



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Parts 778 and 773

Federal Railroad Administration

49 CFR Part 264

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA-2016-0037]

FHWA RIN 2125-AF73

FRA RIN 2130-AC66

FTA RIN 2132-AB32

Program for Eliminating Duplication of Environmental Reviews

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

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This NPRM provides interested parties with the opportunity to comment on proposed regulations governing the U.S. Department of Transportation's (DOT) Program for Eliminating Duplication of Environmental Reviews (Program) established by Section 1309 of the Fixing America's Surface Transportation Act (FAST Act). Section 1309 directed the U.S. Secretary of Transportation (Secretary) to establish a pilot program authorizing up to five States to conduct environmental reviews and make approvals for projects under State environmental laws and regulations instead of the National Environmental Policy Act (NEPA). The FAST Act requires the Secretary, in

consultation with the Chair of the Council on Environmental Quality (CEQ), to promulgate regulations to implement the requirements of the Program, including application requirements and criteria necessary to determine whether State laws and regulations are at least as stringent as the applicable Federal law. The FHWA, FRA, and FTA, hereinafter referred to as “the Agencies,” are proposing these regulations on behalf of the Secretary and seek comments on the proposals contained in this NPRM. This rule would also implement a provision in Section 1308 of the FAST Act that amends the corrective action period that the Agencies must provide to a State participating in the Surface Transportation Project Delivery Program (Section 327 Program).

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

ADDRESSES: You may submit comments, identified by the document number at the top of this document, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 1-202-493-2251
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE, West Building Ground Floor Room W12-140, Washington, DC 20590.
- Hand Delivery / Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

Instructions: All submissions received must include the agency name and docket number

or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: For FHWA, James Gavin, Office of Project Development and Environmental Review, (202) 366-1473, or Diane Mobley, Office of Chief Counsel, (202) 366-1366. For FRA, Michael Johnsen, Office of Railroad Policy and Development, (202) 493-1310, or Chris Van Nostrand, Office of Chief Counsel, (202) 493-6058. For FTA, Megan Blum, Office of Planning and Environment, (202) 366-0463, or Helen Serassio, Office of Chief Counsel, (202) 366-1974. The Agencies are located at 1200 New Jersey Ave., SE, Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On December 4, 2015, President Obama signed into law the FAST Act (Public Law 114-94, 129 Stat. 1312), which contains new requirements related to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.). Section 1309 of the FAST Act, codified at 23 U.S.C. 330, established a pilot program that allows the Secretary to approve up to five States to use one or more State environmental laws instead of NEPA for environmental review of surface transportation projects. In order to be eligible to participate in the Program, a State must have assumed the Secretary's responsibilities for

environmental reviews under 23 U.S.C. 327. To participate in the Program, a State must submit an application and enter into an agreement with DOT.

Section 1308(5) of the FAST Act amended the 23 U.S.C. 327(j) termination procedures for the Section 327 Program by: 1) changing the number of days for corrective action the Agencies must provide to the State from 30 days to not less than 120 calendar days, and 2) upon the request of the Governor of the State, requiring the Agencies provide a detailed description of each responsibility in need of corrective action.

Under Section 1309 of the FAST Act (23 U.S.C. 330), DOT, in consultation with the Chair of CEQ, must promulgate regulations implementing the requirements of that provision. The proposed regulations would establish the Program, specify the information that applicants must submit to participate in the Program, and define the criteria the Agencies, in consultation with the Office of the Secretary and with the concurrence of the Chair of CEQ, will use to determine whether a State law or regulation is as stringent as the Federal requirements under NEPA, the procedures implementing NEPA, and NEPA-related regulations and Executive Orders. This NPRM proposes regulations establishing the Program and requests the public's comments.

Section-by-Section Discussion of the Proposals

23 CFR Part 778 – Pilot Program for Eliminating Duplication of Environmental Reviews

The Agencies propose a title to this part that clearly describes the Program's scope.

