funded or FRA-funded projects to the State DOT.

Section 327(a)(2)(B)(iii) clearly establishes that recipients of funding under chapter 53 of 49 U.S.C. may request the Secretary to maintain the environmental review responsibilities with respect to one or more public transportation projects. The Agencies have added an additional sentence to paragraph 773.107(b)(1) to clarify that the chapter 53 recipients may request that the Secretary maintain the public transportation environmental review responsibilities either on a project-by-project or programmatic basis. The Agencies agree that the MOUs should identify excluded projects individually and/or programmatically. The FTA will take these comments into account in making its final decision on whether to assign the identified projects. The State DOT is not the only entity within the State that may assume the environmental review responsibilities associated with public transportation and railroad projects; however the entity must be a State agency reporting to the governor.

One State DOT recommended revising the language in paragraph 773.107(b)(2) to clarify that the comments submitted and addressed by the State must be for all “timely comments in response to the public notice.”

The Agencies considered this comment and have decided against prescribing a

timeframe for comments or establishing which comments are or are not timely. These issues relate to the time between the close of the comment period and the submission of an assignment application to the Agencies and the particulars of the State's public notice law. States are in the best position to interpret their laws and determine which comments were timely in accordance with their public notice laws. However, the Agencies encourage States to take into account comments submitted after the filing date, to the extent practicable, to avoid having to address these comments for the first time during the Federal Register notice and comment process established through section 773.111. The Agencies have made technical edits to paragraph (b)(2) to indicate that the State must submit copies of all comments received as a result of the publication of the application and that the State must develop responses for all substantive comments.

#### Sovereign immunity waiver

Two State DOTs and one professional association opposed the requirement for States to secure the waiver of sovereign immunity prior to submitting the application to the appropriate Agency. One State DOT indicated that obtaining a waiver of sovereign immunity often requires state legislative and/or gubernatorial action that could extend the application process. The commenters requested a change in the rules to allow States to show proof of waiver of sovereign immunity prior to signing the agreement. The commenters indicated that, as part of the application process, the regulations could require a State to describe the steps it will take to obtain the waiver and the status of those efforts, or provide a plan and a schedule for meeting this requirement. One State DOT stated that the law's requirement for a waiver of sovereign immunity was a major impediment for their participation in the Program because in its situation, only the State

legislature can waive sovereign immunity, and there were no precedents in the State for seeking such a waiver.

The Agencies have considered these comments and have decided to retain the requirement as presented in the NPRM. The Agencies expect an interested State to waive its sovereign immunity under the U.S. Constitution's 11th Amendment to the extent needed to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of the environmental review responsibilities under the Program. See 23 U.S.C. (c)(3)(B). This sovereign immunity waiver is a significant precondition for the State's participation in the Program that typically requires State legislative action (in some States gubernatorial action may be sufficient). The absence of the waiver at the application stage is an indicator that the State is not ready for consideration for the Program.

#### Comparable State laws

One State DOT and one professional association sought clarification on the requirement for States to have laws in effect that authorize the State to take actions necessary to carry out the responsibilities sought. The commenters were unclear whether the provision required State legislation specifically authorizing assignment or whether it was sufficient for the State to rely on existing laws authorizing the State agency to plan and deliver transportation projects or to engage in environmental review.

This provision, based on 23 U.S.C. 327(c)(3)(C)(i), does not require the passage of new State laws and regulations if the State already has existing laws that provide for the environmental review of surface transportation projects. States may rely on existing laws and regulations to meet this requirement if they determine such laws are sufficiently

broad in scope and effect. States should have, for example, laws and regulations that authorize the State agency to conduct reviews of projects within its jurisdiction and to take action to ensure that the environmental mitigation commitments are carried out for the project. The State laws and regulations should not conflict with existing Federal environmental review requirements, including those procedures established by the assigning Agency. The initial meeting and continuous coordination would facilitate a discussion on whether existing laws meet the necessary requirements of this provision.

One State DOT and one professional association opposed the requirement for a State to demonstrate that it has laws comparable to the Freedom of Information Act (FOIA) (5 U.S.C. 552) prior to submitting the application to the appropriate Agency. The commenters requested a change in the rules to allow States to show proof of laws comparable to FOIA prior to signing the agreement. The commenters indicated that, as part of the application process, the regulations could require a State to provide a plan and a schedule for meeting this requirement.

The Agencies have considered these comments and have decided to retain the requirement as presented in the NPRM. As is the case for the sovereign immunity provision, the availability of laws comparable to FOIA is an important precondition for Program participation. 23 U.S.C. 327(c)(3)(C)(ii) requires a State to certify that it has laws that “are comparable to section 552 of title 5” of the U.S.C. The absence of the certification at the application stage is an indicator that the State is not ready for consideration for the Program.

Two public interest groups stated that the word “comparable” when referring to FOIA requirements was ambiguous. The commenters recommended a few changes to

address this issue. First, the commenters suggested changing the text to indicate that the public disclosure laws in effect must be “at least as stringent” as FOIA. Second, the commenters suggested the rule include an analogue to the FOIA fee waiver provision for record requests that serve the public interest. The commenters indicated that public interest groups and individual citizens often do not have sufficient resources to pay the bills demanded by State agencies, which can amount to thousands of dollars for a single request. The commenters suggested that the absence of such a provision would allow State agencies to purposefully run-up the costs by producing large volumes of marginally responsive documents to chill future records requests. Third, the commenters suggested that the rule require State public records acts to include a statutory time frame requirement for the production of records comparable to the 20-day obligation in FOIA. The commenters stated that delayed response times can hamper the ability of citizens to actively engage in the NEPA process and timely access is of utmost importance when there is an opportunity to comment on a NEPA document, as comment periods are narrow and strictly enforced. The commenters suggested including a requirement for State public records laws to prohibit the recovery of search or review fees when the agency fails to meet a statutory deadline absent exceptional circumstances. The commenters also requested that the rule require a State to certify that it has the ability to comply with its public records act and to provide documents in a timely fashion.

The Agencies have considered these comments and have decided against codifying additional criteria to determine whether a state public disclosure law is comparable to FOIA. Section 327(c)(3)(C)(ii) specifically requires that any decision regarding the public availability of a document under the State law be reviewable by a

court of competent jurisdiction; however, the provision does not otherwise establish criteria to determine comparability. The Agencies believe that it is sufficient to require the State Attorney General (or other State official legally empowered by State law) to certify that its public disclosure law is comparable to FOIA. In addition, the public involvement processes will provide the public with an opportunity to raise any concerns regarding a particular State's public records law and its comparability with FOIA.

Two public interest groups recommended that the final rule clarify that a State must also submit to the jurisdiction of the Federal Administrative Procedure Act (APA), which governs Federal NEPA review.

The Agencies have considered this comment and have determined that a change in the text of the regulation is unnecessary. A State submits itself to the jurisdiction of the APA by accepting the Secretary's responsibilities with regard to NEPA and other Federal environmental requirements and by submitting to the jurisdiction of the Federal courts. Section 327(d)(2) establishes that a civil action for failure to carry out the responsibilities of the Secretary under this Program would be "governed by the legal standards and requirements that would apply in such a civil action against the Secretary had the Secretary taken the actions in question." This includes the legal standards established under the APA.

**Section 773.109—Application requirements.**

One State DOT objected to the requirement in paragraph 773.109(a)(1) for the State to identify in its application each project for which a DEIS has been issued and a FEIS is pending, and indicated that this provision exceeded legal requirements and would add unnecessary time and costs. One State DOT requested that the MOU include

guidance for transitioning active projects from the appropriate Federal agency to the State.

The requirement for States to identify active projects is important for establishing how these projects would be handled once the assignment occurs. This provides interested agencies and the public with notice of those active projects that the State would handle and those that the Agency would handle once assignment occurs. Section 327(b)(2) gives the Secretary the authority and sufficient discretion to establish the requirements for the Program's application process, which in this case includes requesting information on active projects.

One State DOT objected to the requirement in paragraph 773.109(a)(3)(i) for the State to provide a summary of State procedures in place to guide development of documents, analyses, and consultations required to fulfill the environmental review responsibilities. The commenter indicated that this provision exceeded legal requirements and would add unnecessary time and costs. One professional association expressed concern with the NPRM's lack of discussion on the need to keep NEPA reviews separate from State environmental review requirements. The commenter indicated that it was important that the application demonstrate or show that the State will conduct NEPA analyses strictly in accordance with NEPA and its implementing regulations. The commenter suggested adding a requirement to the section for "an explanation of how the State will ensure that NEPA analyses and analyses conducted under State law will be kept separate and ensure that NEPA analyses will strictly reflect the requirements of NEPA and its implementing Federal regulations."

Section 327(b)(2) gives the Secretary the authority and sufficient discretion to

establish the requirements for the Program's application process. Information about a State's procedures is an important factor to determine if the State has the capability and authority to engage in environmental reviews for projects. It also gives the appropriate Agency the opportunity to determine if there are any elements of the procedures that may be inconsistent with the Agency's environmental review procedures. Providing a summary and a location where the procedures are documented would be sufficient for the Agencies. The Agencies have added a sentence in paragraph 773.109(a)(3)(i) to clarify that in those States with their own State environmental review procedures, the procedures or summary should include a discussion on the differences (if any) between the State's environmental review standards and the Federal environmental review requirements.

One State DOT commented on the requirement in paragraph 773.109(a)(3)(iii) asking a State to provide a discussion of how it will verify legal sufficiency for the environmental documents it produces. The commenter sought clarification that the legal sufficiency review requirement applied only for a FEIS pursuant to 23 CFR 771.125(b) and certain approvals under section 4(f) of the Department of Transportation Act (23 U.S.C. 138 or 49 U.S.C. 303), rather than for all environmental documents. The commenter requested a modification clarifying that the rule requires legal sufficiency review only in these two circumstances.

For FHWA and FTA projects, a legal sufficiency review is required for a final EIS (23 CFR 771.125(b)) and for section 4(f) approvals (23 CFR 774.7(d)). For FRA projects, a legal sufficiency review is required for determinations that an action is not a major FRA action (section 4(b) of FRA NEPA procedures, 64 FR 28545, 28547, May 26, 1999), for every FONSI (section 10(c), 64 FR at 28551), for every section 4(f)

determination (section 12(b)(6), 64 FR at 28552), every DEIS (section 13(c)(5), 64 FR at 28553), and every FEIS (section 13(c)(13), 64 FR at 28553). The FRA encourages, but does not require, its Program Office to seek advice as to the legal sufficiency of environmental assessments (section 10(d), 64 FR at 28550). Although these are the only situations where either the regulations or the NEPA procedures require legal sufficiency review, they are not the only situations where legal sufficiency may be warranted in the NEPA review process. For example, as a matter of practice FHWA engages in legal sufficiency review of Federal Register notices announcing the 150-day statute of limitations period for environmental review approvals and decisions pursuant to 23 U.S.C. 139(l). In addition to legal sufficiency determinations, legal review may be warranted in other situations like in the development of interagency agreements or programmatic approaches. There may also be circumstances where a review that normally does not require legal sufficiency review may benefit from a legal review to identify and address legal risks before determinations, findings, or decisions are issued. The Agencies are interested in understanding the process that the State seeking assignment would have in place to engage with their legal counsel for seeking legal advice in the environmental review process and for obtaining the legal sufficiency determination in those instances that are required by law, regulation, policy, or guidance. This is needed so the Agencies can understand the capability of the State to address legal issues in the Federal environmental review process. To emphasize this point, the Agencies have changed the information requirement in paragraph 773.109(a)(3)(iii) to “legal reviews” instead of limiting it to legal sufficiency reviews and have added the phrase “including legal sufficiency reviews where required by law, policy, or guidance”

to indicate that the appropriate Operating Administration may require legal sufficiency reviews through policy or guidance.

One State DOT objected to the requirement in paragraph 773.109(a)(3)(iv) for States to discuss how they will identify and address those projects that would normally require Headquarters' prior concurrence of the FEIS under 23 CFR 771.125(c). The State DOT stated that this provision exceeded legal requirements and would add unnecessary time and costs. Another State DOT noticed a typographical error in the paragraph and requested that "Headquarters" be changed to the possessive form "Headquarters'."

Section 327(b)(2) gives the Secretary the authority to establish the requirements for the Program's application process. The prior concurrence process provides an opportunity for FHWA's and FTA's Headquarters offices to review complex or controversial projects to ensure that they are consistent with national policy, do not establish negative precedents, and to brief senior leadership staff of the Agency. Information on how the State will address the prior concurrence process for FHWA and FTA projects, as required by the regulations for environmental review of highway and public transportation projects in 23 CFR 771.125(c), is an important factor for determining whether the State has the resources and capabilities to address complex and controversial issues that require involvement and decisions at the highest levels in the State. As a result, the Agencies have decided to retain this requirement. The Agencies have accepted the edit proposed by the State DOT to change "Headquarters" to its possessive form.

One professional association noted that section 1313(b)(2) of MAP-21 amended

the Program by clarifying that a State cannot be required, as a condition of obtaining assignment, to forego any project delivery method permitted in the absence of assignment. Another professional association urged the Agencies to focus on flexibility. The commenter stated that the application process should allow States to assume certain parts of the review process, while leaving others to the Federal Government depending on what is in the best interest of advancing the project.

The Agencies have noted these comments and have added paragraph 773.109(a)(3)(v). In the pilot, FHWA had reservations about allowing State DOTs to assume environmental review responsibilities for projects where the State DOT would also pursue acquisition of rights-of-way before the completion of the NEPA process. The FHWA's concern was that this project flexibility had the potential to introduce bias in the NEPA review process and in the general decisionmaking process in favor of the alternative that would benefit from the acquired rights-of-way. This risk of bias is mitigated when the Federal agency remains responsible for the integrity of the NEPA environmental review process. See generally 42 U.S.C. 4332(2)(D) (establishing that for non-assignment situations Federal officials retain responsibility of the scope, objectivity, and content of an EIS even if a State agency is allowed to prepare the document); 40 CFR 1502.14(a) (responsibility of the Federal agency to objectively evaluate all reasonable alternatives); 40 CFR 1506.1(b) (responsibility to notify applicant that the Federal agency will take appropriate action to ensure the objectives and procedures of NEPA are achieved when it becomes aware that applicant is about to take action that would have an adverse environmental impact or limit the choice of reasonable alternatives before a ROD is issued); 40 CFR 1506.5(a) (responsibility to independently evaluate information

submitted by an applicant for use in the EIS and for its accuracy); and 40 CFR 1506.5(c) (responsibility to avoid conflicts of interests). See also Burkholder v. Peters, 58 Fed. Appx. 94 (6th Cir. 2003) (holding that independent oversight by the Federal agency ensured objectivity and integrity of the NEPA process in a conflict of interest situation); Associations Working for Aurora’s Residential Environment v. Colorado Dept. of Transp., 153 F.3d 1122 (10th Cir. 1998) (finding that Federal oversight can be taken into account to determine that the integrity and objectivity of the NEPA process was not compromised). It was FHWA’s position that allowing a State DOT to be both the entity pursuing the pre-NEPA right-of-way acquisition and the responsible entity for the environmental review process of the project would create a conflict of interest and have the potential to affect the objectivity and integrity of the NEPA process. Based on these concerns, FHWA prohibited this project flexibility from being used in assigned projects.

Section 1313 amended 23 U.S.C. 327 by adding subparagraph (a)(2)(F), establishing that the “Secretary may not require a State, as a condition of participation in the [P]rogram, to forgo project delivery methods that are otherwise permissible for projects.” The Agencies have taken into account the statute’s language allowing States to pursue all otherwise permissible project delivery methods and interpret this language to mean that the States are responsible for making the decision on whether the proposed project delivery method (e.g., early acquisition, at-risk final design) and review process meet the objectivity and integrity requirements of NEPA. The Agencies have added a new paragraph 773.109(a)(3)(v) to allow for States to discuss the decisionmaking process they will use to determine whether their proposed project delivery method meets the objectivity and integrity requirements of NEPA. This new paragraph would require a

“discussion of the otherwise permissible project delivery methods the State intends to pursue, and the process it will use to decide whether pursuing those project delivery methods and being responsible for the environmental review meet the objectivity and integrity requirements of NEPA.”

One State DOT objected to the requirement in paragraph 773.109(a)(4) for States to include a description of staff positions, including management, that will be dedicated to fulfill the additional functions needed for the assigned responsibilities, personnel needs (including legal counsel), summary of anticipated resources, and commitment to make the anticipated financial resources available. The State DOT stated that this provision exceeded legal requirements and would add unnecessary time and costs. Another State DOT suggested removing the requirement for States to provide information on staffing levels, organizational structure, and use of consultant services, indicating that the State DOT was concerned that this will allow the Agencies to mandate organizational requirements as a precondition of the assignment. The commenter stated that the Agencies should focus on conducting outcome-based reviews where the Agencies would assess program performance based on discreet metrics (such as the number of legal challenges to a State’s NEPA documentation) and identify areas of risk based on actual program implementation, rather than a review of a proposed organizational structure. One public interest group requested that the rule require a State to certify that it has the ability to comply with its public records act and to provide documents in a timely fashion.

Section 327(b)(2) gives the Secretary the authority to establish the requirements for the Program’s application process. Description of staff positions that will be dedicated to fulfill the additional functions needed for the assigned responsibilities,

personnel needs (including legal counsel), summary of anticipated resources, and commitment to make the anticipated financial resources available is a critical piece of information for the Agencies to determine if the State has the capability, including financial and personnel resources, to assume the responsibilities under the Program (see 23 U.S.C. 327(b)(4)(B)). The purpose of the information is to assist in the decision whether to approve the application and is, therefore, required at the application stage. Information on the State's performance in the Program is useful for decisions on whether to renew the State's participation but not appropriate for initial approval decisions. The information could allow the Agencies to make suggestions and recommendations to ensure the successful implementation of the Program within the State. The appropriate Agency should be able to determine if the resources proposed are adequate as this is part of its responsibility to verify that the State has the capability, including financial and personnel, to assume the responsibilities.