Section 778.101 Purpose.

The Agencies propose a section to explain the purpose of the Program.

Section 778.103 Eligibility and Certain Limitations

The Agencies propose a section describing the Program's eligibility requirements and the limitations of a State's participation.

This section proposes four requirements necessary for a State to participate in the Program. First, a State must act through the Governor or top-ranking State transportation official who is charged with responsibility for highway construction. Second, a State must expressly consent to the exclusive jurisdiction of the U.S. District Courts for compliance, discharge, and enforcement of any responsibility under this Program. Third, a State must have assumed the responsibilities of the Secretary under 23 U.S.C. 327. Fourth, a State must have laws in effect authorizing the State to take the actions necessary to carry out the alternative environmental review and approval procedures under State laws and regulations.

Section 778.103 identifies two conditions governing a State's participation in the Program. First, State environmental laws and regulations may only be substituted as a means for complying with NEPA, procedures governing the implementation of NEPA, and related regulations and Executive Orders. Second, compliance with State environmental laws and regulations does not substitute for compliance with any other applicable Federal environmental requirements.

Section 778.105 Application Requirements for Participation in the Program

The Agencies propose a section describing the required content of an eligible State's application to participate in the Program.

To participate in the Program, any eligible State would submit an application that includes:

- (1) A full and complete description of the alternative environmental review and approval procedures the State proposes to use, including (i) the procedures the State uses to engage the public and consider alternatives to the proposed action; and (ii) the extent to which the State considers environmental consequences or impacts on resources potentially impacted by the proposed actions (40 CFR 1508.7 and 1508.8).
- (2) Identification of each Federal environmental requirement the State is seeking to substitute, within the limitations of this section;
- (3) Identification of each State environmental law and regulation that the State intends to substitute for a Federal environmental requirement, within the limitations of this section;
- (4) A detailed explanation of how the State environmental law and regulation intended to substitute for a Federal environmental requirement is at least as stringent as the Federal requirement;
- (5) A detailed description of the projects or classes of transportation projects for which the State anticipates exercising the authority that may be granted under the Program;
- (6) Verification that the State has the financial and personnel resources necessary to carry out the Program;
- (7) Evidence that the State has sought public comments on its application prior to its submittal and the State's response to any comments it received;
- (8) A point of contact for questions regarding the application and a point of contact regarding potential implementation of the Program (if different);

- (9) 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 enter into the Program, and that the State consents to exclusive Federal court jurisdiction for the compliance, discharge, and enforcement of any responsibility under this Program;
- (10) 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 the Freedom of Information Act (FOIA), 5 U.S.C. 552, including providing that any decision regarding the public availability of a document under those laws is reviewable by a court of competent jurisdiction; and
- (11) The State Governor's (or in the case of the District of Columbia, the Mayor's) or the State's top ranking transportation official's signature approving the application.

Section 778.107 Application Review and Approval

The Agencies propose a section establishing the review and approval process for a State's application to the Program.

To begin the review and approval process, the applicable Operating Administration also would solicit public comments on a State's complete application and would consider comments before making a decision on the application. In addition to the State's application, the Operating Administration may provide other documents for public review such as a draft of the proposed agreement. After receiving a complete application, the Operating Administration would have 120 calendar days to make a

decision on the State's application. The Operating Administration would transmit the decision to the applicant, with an explanation in writing.

In making the decision, the Operating Administration would approve a State's application only if:

- (1) That State is party to an agreement with the Operating Administration under 23 U.S.C. 327;
- (2) The Operating Administration has determined, after considering any public comments received, the State has the capacity, including financial and personnel, to undertake the alternative environmental review and approval procedures; and
- (3) The Operating Administration, in consultation with the Office of the Secretary, with the concurrence of the Chair of CEQ, and after considering public comments received, has determined the State laws or regulations described in the State's application are at least as stringent as the Federal requirements they substitute.