Two State DOTs commented on the provision in paragraphs 773.109(a)(6)-(7) requiring States to provide certification by the State Attorney General or other State official legally empowered by State law that the State can and will assume the responsibilities sought, that the State consents to the jurisdiction of Federal courts with respect to the responsibilities sought, and that the State has laws that are comparable to FOIA. One of the State DOTs indicated that certification could be evidenced by the approval of the application and not a separate certification by the State's Attorney General. The commenter also indicated that the requirement for certification on laws comparable to FOIA is not in the statute. The State DOT stated that this provision exceeded legal requirements and would add unnecessary time and costs. The other State

DOT stated that the requirement for a certification from the State Attorney General deviated from the statutory requirement in 23 U.S.C. 327(c)(3) and imposed an unnecessary procedural requirement on the State's submission of the application. The commenter indicated that for some States, it may not be the practice of the Attorney General to issue (and there may be no State official legally empowered by State law to make) the types of certification listed in the NPRM. The State DOT indicated that inclusion of the certifications in the State application should suffice since the Governor signs the application and executes the MOU. The commenter suggested the Agencies change the phrase "can and will assume the responsibilities of the Secretary" in paragraph 773.109(a)(6) if the Agencies decide to keep the certification requirement. The State DOT indicated that a certification that the State "can and will assume the responsibilities of the Secretary" is more appropriate for the individual signing the application or the MOU on behalf of the State. The State DOT commented that a lawyer may appropriately certify that the State is legally empowered by State law to assume the responsibilities of the Secretary.

The Agencies have considered these comments and have decided to retain the requirement as proposed. Section 327(c)(3)(B) establishes that the Governor (or for highway projects, the top-ranking transportation official responsible for highway construction) must expressly consent, on behalf of the State, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State. In evaluating how to implement this requirement, the Agencies considered how States waive their sovereign immunity under the 11th Amendment of the U.S. Constitution (that is, how they consent to the jurisdiction of

Federal courts). In many States this authority rests with the legislature instead of the Governor. In these circumstances, an affirmation by the Governor or a State official waiving sovereign immunity may lack legal authority. Identifying who can and how to waive sovereign immunity involves legal research and interpretation of State laws. The Agencies believe that States' attorneys are in the best position to determine the validity of the waiver of sovereign immunity within their States. Therefore, the Agencies have decided to rely on the legal opinion of the State official who is empowered to issue binding legal opinions for the State's executive branch as a way to ensure that the sovereign immunity waiver is valid and supported by law. Typically this official is the State Attorney General, but in some States the agency's (for example, State DOT) general counsel may have the authority under the State Constitution or State statute to issue legal opinions that bind the State. The Agencies have added the phrase "to issue legal opinions that bind the State" to make clear that another State official that has this authority may issue the certification. The Agencies interpret section 327(b)(2) as providing the Secretary with sufficient authority to establish this as a requirement for the application process.

The Agencies also believe that the State Attorney Generals (or other State official empowered by law to issue binding legal opinions) are in the best position to opine that the State public records laws are comparable to FOIA and that the State has laws that authorize it to take actions necessary to carry out the responsibilities being assumed. This certification is explicitly required in section 327(c)(3)(C). The Agencies interpret section 327(b)(2) as providing the Secretary with sufficient authority to establish this as a requirement for the application process.

The Agencies agree with the comments objecting to the manner in which the requirement is phrased which indicates that the State Attorney General must certify that the State “can and will assume the responsibilities of the Secretary.” The Agencies have changed the phrasing to a certification that the State “has legal authority” to assume the responsibilities of the Secretary.

Two State DOTs commented on the requirement in paragraph 773.109(a)(10) requiring the State Governor’s signature approving the application. One State DOT indicated that this exceeded legal requirements and would add unnecessary time and costs. The other State DOT recommended the rule retain the flexibility in the previous version of part 773 allowing the head of the State agency having primary jurisdiction over highway matters to sign the Program application.

The Agencies have considered this comment and have decided to make the change requested to allow the top ranking transportation official in the State who is charged with responsibility for highway construction to sign the Program application with respect to highway projects. This change is consistent with the statutory language in section 327(c)(1) requiring the Governor or the top ranking transportation official in the State who is charged with responsibility for highway construction to execute the agreement. The purpose of requiring the Governor’s signature on the application instead of limiting the Governor’s involvement to the execution of the agreement is to ensure that the highest level in the State’s executive branch is aware of the resource commitment involved with implementing the Program and is aware of the responsibilities involved in participation. The Agencies interpret section 327(b)(2) as providing the Secretary with sufficient authority to establish this as a requirement for the application process.

One professional association commented on the requirement in paragraph 773.109(d), which states that the State should submit an application for multimodal projects as early as possible once the project is identified as a multimodal project. The commenter stated that the final rule should make clear that the States can request assignment for multimodal projects in general, not just on an individual basis. The professional association recommended removing or revising language that assumes that a State will identify a specific multimodal project during the application process.

The Agencies considered these comments and decided to modify this requirement. The Agencies interpret the addition of multimodal projects in section 327 to mean that the State may retain the environmental review responsibilities of the assigning Agency even when a project becomes a multimodal project later during the project development process. The introduction of a multimodal element to a project does not automatically disqualify the project from assignment. The final rule now establishes a presumption that a State's request for assignment includes the environmental review responsibilities for those elements of a multimodal project that are within the purview of the assigning Agency. The Agencies would expect States to work with other Operating Administrations as appropriate (for example, establishing cooperating agency, lead agency, or joint lead agency relationships). Specifically, the Agencies have added a sentence in paragraph 773.105(b) and have modified paragraph 773.109(d) to establish this presumption. The provision allows States to opt-out of this presumption by affirmatively rejecting these responsibilities in the application. In these situations, the environmental review responsibilities would remain with the Operating Administration whenever a project becomes a multimodal project.

The Agencies have also added a new paragraph 773.109(d)(1) that allows States to request assignment for discrete multimodal projects. This would be helpful, for example, in situations where a project is identified early in its project development process as a multimodal project and where the State is only interested in the environmental review responsibilities for that project or group of projects. In addition, the Agencies have introduced a new paragraph 773.109(d)(2) that allows States to pursue a limited assignment of multimodal environmental review responsibilities. This provision allows a State to request, at the same time it requests assignment from one Agency, the multimodal environmental review responsibilities from either of the other two Agencies. This would mean that, if successful, a State would get all the assignable responsibilities for a multimodal project without needing to apply at a later stage for the other Agencies' environmental review responsibilities. These changes address the requests for more flexibility when it comes to assignment of environmental review responsibilities with respect to multimodal projects.

One State DOT noted that the application requirements for multimodal projects appear to suggest that separate applications would be required for each multimodal project, group of projects, or class of projects. The State DOT encouraged the Agencies to seek opportunities to increase consistency among Operating Administrations and align requirements and processes for multimodal projects so that States might handle the projects and potential assignment programs more efficiently. The State DOT was concerned that the highly variable nature of multimodal projects and the array of circumstances and requirements present would mean that States interested in assignment of multimodal projects would need to devote substantial resources in developing

applications for different projects or classes of projects, and for maintaining and monitoring the associated programs.

To address the commenter's concerns, the Agencies have decided to change the rule to establish a presumption that States requesting assignment of environmental review responsibilities for highway, railroad, or public transportation projects are also requesting those responsibilities for those components of multimodal projects. As a result, a State would not need to submit separate applications for environmental review responsibilities for those components of multimodal projects. The Agencies also have allowed for the possibility of State requests for environmental review responsibilities for discrete multimodal projects. This accommodates situations where a multimodal project is known at the outset and for situations where a State is only interested in environmental review responsibilities for multimodal projects and no other responsibilities. The Agencies, with the assistance of the Office of the Secretary of Transportation, will continue to seek opportunities to increase consistency in the environmental review process and align requirements and processes for multimodal projects so that States might handle the projects more efficiently.

One professional association welcomed the provision allowing for electronic submissions and joint applications when applying for assignment from more than one DOT agency. The commenter opined that these provisions will promote efficiency in the application process, especially when a joint application is filed.

The Agencies agree and revised paragraph 773.109(f) to establish that States should submit joint applications to FHWA instead of requiring submission to each Operating Administration. The FHWA will take the responsibility of circulating the joint

application to the appropriate Agency for consideration and approval.

**Section 773.111—Application review and approval.**

Three State DOTs objected to the requirement in paragraph 773.111(a) stating that the Agencies will provide a notice and comment opportunity for their decision to assign the environmental review responsibilities to a State. One State DOT indicated that the requirement for both the State and the appropriate Agency to solicit public comment for the same application was unnecessary and redundant, and should be carried out concurrently. Another State DOT stated that the law only requires one episode of public involvement while the regulations require multiple episodes of public involvement. Another State DOT commented that the Agencies should eliminate the public involvement process required in paragraph 773.111(a) because the law does not require it. The commenter indicated that if the purpose of this requirement is to ensure the application gets noticed in the Federal Register, then the rule should require the State to provide a draft notice to the Agency for publication.

The Agencies considered these comments and have decided to retain the requirement. The public involvement process for the appropriate Agency's decision to assign the environmental review responsibilities serves a different purpose than the public involvement process required for the State's application. In this instance the public involvement provides input to the Agencies on their decision to assign and the scope of the potential assignment. At this stage, the public is made aware of the content of the agreement and any special conditions or restrictions that the Agencies may be considering. The public is given a chance to influence the ultimate decision to allow the State to participate in the Program. The scope of public involvement is also broader

because it would seek input at a national level instead of being limited to within the State. Finally, the notification process facilitates the requirement in section 327(b)(5) for the Secretary to solicit the views of Federal agencies before approving the application.

One professional association commented that there was no reason to make it optional for the State to provide to the public its application, supporting materials, and a list of responsibilities sought by the State that the Operating Administration proposes to retain. The commenter indicated that this information must be made available if the public is going to have a fair opportunity to comment. The commenter recommended using the word “must” instead of “may” in the second sentence of paragraph 773.111(a). One State DOT objected to the inclusion of a draft MOU in the materials that would be made available for comment after the State has submitted its application. The State DOT indicated that making the Draft MOU available would be beyond the procedural requirements set by statute and are unnecessary from a public policy perspective given that the public would have had two opportunities to inspect the State’s application. The State DOT indicated that the MOU is a legal document used to formalize the assignment that contains various certifications and commitments, and sets forth common understandings between the two agencies about how the Operating Administration will monitor the State. The State DOT stated that this is a binding agreement only on the respective parties and does not affect the rights or obligations of any private party. Therefore, the commenter argued, it is not the type of document that is normally circulated for public comment.

The Agencies have decided to make the suggested change by the professional association in paragraph 773.111(a). With respect to the draft MOU, the Agencies agree

with the State DOT that the MOU would contain various certifications and commitments, and set forth common understandings between the two agencies about how the Operating Administration will monitor the State. The MOU would discuss the expectations and conditions for Program participation. The Agencies believe that these reasons support the disclosure of the MOU in its draft form to seek input from interested parties on the terms and conditions proposed. This has been the practice that FHWA has followed successfully in its implementation of the 23 U.S.C. 326 assignment program for highway projects that qualify for categorical exclusions. The Agencies have also substituted the phrase “any additional supporting materials” with “a draft of the MOU” to indicate that the Agency will provide a draft of the agreement for public review.

One State DOT requested information on which branch or office of the Operating Administration will grant application approval.

The NPRM did not specify that the Administrator of the appropriate agency would approve each application. The Agencies have added paragraph 773.111(c) to clarify that the Administrator is responsible for approving and executing the MOU on behalf of the appropriate Agency

**Section 773.113—Application amendments.**

One State DOT objected to the requirement of two separate public comment periods for amendments: one under the State public notice laws and one by the Federal agency. The commenter indicated that the rule should not require the second Federal public comment period. The commenter also stated that the notice and solicitation of public comment should be limited to amendments that substantially change the scope or nature of the application.

The Agencies considered these comments and modified the provision to require public comment if the amendment makes substantial changes to the original application. This change recognizes that there may be amendments that do not trigger the need for notification and invitation for public comment. The regulation makes clear that the Agencies are the final decisionmaker on whether the amendment is a substantial change that triggers the need for additional public comment. The Agencies also are the final decisionmakers on whether one or two public involvement opportunities are needed—one for the amended application and one for the Agencies’ decision to approve the amended application. If the appropriate Agency determines that a notice and request for public comment through the State process is needed in the same fashion as paragraph 773.107(b), then the Agency will expect the State to provide the comments submitted and identify the changes made to the application in response to the comments.

One State DOT expressed concern with the requirement in paragraph 773.113(b) that a State cannot amend an application earlier than 1 year after the execution of the MOU. The commenter indicated that some amendments may take longer to implement than others.

The Agencies considered this comment and decided to eliminate the 1-year restriction. The purpose of the wait period after the execution of the MOU was to avoid situations where a State requests significant changes shortly after the execution of the MOU. These situations have the potential to confuse the public and resource agencies on which entity is responsible for the environmental review of a project. Although the Agencies believe that this caution remains valid, they do not believe that the regulation needs to prescribe a particular timeframe (like one year as proposed in the NPRM).

There may be situations where amendments could be warranted in the first year. The Agencies determined that they have sufficient discretion to take these concerns into account when considering requests for amendments. Communication between the appropriate Operating Administration(s) and the State will assist in determining whether the Operating Administration(s) should process the amendment or whether more time is needed prior to pursuing the amendment. The Agencies have added a new paragraph 773.113(b)(3) to clarify that the Operating Administration has the discretion to accept or reject the amendment and to modify the MOU if needed.

The Agencies have made further changes in paragraph 773.113(b) to clarify that post-MOU amendments could occur in situations where a renewal MOU exists. The Agencies will handle such requests in the same manner as post-MOU amendment requests.

**Section 773.115—Renewals.**

One State DOT indicated that the rule lacked provisions for performance evaluation when considering renewal requests and objected to the requirements that were tantamount to a reapplication process because they would be time-consuming. The commenter suggested the renewal process be based on a determination by the Secretary that the State has satisfactorily carried out the provisions of the existing MOU and that is supported by the audit and monitoring reviews required as part of the MOU implementation.

After considering these comments the Agencies have made various changes to the renewal application process. First, the application to renew an MOU is now the “renewal package.” Second, the Agencies have switched paragraphs 773.115(b) and 773.115(d) as

they were proposed in the NPRM. Paragraph 773.115(b) now discusses the need for public notice and comment on the renewal package. Paragraph 773.115(d) now discusses the 180-day time limit for the submittal of renewal packages. Third, the Agencies have modified the requirement for public notice and comment on the renewal package. Paragraph 773.115(b) indicates that after discussing with the State any changes that have occurred since the original application, the appropriate Operating Administration will decide whether to require a statewide public notice and comment before submission of the renewal package in addition to the Federal Register public notice and comment period on the Operating Administration's decision to approve the renewal. Fourth, in paragraph 773.115(c), the Agencies also have made changes to the information required in the renewal package. The final rule now establishes that the renewal package must include up-to-date certifications required in paragraphs 773.109(a)(6)–(7) if they are needed and the Governor's signature is on the renewal package. Up-to-date certifications may be needed if there have been changes in State laws affecting these certifications or if the necessary State laws have "sunset" termination dates that would occur before the end of a renewal period. States must also describe any changes that have occurred since the initial application. If the Operating Administration requires an opportunity for public comment prior to the submission of the renewal package, the State must provide the comments submitted and responses to substantive comments, and note any changes the State has made in response to the comments. Thus, this process now focuses on the changes that have occurred since the original application instead of requiring re-application. Finally, the Agencies have added paragraph 773.115(g) to clarify that the approval decision will take into account the audit and monitoring reports and the State's overall performance in

the Program.

One State DOT objected to the requirement in paragraphs 773.115(a)-(b) for the State to notify the appropriate Agency twelve months before expiration of the MOU and for the submittal of the application 180 days prior to the MOU expiration. The State DOT indicated that this exceeded legal requirements and would add unnecessary time and costs.

Section 327(b)(2) gives the Secretary the authority to establish the requirements for the Program's application process, including the renewal process. The timeframe provided is important to ensure adequate planning by both the Operating Administration and the State. The Operating Administration must plan for adequate resources and dedicated time to ensure a smooth transition. The Agencies believe that this is an appropriate timeframe based on FHWA's experience with the pilot program.

One State DOT indicated that Federal law does not require the items for the MOU renewal application listed in paragraphs 773.115(c)(1)-(4).

The Agencies have made several changes to the information required for renewal packages. The Agencies note that section 327(b)(2) gives the Secretary the authority to establish the requirements for the Program's application process, including the renewal process.

One State DOT objected to the requirement in paragraph 773.115(c)(4) of having the Governor sign the renewal application. The commenter recommended the rule allow the head of the State agency having primary jurisdiction over highway matters to sign the Program renewal application.

The Agencies agree that the head of the State agency having primary jurisdiction

over highway matters could sign the Program renewal package since this officer is allowed by section 327(c)(1) to execute the MOU. This allowance, however, is limited to Program participation with regard to highway projects.

One State DOT objected to the requirement of two separate public comment periods for renewals: one under the State public notice laws and one by the Federal agency. The commenter indicated that the rule should not require the second Federal public comment period.

The Agencies considered this comment and modified the provision to allow for statewide notification and public comment if significant changes have occurred compared to the previous application or if renewal proposes the assumption of new responsibilities. This change recognizes that there may be renewals that do not trigger the need for two notice and comment procedures. The regulation makes clear that the Agencies are the final decisionmaker on whether the renewal triggers the need for a statewide notice and public comment period prior to the State's submittal. If the appropriate Agency determines that a notice and request for public comment through the State process is needed in the same fashion as paragraph 773.107(b), then the Agency will expect the State to provide the comments submitted and identify the changes made to the application in response to the comments.

One State DOT expressed support for the provision that allows continuance of the Program in cases where there are delays in the execution of the renewal of the MOU.

The Agencies appreciate the comment and are not making any changes to this section.

**Section 773.117—Termination.**

Two State DOTs and one public interest group commented on the lack of information on the circumstances, restrictions, and criteria for termination. One State DOT indicated that the rule should specify the restrictions on both the Secretary's and the State's abilities to terminate, or the Agencies should omit the provision from the rulemaking altogether. The public interest group supported not including specific criteria, but indicated that the rule should make clear that, at a minimum, termination will be required if any of the conditions set out in the application process are no longer being met.

The Agencies considered these comments and decided to make changes to the section to address them. Section 773.117 is now divided into four subsections. The first, paragraph 773.117(a), discusses termination by the Operating Administration. The paragraph specifies that the Operating Administration that granted the assignment may terminate the State's participation if it determines that the State is not adequately carrying out the responsibilities assigned to the State. It includes examples of situations where the Operating Administration may make this finding including persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies; failure to address deficiencies identified during the audit or monitoring process; failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed; intentional noncompliance with the terms of one or more MOU(s); and persistent failure to adequately consult, coordinate, and/or take the concerns of other Operating Administrations, Federal agencies, and resource agencies into account in carrying out the responsibilities assumed. This list is illustrative; it is not meant to be all-inclusive. Paragraph (a)(1) establishes that the auditing and monitoring reports may be

sources for this finding, and that the Operating Administration is not bound only to these sources of information. Paragraph (a)(2) restates the requirement in 23 U.S.C. 327(j)(B) that the Operating Administration must provide notice and an opportunity for corrective action before terminating the State's participation. The paragraph also emphasizes that the Operating Administration is the entity that determines whether the corrective actions taken by the State were satisfactory, as established in section 327(j)(1)(C) of title 23 U.S.C.