Before the Operating Administration approves the application, the State must enter into a written agreement with the Operating Administration. At a minimum the written agreement must:

- (1) Be executed by the Governor or top-ranking transportation official in the State charged with responsibility for highway construction;
- (2) Provide that the State agrees to assume the responsibilities of the Program, as identified by the Operating Administration;
- (3) Provide that the State expressly consents to accept Federal court jurisdiction for the compliance, discharge, or enforcement of any responsibility it undertakes for the Program;

- (4) Certify that State laws or regulations exist that authorize the State to carry out the responsibilities of the Program;
- (5) Certify that State laws or regulations exist that are comparable to FOIA (5 U.S.C. 552), including a provision that any decision regarding the public availability of a document under the State laws or regulations is reviewable by a Court of competent jurisdiction;
- (6) Commit the State to maintain the personnel and financial resources necessary to carry out its responsibilities under the Program;
- (7) Have a term of not more than 5 years, the term of a State's agreement with the Operating Administration in accordance with 23 U.S.C. 327, or a term ending on December 4, 2027, whichever is sooner; and
- (8) Be renewable.

The Operating Administration's execution of the Agreement would constitute approval of the application. A State approved to participate in the Program may further apply the approved alternative environmental review and approval procedures to locally administered projects for up to 25 local governments at the request of those local governments. For such locally administered projects, the State would be responsible for ensuring that the requirements of the approved alternative State procedures are met.

Section 778.109 Criteria for Determining Stringency

After consultation with the Agencies, CEQ identified criteria the Agencies would use to determine whether the State laws or regulations are at least as stringent as the Federal NEPA requirements. These criteria provide for protection of the environment, provide opportunity for public participation and comment (including access to the

documentation necessary to review the potential impact of a project), and ensure consistent review of projects that would otherwise have been covered under NEPA. The legislative and regulatory citations noted are intended to indicate, in general, the basis for the criteria. Based on CEQ's criteria, the Agencies and CEQ propose that to be considered at least as stringent as the Federal NEPA requirements, a State environmental law or regulation, at a minimum, must:

- (a) Define the types of actions that normally require an environmental impact assessment, including government-sponsored projects such as those receiving Federal financial assistance or permit approvals. (42 U.S.C. 4332(2)(C); 40 CFR 1508.18);
- (b) Ensure an early process for determining the scope of the action and issues that need to be addressed, identifying the significant issues, and for the classification of the appropriate environmental impact assessment in accordance with the significance of the likely impacts. For actions that may result in significant impacts on the human environment the scoping process should be an open and public process. (23 U.S.C. 139(e); 40 CFR 1501.3, 1501.4, 1501.7, 1507.3(b), 1508.14, and 1508.25);
- (c) Prohibit agencies and non-governmental proponents from taking action concerning the proposal until the environmental impact evaluation is complete when such action would (1) have adverse environmental impacts or (2) limit the choice of reasonable alternatives. (40 CFR 1506.1 and 1506.10(b)).
- (d) Protect the integrity and objectivity of the analysis by requiring the agency to take responsibility for the scope and content of the analysis and by preventing conflicts

of interest among the parties developing the analysis and the parties with financial or other interest in the outcome of the project. (42 U.S.C. 4332(2)(D); 40 CFR 1506.5);