New paragraph (b) provides the termination procedures when a State initiates termination. The regulation closely follows the requirements in 23 U.S.C. 327(j)(2) for those situations. The statute provides that the Secretary may establish terms and conditions for these types of termination requests. Based on this authority, the Agencies have established a requirement for the inclusion of a draft transition plan with the notification, and for the agreement and approval of a final transition plan before termination takes effect. The MOUs may establish additional terms and conditions for these types of termination requests. Paragraphs (b)(1)-(5) establish the information that States must include in transition plans. Paragraph (b)(5) indicates that the appropriate Operating Administration may request additional information that paragraphs (b)(1)-(4) have not identified.

New paragraph (c) establishes procedures for termination by mutual agreement. The statute is silent on these types of termination, and the Agencies believe that there is sufficient discretion to establish procedures for these types of termination situations. In these situations, the State and the Operating Administration may agree on a particular date or timeframe for termination prior to the expiration of the MOU. For example, this

could occur when after several years of State participation both parties decide that it is in their best interest to terminate the State's participation. A precondition of this type of termination is the agreement and approval by both parties of a transition plan that contains the same information as required in paragraphs (b)(1)-(5).

Finally, new paragraph (c) discusses the effect of termination of the State's participation with regard to highway projects on railroad, public transportation, or multimodal-related assignments, if they have been granted under the Program. Section 327(a)(2)(B) establishes that assignment of the Secretary's environmental review responsibilities with respect to highway projects is a precondition of assignment of environmental review responsibilities with respect to railroad, public transportation, and multimodal projects. Consequently, if assignment with respect to highway projects is terminated, assignment with respect to railroad, public transportation, and/or multimodal projects must also be terminated.

One public interest group and one professional association requested a provision allowing the public to petition the Agencies to withdraw assigned responsibilities. The professional association was particularly concerned that States would fail to adhere strictly to the NEPA requirements and offered the following new paragraph (b): "Any person may petition FHWA, FRA, or FTA for termination of the Secretary's assignment of responsibilities to a State by petitioning the FHWA, FRA, or FTA Administrator. The application must set forth the reasons termination is sought." The public interest group indicated that allowing third party petitions for termination would allow these third parties to monitor the success of the Program and would assist in the conservation of Federal resources. The commenter also indicated that this would create an opportunity

for those individuals and organizations on the ground, closest to the administration of the program, to have a role in its oversight.

The Agencies have considered these comments and have decided not to create a third-party petition process. The law does not establish a process for third-parties (other than recipients of chapter 53 funding) to petition or object to an assignment decision. However, the Agencies believe that any information from third parties on the adequacy of approving assignment or renewal, or on the performance of a State, are important factors in the Operating Administration's decisionmaking and oversight process with regard to this Program. The Agencies encourage third parties and the public to use the opportunities for public involvement that will be available throughout the application, auditing, and renewal processes to express their views on these matters with regard to the particular State.

#### **Statutory/Legal Authority for this Rulemaking**

The Agencies derive explicit authority for this rulemaking action from 23 U.S.C. 327(b)(2), which states that “the Secretary shall amend, as appropriate, regulations that establish requirements relating to information required to be contained in any application of a State to participate in the program.” In addition, 49 U.S.C. 322 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 the Agencies in 49 CFR 1.81(a)(3), which provides that the authority to prescribe regulations contained in 49 U.S.C. 322 is delegated to each Administrator “with respect to statutory provisions for which authority is delegated by other sections in [49 CFR Part 1].” Included in 49 CFR Part 1, specifically 49 CFR 1.81(a)(4)-(6), is the delegation of

authority with respect to the Secretary's environmental review requirements.

### **Rulemaking Analyses and Notices**

The Agencies considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket (FHWA-2013-0022) at Regulations.gov. The Agencies also considered comments received after the comment closing date and filed in the docket prior to this final rule.

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined that this action is not a significant regulatory action under section 3(f) of Executive Order 12866 and is not significant within the meaning of Department of Transportation's regulatory policies and procedures (44 FR 11034, Feb. 2, 1979).

The changes to this rule are not anticipated to adversely affect, in a material way, any sector of the economy. This final rule sets forth application requirements for the Program, which will result in only minimal costs to program applicants. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), the Agencies must consider whether this final rule would have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. States are not included in the definition of small entity set forth in 5 U.S.C. 601. The final rule addresses application requirements for States wishing to participate in the Program. Therefore, the Regulatory Flexibility Act does not apply, and the Agencies certify that this action would not have significant economic impact on a substantial number of small entities.

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

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any 1 year (2 U.S.C. 1532).

#### **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 Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The Agencies have analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 and determined that this action will not have Federalism implications as described by the Executive Order.

The Agencies have also determined that this action would not preempt any State law or State regulation or affect any States' ability to discharge traditional State governmental functions.

Under the Program, a State may voluntarily assume the responsibilities of the Secretary for implementation of NEPA for one or more highway projects, and one or more railroad, public transportation, or multimodal projects. Upon a State's voluntary assumption of NEPA responsibilities, a State also may assume all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of highway, public transportation, railroad, or multimodal projects. It is expected that a State would choose to assume these Federal agency responsibilities in those cases where the State believes that such an action would enable the State to streamline project development and construction. The assumption of these Federal agency responsibilities would not preempt any State law or State regulation or affect any States' ability to discharge traditional State governmental functions. Any federalism implications arising from the States' assumption of Federal agency responsibilities are attributable to 23 U.S.C. 327. Any change in the relative role of the State is consistent with section 2(a) and 3(c) of Executive Order 13132 because the Federal Government is granting to the States the maximum administrative discretion possible.

The NPRM invited State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments. No State or local governments provided comments on this issue.

### **Executive Order 13175 (Tribal Consultation)**

Executive Order 13175 requires agencies to ensure meaningful and timely input from Indian tribal government representatives in the development of rules that “significantly or uniquely affect” Indian communities and that impose “substantial and direct compliance costs” on such communities. The Agencies have analyzed this action under Executive Order 13175 and believe that the action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on tribal governments; and would not preempt tribal law. The final rule addresses application requirements for the Program and would not impose any direct compliance requirements on tribal governments. Therefore, a tribal summary impact statement is not required. The Agencies received no comment in response to our request in the NPRM for comments from Indian tribal governments on the effect that adoption of this specific proposal might have on Indian communities.

### **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 DOT’s regulations implementing Executive Order 12372 (49 CFR part 17) applied to this action, and the Agencies followed them in developing this final rule.

## **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for collections of information they conduct, sponsor, or require through regulations. The PRA applies to Federal agencies' collections of information imposed on ten or more persons. "Persons" include a State, territorial, tribal, or local government, or branch thereof, or their political subdivisions. In this regulation, the Agencies consider the State to be the applicant/person for all types of projects covered by this regulation. A State with multiple applications would count as one person for purposes of the Agencies' PRA analysis.

The Agencies have determined that the number of States interested in the Program is very small. During FHWA's implementation of the Pilot Program in the past 7 years, only one State, California, indicated any interest and applied to participate in the Program. The FHWA twice surveyed the remaining States for any additional interest in participation and received no expressed interest. The Agencies are aware of only one additional State that has initiated legislative action to facilitate its potential application for this Program.

Based on this information, the Agencies' anticipate fewer than 10 States requesting to participate in the Program. The Agencies will initiate the clearance process for OMB's approval to collect information if they receive applications from nine States. The Agencies will contact OMB to initiate that process at that time.

## **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) (the DOT Order), 91 FR 27534, May 10, 2012 (available at [www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cfm](http://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 Executive Order 12898 and the DOT Order in all rulemaking activities. In addition, FHWA and FTA have issued additional documents relating to administration of Executive Order 12898 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 (the FHWA Order) (available at [www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm](http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm)). The FTA also issued an update to its EJ policy, FTA Policy Guidance for Federal Transit Recipients, (the FTA Circular) 77 FR 42077, July 17, 2012 (available at [www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html)).

The Agencies have evaluated this final rule under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies have determined that the proposed application regulations would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. States assuming NEPA responsibilities and Executive Order 12898 responsibilities must comply with the Department's and the appropriate Operating Administrations' guidance and policies on environmental justice and title VI of the Civil Rights Act of 1964.

**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 final rule would not concern an environmental risk to health or safety that might 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 must 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)). This action qualifies for CEs under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not lead directly to construction) for

FHWA, and 23 CFR 771.118(c)(4) (planning and administrative activities that do not involve or lead directly to construction) for FTA. In addition, FRA has determined that this action is not a major FRA action requiring the preparation of an EIS or EA under FRA's Procedures for Considering Environmental Impacts (64 FR 28545, May 26, 1999 as amended by 78 FR 2713, Jan. 14, 2013). The Agencies have evaluated whether the action would involve unusual circumstances or extraordinary circumstances and have determined that this action would not involve such circumstances.

Under the Program, a selected State may voluntarily assume the responsibilities of the Secretary for implementation of NEPA for one or more highway projects, and one or more railroad, public transportation, or multimodal projects. Upon a State's voluntary assumption of NEPA responsibilities, that State also may choose to be assigned all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of highway, public transportation, railroad, or multimodal projects. A State must follow the DOT's and the appropriate Agency's regulations, policies, and guidance with respect to NEPA and the assumed environmental law responsibilities. As a result, the Agencies find that this rule will not result in significant impacts on the human environment.

#### **Regulation Identification Number**

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

## **List of Subjects**

### 23 CFR Part 773

Environmental protection, Highways and roads.

### 49 CFR Part 264

Environmental protection, Railroads.

### 49 CFR Part 622

Environmental protection, Grant programs—transportation, Public transit,  
Recreational areas, Reporting and record keeping requirements.

For the reasons discussed in the preamble, the Agencies amend 23 CFR chapter I and 49 CFR chapters II and VI as follows:

#### **Title 23**

1. Revise part 773 to read as follows:

#### **PART 773—SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM APPLICATION REQUIREMENTS AND TERMINATION**

Sec.

773.101 Purpose.

773.103 Definitions.

773.105 Eligibility.

773.107 Pre-application requirements.

773.109 Application requirements.

773.111 Application review and approval.

773.113 Application amendments.

773.115 Renewals.

773.117 Termination.

Appendix A to Part 773—Example List of the Secretary’s Environmental Review Responsibilities That May Be Assigned Under 23 U.S.C. 327.

Authority: 23 U.S.C. 315 and 327; 49 CFR 1.81(a)(4)-(6); 49 CFR 1.85

**§ 773.101 Purpose.**

The purpose of this part is to establish the requirements for an application by a State to participate in the Surface Transportation Project Delivery Program (Program). The Program allows, under certain circumstances, the Secretary to assign and a State to assume the responsibilities under the National Environmental Policy Act of 1969 (NEPA) and for environmental review, consultation, or other action required under certain Federal environmental laws with respect to one or more highway, railroad, public transportation, or multimodal projects within the State.

**§ 773.103 Definitions.**

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) and 49 U.S.C., are applicable to this part. As used in this part:

Classes of projects means either a defined group of projects or all projects to which Federal environmental laws apply.

Federal environmental law means any Federal law, regulation, or Executive Order (E.O.) under which the Secretary of the U.S. Department of Transportation (DOT) has responsibilities for environmental review, consultation, or other action with respect to the review or approval of a highway, railroad, public transportation, or multimodal project. The Federal environmental laws for which a State may assume the responsibilities of the Secretary under this Program include the list of laws contained in Appendix A to this part.

Highway project means any undertaking that is eligible for financial assistance under title 23 U.S.C. and for which the Federal Highway Administration has primary responsibility. A highway project may include an undertaking that involves a series of

contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel. The term highway project does not include any project authorized under 23 U.S.C. 202, 203, or 204 unless the State will design and construct the project.

MOU means a Memorandum of Understanding, a written agreement that complies with 23 U.S.C. 327(b)(4)(C) and (c), and this part.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

Operating Administration means any agency established within the DOT, including the Federal Aviation Administration, Federal Highway Administration (FHWA), Federal Motor Carrier Safety Administration, Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration, National Highway Traffic Safety Administration, Office of the Secretary of Transportation, Pipeline and Hazardous Materials Safety Administration, and Saint Lawrence Seaway Development Corporation.

Program means the “Surface Transportation Project Delivery Program” established under 23 U.S.C. 327.

Public transportation project means a capital project or operating assistance for “public transportation,” as defined in chapter 53 of title 49 U.S.C.

Railroad project means any undertaking eligible for financial assistance from FRA to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a railroad, as that term is defined in 49 U.S.C. 20102, including: environmental mitigation activities; an undertaking that

involves a series of contracts or phases, such as a railroad corridor; and anything that may be constructed in connection with a railroad. The term railroad project does not include any undertaking in which FRA provides financial assistance to Amtrak or private entities.

State means any agency under the direct jurisdiction of the Governor of any of the 50 States or Puerto Rico, or the mayor in the District of Columbia, which is responsible for implementing highway, public transportation, or railroad projects eligible for assignment. The term “State” does not include agencies of local governments, transit authorities or commissions under their own board of directors, or State-owned corporations.

**§ 773.105 Eligibility.**

(a) Applicants. A State must comply with the following conditions to be eligible and to retain eligibility for the Program.

(1) For highway projects:

(i) The State must act by and through the State Department of Transportation (State DOT) established and maintained in conformity with 23 U.S.C. 302 and 23 CFR 1.3;

(ii) The State expressly consents to accept the jurisdiction of the Federal courts for compliance, discharge, and enforcement of any responsibility assumed by the State;

(iii) The State has laws in effect that authorize the State to take the actions necessary to carry out the responsibilities it is assuming;

(iv) The State has laws in effect that are comparable to the Freedom of Information Act (FOIA) (5 U.S.C. 552), including laws providing that any decision

regarding the public availability of a document under those State laws is reviewable by a court of competent jurisdiction; and

(v) The State has the financial and personnel resources necessary to carry out the responsibilities it is assuming.

(2) For railroad or public transportation projects:

(i) The State must comply with paragraphs (a)(1)(ii) through (v) of this section;

and

(ii) The State must have assumed the responsibilities of the Secretary under this part with respect to one or more highway projects.

(b) Responsibilities. Responsibilities eligible for Program assignment and State assumption include all NEPA responsibilities and all or part of the reviews, consultations, and other actions required under other environmental laws, regulations, and E.O.s.

Appendix A to this part contains an example list of other environmental laws, regulations, and E.O.s that may be assigned to and assumed by the State. These may include the environmental review responsibilities for the elements of a multimodal project that are within an applicable Operating Administration's jurisdiction. The following responsibilities are ineligible for Program assignment and State assumption:

(1) Conformity determinations required under section 176 of the Clean Air Act (42 U.S.C. 7506);

(2) The Secretary's responsibilities under 23 U.S.C. 134 and 135;

(3) The Secretary's responsibilities under 49 U.S.C. 5303 and 5304;

(4) The Secretary's responsibilities for government-to-government consultation with Indian tribes;

(5) The Secretary's responsibilities for approvals that are not considered to be part of the environmental review of a project, such as project approvals, Interstate access approvals, and safety approvals; and

(6) The Secretary's responsibilities under NEPA and for reviews, consultations, and other actions required under other Federal environmental laws for actions of Operating Administrations other than FHWA, FRA, and FTA.

(c) Projects. Environmental reviews ineligible for assignment and State assumption under the Program include reviews for the following types of projects:

(1) Projects that cross State boundaries, and

(2) Projects adjacent to or that cross international boundaries.

(d) Discretion retained. Nothing in this section limits an Operating Administration's discretion to withhold approval of assignment of eligible responsibilities or projects under this Program.

**§ 773.107 Pre-application requirements.**

(a) Coordination meeting. The State must request and participate in a pre-application coordination meeting with the appropriate Division or Regional, and Headquarters office of the applicable Operating Administration(s) before soliciting public comment on its application.

(b) Public comment. The State must give notice of its intention to participate in the Program and must solicit public comment by publishing the complete application in accordance with the appropriate State public notice laws not later than 30 days prior to submitting its application to the appropriate Operating Administration(s). If allowed under State law, publishing a statewide notice of availability of the application rather than

the application itself may satisfy the requirements of this provision so long as the complete application is made available on the internet and is reasonably available to the public for inspection. Solicitation of public comment must include solicitation of the views of other State agencies, tribal agencies, and Federal agencies that may have consultation or approval responsibilities associated with the project(s) within State boundaries.

(1) The State requesting FTA's responsibilities with respect to public transportation projects must identify and solicit public comment from potential recipients of assistance under chapter 53 of title 49 U.S.C. These comments may include requests for the Secretary to maintain the environmental review responsibilities with respect to one or more public transportation projects.

(2) The State must submit copies of all comments received as a result of the publication of the respective application(s). The State must summarize the comments received, develop responses to substantive comments, and note any revisions or actions taken in response to the public comment.

(c) Sovereign immunity waiver. The State must identify and complete the process required by State law for consenting and accepting exclusive Federal court jurisdiction with respect to compliance, discharge, and enforcement of any of the responsibilities being sought.

(d) Comparable State laws. The State must determine that it has laws that are in effect that authorize the State to take actions necessary to carry out the responsibilities the State is seeking and a public records access law that is comparable to FOIA. The State must ensure that it cures any deficiency in applicable State laws before submitting its

application.