- (e) Based on a proposed action's purpose and need, require objective evaluation of reasonable alternatives to the proposed action (including the alternative of not taking the action) if it may result in significant impacts to the human environment or, for those actions that may not result in significant impacts, consideration of alternatives if they will involve unresolved conflicts concerning alternative uses of available resources (42 U.S.C. 4332(2)(C)(iii); 42 U.S.C. 4332(2)(E); 23 U.S.C. 330(b)(1)(A); 40 CFR 1502.13, 1502.14, and 1508.9);
- (f) Require an assessment of the reasonably foreseeable direct, indirect, and cumulative impacts of a proposed action (and any reasonable alternatives) on the human environment, and a comparison of those potential impacts with existing environmental conditions (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(B); 40 CFR 1502.16, 1508.9(b), and 1508.4);
- (g) Require the consideration of appropriate mitigation for the impacts associated with a proposal and reasonable alternatives (including avoiding, minimizing, rectifying, reducing or eliminating the impact over time, and compensating for the impact) (40 CFR 1502.14(f), 1502.16(h), and 1508.20);
- (h) Provide for adequate interagency participation, including appropriate coordination and consultation with State, Federal, tribal, and local agencies with jurisdiction by law, special expertise, or an interest with respect to any environmental impact associated with the proposal, and for collaboration that would eliminate

duplication of reviews. For actions that may result in significant impacts to the human environment, the process should allow for the development of plans for interagency coordination and public involvement, and the setting of timetables for the review process (42 U.S.C. 4332(2)(C); 23 U.S.C. 139(d) and 139(g); 40 CFR 1500.5(e), 1501.6, 1502.25, and part 1503);

- (i) Provide an opportunity for public participation and comment that is commensurate with the significance of the proposal's impacts on the human environment, and require public access to the documentation developed during the environmental review and a process to respond to public comments. (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(A); FAST Act, Sec. 1309(c)(2)(B)(ii); 40 CFR 1502.19, part 1503, and 1506.6; and E.O. 11514, Sec. 1(b));
- (j) Include procedures for the elevation and resolution of interagency disputes prior to a final decision on the proposed project. (23 U.S.C. 139(h); 40 CFR part 1504);
- (k) Require, for the conclusion of the process, a concise documentation of findings (for actions that would not likely result in significant impacts to the human environment) or, for actions that may result in significant impacts, a concise record that states the decision that: (i) identifies all alternatives considered (specifying which were environmentally preferable); (ii) identifies and discusses all factors that were balanced by the agency in making its decision, and states how those considerations entered into the decision; (iii) states whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not; and (iv) describes the monitoring and enforcement program

that will be adopted where applicable for any mitigation (40 CFR 1501.4 and 1505.2);

(l) Require the agency to supplement environmental impacts assessments if there are substantial changes in the proposal that are relevant to environmental concerns or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (23 U.S.C. 330(e)(3); 40 CFR 1502.9); and

(m) Allow for the use of procedures that facilitate process efficiency such as the identification of categories of actions that do not individually or cumulatively have a significant impact on the human environment and which have been found to not have such effect with procedures that require the consideration of extraordinary circumstances that would warrant a higher level of analysis, the use of tiering, programmatic approaches, adoption, incorporation by reference, approaches to eliminate duplication with other Federal requirements, and special procedures to address emergency situations (23 U.S.C. 139(b)(3); 40 CFR 1502.20, 1502.21, 1502.25, 1506.2, 1506.3, 1506.4, 1507.3(b)(ii), and 1508.4).

Section 778.111 Review and Termination

The Agencies propose a section describing the termination date of the Program, the Operating Administration's responsibilities to review each approved State's performance implementing the Program, and the Operating Administration's right to terminate a State's participation in the Program early.

Under FAST Act Section 1309, the Program will terminate 12 years after enactment (December 4, 2027). Until then, the Operating Administration would review

each participating State's performance, at least once every 5 years. The Operating Administration would provide public notice and an opportunity for public comment on the review. At the conclusion of the Operating Administration's last review before the expiration of the term, the Operating Administration may extend a State's participation in the Program for an additional term not to exceed 5 years (if this extension ends before December 4, 2027) or it may terminate the State's participation in the Program.

Finally, the Operating Administration could terminate a State's participation in the Program if the Operating Administration, in consultation with the Office of the Secretary and the Chair of CEQ, determines a participating State's performance fails to meet the terms of the written agreement, the requirements of 23 CFR part 778, or 23 U.S.C. 330. Before terminating the State's participation, the Operating Administration would first notify the State and allow 90 days for the State to take corrective action. If the State fails to take corrective action during this time, the Operating Administration may then terminate that State's participation in the Program.