**§ 773.109 Application requirements.**

(a) Highway project responsibilities. An eligible State DOT may submit an application to FHWA to participate in the Program for one or more highway projects or classes of highway projects. The application must include:

(1) The highway projects or classes of highway projects for which the State is requesting assumption of Federal environmental review responsibilities under NEPA. The State must specifically identify in its application each highway project for which a draft environmental impact statement has been issued and for which a final environmental impact statement is pending, prior to the submission of its application;

(2) Each Federal environmental law, review, consultation, or other environmental responsibility the State seeks to assume under this Program. The State must indicate whether it proposes to phase-in the assumption of these responsibilities, i.e. initially assuming only some responsibilities with a plan to assume additional responsibilities at specific future times;

(3) For each responsibility requested in paragraphs (a)(1) and (2) of this section, the State must describe how it intends to carry out these responsibilities. Such description must include:

(i) A summary of State procedures currently in place to guide the development of documents, analyses, and consultations required to fulfill the environmental review responsibilities requested. For States that have comparable State environmental review procedures, the discussion should describe the differences, if any, between the State environmental review process and the Federal environmental review process, focusing on

any standard that is mandated by State law, regulation, executive order, or policy that is not applicable to the Federal environmental review. The State must submit a copy of the procedures with the application unless these are available electronically. The State may submit the procedures electronically, either through email or by providing a hyperlink;

(ii) Any changes that the State has made or will make in the management of its environmental program to provide the additional staff and training necessary for quality control and assurance, appropriate levels of analysis, adequate expertise in areas where the State is requesting responsibilities, and expertise in management of the NEPA process and reviews under other Federal environmental laws;

(iii) A discussion of how the State will conduct legal reviews for the environmental documents it produces, including legal sufficiency reviews where required by law, policy, or guidance;

(iv) A discussion of how the State will identify and address those projects that without assignment would have required FHWA Headquarters' prior concurrence of the final environmental impact statement under 23 CFR 771.125(c); and

(v) A discussion of otherwise permissible project delivery methods the State intends to pursue, and the process it will use to decide whether pursuing those project delivery methods and being responsible for the environmental review meet the objectivity and integrity requirements of NEPA.

(4) A verification of the personnel necessary to carry out the authority that the State may assume under the Program. The verification must contain the following information:

(i) A description of the staff positions, including management, that will be

dedicated to fulfilling the additional functions needed to perform the assigned responsibilities;

(ii) A description of any changes to the State's organizational structure that would be necessary to provide for efficient administration of the responsibilities assumed; and

(iii) A discussion of personnel needs that may be met by the State's use of outside consultants, including legal counsel provided by the State Attorney General or private counsel;

(5) A summary of the anticipated financial resources available to meet the activities and staffing needs identified in paragraphs (a)(3) and (4) of this section, and a commitment to make adequate financial resources available to meet these needs;

(6) Certification and explanation by the State's Attorney General, or other State official legally empowered by State law to issue legal opinions that bind the State, that the State has legal authority to assume the responsibilities of the Secretary for the Federal environmental laws and projects requested, and that the State consents to exclusive Federal court jurisdiction with respect to the responsibilities the State is requesting to assume. Such consent must be broad enough to include future changes in relevant Federal policies and procedures or allow for its amendment to include such future changes;

(7) Certification by the State's Attorney General, or other State official legally empowered by State law to issue legal opinions that bind the State, that the State has laws that are comparable to FOIA, including laws that allow for any decision regarding the public availability of a document under those laws to be reviewed by a court of competent jurisdiction;

(8) Evidence that the required notice and solicitation of public comment by the State relating to participation in the Program has taken place and copies of the State's responses to the comments;

(9) A point of contact for questions regarding the application and a point of contact regarding the implementation of the Program (if different); and

(10) The State Governor's (or in the case of District of Columbia, the Mayor's) signature approving the application. For the Secretary's responsibilities with respect to highway projects, the top ranking transportation official in the State who is charged with responsibility for highway construction may sign the application instead of the Governor.

(b) Public transportation project responsibilities. An eligible State may submit an application to FTA to participate in the Program for one or more public transportation projects or classes of public transportation projects. The application must provide the information required by paragraphs (a)(1) through (10) of this section, but with respect to FTA's program and the public transportation project(s) at issue. In addition, the application must include:

(1) Evidence that FHWA has assigned to the State, or the State has requested assignment of the responsibilities of, FHWA with respect to one or more highway projects within the State under NEPA; and

(2) Evidence that any potential recipients of assistance under chapter 53 of title 49 U.S.C. for any public transportation project or classes of public transportation projects in the State being sought for Program assignment have received written notice of the application with adequate time to provide comments on the application.

(c) Railroad project responsibilities. An eligible State may submit an application

to FRA to participate in the Program for one or more railroad projects or classes of railroad projects. The application must provide the information required by paragraphs (a)(1) through (10) of this section, but with respect to the railroad project(s) at issue. In addition, the application must include evidence that FHWA has assigned to the State, or the State has requested assignment of, the responsibilities of FHWA with respect to one or more highway projects within the State under NEPA.

(d) Multimodal project responsibilities. The Operating Administration(s) will presume that the responsibilities sought by the State include the Secretary's environmental review responsibilities for multimodal projects' elements that would otherwise fall under the Operating Administration's authority. These responsibilities include establishing appropriate relationships with the other Operating Administration(s) involved in the multimodal project, including cooperating agency, participating agency, and lead or co-lead agency relationships under NEPA. The State must affirmatively reject multimodal environmental review responsibilities in its application if it intends to have the responsibilities remain with the Operating Administration when a multimodal project is involved. In addition, States may:

(1) Request the Secretary's environmental review responsibilities with respect to the highway, railroad, and/or public transportation elements of one or more particular multimodal projects by submitting an application with the information required in paragraphs (a)(1) through (10) of this section, but with respect to the multimodal project(s) at issue. The application must either request highway responsibilities for the multimodal project or include evidence that FHWA has assigned to the State, or the State has requested assignment of, the responsibilities of FHWA with respect to one or more

highway projects within the State under NEPA; and

(2) Request, at the same time the State applies for assignment of one of the Operating Administration's environmental review responsibilities, the general multimodal environmental review responsibilities of the other Operating Administration(s).

(e) Electronic submissions. Applications may be submitted electronically to the appropriate Operating Administration.

(f) Joint application. A State may submit joint applications for multiple Operating Administrations' responsibilities. A joint application should avoid redundancies and duplication of information to the maximum extent practicable. In its application, the State must distinguish the projects or classes of projects it seeks to assume by transportation mode. A joint application must provide all of the information required by each Operating Administration for which a State is seeking assignment. A State must submit joint applications to FHWA.

(g) Requests for additional information. The appropriate Operating Administration(s) may request that the State provide additional information to address any deficiencies in the application or clarifications that may be needed prior to determining that the application is complete.

**§ 773.111 Application review and approval.**

(a) The Operating Administration(s) must solicit public comment on the pending request and must consider comments received before rendering a decision on the State's application. Materials made available for this public review must include the State's application, a draft of the MOU, and a list of responsibilities sought by the State that the

Operating Administration(s) proposes to retain. The notification may be a joint notification if two or more Operating Administrations are involved in the assignment for a project or a class of projects.

(b) If the Operating Administration(s) approves the application of a State, then the Operating Administration(s) will invite the State to execute the MOU.

(c) The Administrator for the appropriate Operating Administration will be responsible for approving the application and executing the MOU on behalf of the Operating Administration.

(d) The State's participation in the Program is effective upon full execution of the MOU. The Operating Administration's responsibilities under NEPA and any other environmental laws may not be assigned to or assumed by the State prior to execution of the MOU with the exception of renewal situations under § 773.115(g) of this part.

(e) The MOU must have a term of not more than 5 years that may be renewed pursuant to § 773.115 of this part.

(f) The State must publish the MOU and approved application on its web site and other relevant State web sites and make it reasonably available to the public for inspection and copying.

**§ 773.113 Application amendments.**

(a) After a State submits its application to the appropriate Operating Administration(s), but prior to the execution of the MOU(s), the State may amend its application at any time to request the addition or withdrawal of projects, classes of projects, or environmental review responsibilities consistent with the requirements of this part.

(1) Prior to submitting any such amendment, the State must coordinate with the appropriate Operating Administration(s) to determine if the amendment represents a substantial change in the application to such an extent that additional notice and opportunity for public comment is needed. The Operating Administration is responsible for making the final decision on whether notice and public comment is needed and whether to provide one opportunity (pursuant to § 773.107(b)) or two opportunities (pursuant to § 773.107(b) and § 773.111(a)) for public comment. The Operating Administration will make this determination based on the magnitude of the changes.

(2) If the Operating Administration determines that notice and solicitation of public comment is needed pursuant to § 773.107(b), the State must include copies of all comments received, responses to substantive comments, and note the changes, if any, that were made in response to the comments.

(b) After the execution of the MOU(s) or renewal MOU(s), a State may amend its application to the appropriate Operating Administration(s) to request additional projects, classes of projects, or more environmental review responsibilities consistent with the requirements of this part.

(1) Prior to requesting any such amendment, the State must coordinate with the appropriate Operating Administration(s) to determine if the amendment represents a substantial change in the application information to the extent that additional notice and opportunity for public comment is needed. The Operating Administration is responsible for making the final decision on whether notice and public comment are needed and whether to provide one opportunity (pursuant to § 773.107(b) or § 773.111(a)) or two opportunities (pursuant to § 773.107(b) and § 773.111(a)) for public comment. The

Operating Administration will make this determination based on the magnitude of the changes.

(2) If the Operating Administration determines that notice and solicitation of public comment is required pursuant to § 773.107(b), the State must include copies of all comments received, responses to substantive comments, and note the changes, if any, that were made in response to the comments.

(3) The Operating Administration is responsible for making the final decision on whether to accept the amendment and whether an amendment to the MOU is required. Amendments do not change the expiration date of the initial or renewal MOU.

**§ 773.115 Renewals.**

(a) A State that intends to renew its participation in the Program must notify the appropriate Operating Administration(s) at least 12 months before the expiration of the MOU.

(b) Prior to requesting renewal, the State must coordinate with the appropriate Operating Administration(s) to determine if significant changes have occurred or new assignment responsibilities are being sought that would warrant statewide notice and opportunity for public comment prior to the State's submission of the renewal package. The Operating Administration is responsible for making the final decision on whether the State should engage in statewide notification prior to its submittal. The Operating Administration will make this determination based on the magnitude of the change(s) in the information and/or circumstances.

(c) The renewal package must:

(1) Describe changes to the information submitted in the initial Program

application;

(2) Provide up-to-date certifications required in § 773.109(a)(6) and (7) of this part for the applicable Operating Administration(s), if up-to-date certifications are needed or if the necessary State laws have termination dates that would occur before the end of a renewal period;

(3) Provide evidence of the statewide public notification, if one was required under paragraph (b) of this section, and include copies of all comments received, responses to substantive comments, and note the changes, if any, that were made to the renewal package in response to the comments; and

(4) Include the State Governor's (or in the case of District of Columbia, the Mayor's) signature approving the renewal package. For the Secretary's responsibilities with respect to highway projects, the top ranking transportation official in the State who is charged with responsibility for highway construction may sign the renewal package instead of the Governor.

(d) A State must submit a renewal package no later than 180 days prior to the expiration of the MOU.

(e) The Operating Administration(s) may request that the State provide additional information to address any deficiencies in the renewal application or to provide clarifications.

(f) The Operating Administration(s) must provide Federal Register notification and solicit public comment on the renewal request and must consider comments received before approving the State's renewal application. Materials made available for this public review will include the State's original application, the renewal package, a draft of

the renewal MOU, a list of responsibilities sought by the State that the Operating Administration proposes to retain, and auditing and monitoring reports developed as part of the Program. The notification may be a joint notification if two or more Operating Administrations are involved in the assignment for a project or a class of projects.

(g) In determining whether to approve the State's renewal request, the Operating Administration will take into account the renewal package, comments received if an opportunity for public comments was provided in accordance with paragraph (f) of this section, the auditing and monitoring reports, and the State's overall performance in the Program. If the Operating Administration(s) approves the renewal request, then the Operating Administration(s) will invite the State to execute the renewal MOU. The Administrator for the appropriate Operating Administration will be responsible for approving the application and executing the renewal MOU on behalf of the Operating Administration. The renewal MOU must have a term of not more than 5 years, and the State must publish it on the State's DOT Web site and other relevant State web site(s).

(h) At the discretion of the Operating Administration, a State may retain temporarily its assigned and assumed responsibilities under a MOU after the expiration of the MOU, where the relevant Operating Administration(s) determines that:

(1) The State made a timely submission of a complete renewal application in accordance with the provisions of this section;

(2) The Operating Administration(s) determines that all reasonable efforts have been made to achieve a timely execution of the renewal; and

(3) The Operating Administration(s) determines that it is in the best interest of the public to grant the continuance.

**§ 773.117 Termination.**

(a) Termination by the Operating Administration. An Operating Administration(s) that approved the State's participation in the Program may terminate the State's participation if the Operating Administration(s) determines that the State is not adequately carrying out the responsibilities assigned to the State. Examples of situations where such a finding may be made include: persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies; failure to address deficiencies identified during the audit or monitoring process; failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed; intentional noncompliance with the terms of the MOU(s); and persistent failure to adequately consult, coordinate, and/or take into account the concerns of other Operating Administrations, when applicable, and appropriate Federal, State, tribal, and local agencies with oversight, consulting, or coordination responsibilities under Federal environmental laws and regulations.

(1) The Operating Administration(s) may rely on the auditing and monitoring reports as sources for a finding that the State is not adequately carrying out its responsibilities. The Operating Administration(s) may also rely on information on noncompliance obtained outside the auditing and monitoring process.

(2) The Operating Administration(s) may not terminate a State's participation without providing the State with notification of the noncompliance issue that could give rise to the termination, and without affording the State an opportunity to take corrective action to address the noncompliance issue. The Operating Administration(s) must provide the State a period of no less than thirty (30) days to take the corrective actions.

The Operating Administration(s) is responsible for making the final decision on whether the corrective action is satisfactory.

(b) Termination by the State. The State may terminate its participation at any time by notifying the Secretary no later than 90 days prior to the proposed termination date. The notice must include a draft transition plan detailing how the State will transfer the projects and responsibilities to the appropriate Operating Administration(s).

Termination will not take effect until the State and the Operating Administration(s) agree, and the Operating Administration(s) approve a final transition plan. Transition plans must include:

- (1) A list of projects and their status in the environmental review process that the State will return to the Operating Administration(s);
- (2) A process for transferring files on pending projects;
- (3) A process for notifying the public that the State will terminate its participation in the Program and a projected date upon which this termination will take effect;
- (4) Points of contacts for pending projects; and
- (5) Any other information required by the Operating Administration(s) to ensure the smooth transition of environmental review responsibilities and prevent disruption in the environmental reviews of projects to the maximum extent possible.

(c) Termination by mutual agreement. The State and the Operating Administration(s) may agree to terminate assignment on a specific date before the expiration of the MOU. Termination will not take effect until the State and the Operating Administration(s) agree, and the Operating Administration(s) approve a final transition plan. Transition plans must include the information outlined in paragraphs (b)(1)-(5) of

this section.

(d) Effect of termination of highway responsibilities. Termination of the assignment of the Secretary's environmental review responsibilities with respect to highway projects will result in the termination of assignment of environmental responsibilities for railroad, public transportation, and multimodal projects.

**Appendix A to Part 773—Example List of the Secretary's Environmental Review Responsibilities that May Be Assigned under 23 U.S.C. 327.**

**Federal Procedures**

NEPA, 42 U.S.C. 4321 et seq.

Regulations for Implementing the Procedural Provisions of NEPA at 40 CFR 1500–1508.

FHWA/FTA environmental regulations at 23 CFR part 771.

FRA's Procedures for Considering Environmental Impacts, 64 FR 28545, May 26, 1999 and 78 FR 2713, Jan. 14, 2013.

Clean Air Act, 42 U.S.C. 7401–7671q. Any determinations that do not involve conformity.

Efficient Environmental Reviews for Project Decisionmaking, 23 U.S.C. 139.

Noise

Noise Control Act of 1972, 42 U.S.C. 4901–4918.

Airport Noise and Capacity Act of 1990, 49 U.S.C. 47521–47534.

FHWA noise regulations at 23 CFR part 772.

Wildlife

Endangered Species Act of 1973, 16 U.S.C. 1531–1544.

Marine Mammal Protection Act, 16 U.S.C. 1361–1423h.

Anadromous Fish Conservation Act, 16 U.S.C. 757a–757f.

Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d.

Migratory Bird Treaty Act, 16 U.S.C. 703–712.

Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801–1891d.

#### Historic and Cultural Resources

National Historic Preservation Act of 1966, 16 U.S.C. 470 et seq.

Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa–470mm.

Archeological and Historic Preservation Act, 16 U.S.C. 469–469c.

Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001–3013; 18 U.S.C. 1170.

#### Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. 1996.

Farmland Protection Policy Act, 7 U.S.C. 4201–4209.

#### Water Resources and Wetlands

Clean Water Act, 33 U.S.C. 1251–1387.

Section 404, 33 U.S.C. 1344

Section 401, 33 U.S.C. 1341

Section 319, 33 U.S.C. 1329

Coastal Barrier Resources Act, 16 U.S.C. 3501–3510.

Coastal Zone Management Act, 16 U.S.C. 1451–1466.

Safe Drinking Water Act, 42 U.S.C. 300f - 300j–26.

Rivers and Harbors Act of 1899, 33 U.S.C. 403.

Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287.

Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921.

Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14).

FHWA wetland and natural habitat mitigation regulations at 23 CFR part 777.

Flood Disaster Protection Act, 42 U.S.C. 4001–4130.

#### Parklands

Section 4(f), 49 U.S.C. 303; 23 U.S.C. 138.

FHWA/FTA Section 4(f) regulations at 23 CFR part 774.

Land and Water Conservation Fund, 16 U.S.C. 4601-4–4601-11.

#### Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.

9601–9675.

Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9671–9675.

Resource Conservation and Recovery Act, 42 U.S.C. 6901–6992k.

#### Executive Orders Relating to Eligible Projects

E.O. 11990, Protection of Wetlands

E.O. 11988, Floodplain Management

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations  
and Low Income Populations

E.O. 13112, Invasive Species

#### **Title 49**

2. Add 49 CFR part 264 to read as follows:

**PART 264—SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM**  
**APPLICATION REQUIREMENTS AND TERMINATION**

Sec.

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

**Authority:** 23 U.S.C. 327; 49 CFR 1.81.

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

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**

3. 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 and 5323(q); 23 U.S.C. 139, 326, and 327; Pub. L. 109-59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500-1508; 49 CFR 1.81, 1.85; and Pub. L. 112-141, 126 Stat. 405, sections 1313 and 1315.

4. Revise § 622.101 to read as follows:

**§ 622.101 Cross-reference to procedures.**

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.

This final rule is being issued pursuant to authority delegated under 49 CFR 1.81.

Issued on: September 10, 2014.

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Gregory G. Nadeau,  
Acting Administrator,  
Federal Highway Administration.

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Therese McMillan,  
Acting Administrator,  
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