23 CFR Part 773 – Surface Transportation Project Delivery Program Application Requirements and Termination

The Agencies propose to revise section 773.117(a)(2) by modifying the current termination time period language to state that the Operating Administration(s) must provide the State no less than 120 days to take corrective actions.

The Agencies propose to add a new section 773.117(a)(3) to include that on the request of the Governor of the State, the Operating Administration(s) shall provide a detailed description of each responsibility in need of corrective action regarding an inadequacy identified by the Operating Administration.

49 CFR Part 264 – Program for Eliminating Duplication of Environmental Reviews and the Surface Transportation Project Delivery Program

The Agencies propose to revise the heading for 49 CFR part 264 and add a reference to 23 U.S.C. 330 and the Program application procedures in 23 CFR part 778 as applicable to rail projects. This cross-reference would assist potential FRA applicants, State and Federal agencies, and the public.

49 CFR Part 622 – Environmental Impact and Related Procedures

The Agencies propose to revise the authorities in subpart A – Environmental Procedures to include a reference to 23 U.S.C. 330 and the application procedures in 23 CFR part 778 as applicable to transit projects. This cross-reference would assist potential FTA applicants, State and Federal agencies, and the public.

Statutory/Legal Authority for this Rulemaking

The Agencies have the authority for this rulemaking action under 49 U.S.C. 322(a), which provides authority to “[a]n officer of the Department of Transportation [to] prescribe regulations to carry out the duties and powers of the officer.” The Secretary delegated this authority to the Agencies’ Administrators in 49 CFR 1.81(a)(3), which provides that the authority to prescribe regulations contained in 49 U.S.C. 322(a) is delegated to each Administrator “with respect to statutory provisions for which authority is delegated by other sections in [49 CFR part 1].”

Rulemaking Analyses and Notices

The Agencies will consider all comments received before the close of business on the comment closing date indicated above and will make such comments available for examination in the docket at the above regulations.gov address. The Agencies will file

comments received after the comment closing date and consider them to the extent practicable. In addition to late comments, the Agencies will also continue to file relevant information in the docket as it becomes available after the comment period closing date. Interested persons should continue to examine the docket for new material. The Agencies may publish a final rule at any time after close of the comment period.

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of DOT's regulatory policies and procedures (44 FR 11032). This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Agencies anticipate that the economic impact of this rulemaking would be minimal. The Agencies do not have specific data to assess the monetary value of the benefits from the proposed changes because such data does not exist and would be difficult to develop.

This proposed rulemaking would not adversely affect, in any material way, any sector of the economy. This proposed rulemaking 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

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the Agencies have evaluated the effects of this proposed rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The proposed rule addresses application requirements for States wishing to participate in the Program. As such, it affects only States, and States are not included in the definition of small entity set forth in 5 U.S.C. 601. 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 proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any one year (2 U.S.C.

1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the Agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the Program in accordance with changes made in the Program by the Federal Government.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Agencies analyzed this proposed action in accordance with the principles and criteria contained in Executive Order 13132 and determined that it would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Agencies have also determined that this proposed action would not preempt any State law or State regulation or affect the States’ ability to discharge traditional State governmental functions. The Agencies invite State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments.

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, and believe that it would not have substantial direct effects on one or more Indian tribes;

would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

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

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a), 77 FR 27534 (May 10, 2012), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, FHWA and FTA have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, the FHWA issued an update to its EJ order, FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. FTA also issued an update to its EJ policy, FTA Policy Guidance for Federal Transit Recipients, 77 FR 42077 (July 17, 2012).

The Agencies have evaluated this proposed rule under the Executive Order, the DOT Order, the FHWA Order, and the FTA Policy Guidance. The Agencies have determined that the proposed application regulations, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority

or low-income populations. States participating in the Program must comply with DOT's and the appropriate Agency guidance and policies on environmental justice.

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This proposed action qualifies for categorical exclusions 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 which do not involve or lead directly to construction) for FTA. In addition, FRA has determined that this proposed action is not a major FRA action requiring the preparation of an environmental impact statement or environmental assessment 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 proposed action would involve unusual or extraordinary circumstances and have determined that this proposed action would not involve such circumstances.

Under the Program, a selected State may conduct environmental reviews and make approvals for projects under State environmental laws and regulations instead of NEPA. These State environmental laws and regulations must be at least as stringent as the Federal requirements. As a result, the Agencies find that this proposed rulemaking would not result in significant impacts on the human environment.

Regulation Identifier Number

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

List of Subjects

23 CFR Part 778

Environmental protection, Eliminating duplication of environmental reviews pilot program, Highways and roads.

23 CFR Part 773

Environmental protection, Surface transportation project delivery program application requirements and termination, Highways and roads.

49 CFR Part 264

Environmental protection, Eliminating duplication of environmental reviews pilot program, Railroads.

49 CFR Part 622

Environmental protection, Environmental impact and related procedures, Public transportation, Transit.

Brandye L. Hendrickson
Acting Administrator
Federal Highway Administration

Heath Hall
Acting Administrator
Federal Railroad Administration

Jane Williams
Acting Administrator
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For the reasons discussed in the preamble, the Agencies propose to amend 23 CFR chapter I and 49 CFR chapters II and VI as follows:

TITLE 23 -- Highways

PART 773 – SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM

APPLICATION REQUIREMENTS AND TERMINATION

1. The authority citation for part 773 continues to read as follows:

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

2. Amend § 773.117 by revising paragraph (a)(2) and adding paragraph (a)(3) to read as follows:

(a) * * *

(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 120 days to take corrective actions. The Operating Administration(s) is responsible for making the final decision on whether the corrective action is satisfactory.

(3) On the request of the Governor of the State, the Operating Administration(s) shall provide a detailed description of each responsibility in need of corrective action regarding an inadequacy identified by the Operating Administration(s).

* * * * *

3. Add part 778 to read as follows:

PART 778 – PILOT PROGRAM FOR ELIMINATING DUPLICATION OF ENVIRONMENTAL REVIEWS

Sec.

- 778.101 Purpose.
- 778.103 Eligibility and Certain Limitations.
- 778.105 Application requirements for participation in the program.
- 778.107 Application review and approval.
- 778.109 Criteria for Determining Stringency.
- 778.111 Review and Termination.

Authority: 23 U.S.C. 330; 49 CFR 1.81.

§ 778.101 Purpose.

The purpose of this part is to establish the requirements for a State to participate in the pilot program for eliminating duplication of environmental reviews (“Program”) under 23 U.S.C. 330. This Program allows States to conduct environmental reviews and make approvals for projects under State environmental laws and regulations instead of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

§ 778.103 Eligibility and Certain Limitations.

(a) *Applicants.* To be eligible for the Program, a State must:

- (1) Act by and through the Governor or top-ranking State transportation official who is charged with responsibility for highway construction;
- (2) Expressly consent to the exclusive jurisdiction of U.S. District Courts for compliance, discharge, and enforcement of any responsibility under this Program;
- (3) Have previously assumed the responsibilities of the Secretary under 23 U.S.C. 327 related to environmental review, consultation, or other actions required under certain Federal environmental laws; and
- (4) Identify laws authorizing the State to take the actions necessary to carry out the equivalent environmental review and approval procedures under State laws and regulations.

(b) *Certain Limitations.* (1) State environmental laws and regulations may only be substituted as a means of complying with:

- (i) NEPA;

(ii) Procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109, 128, and 139; and

(iii) Related regulations and Executive Orders.

(2) Compliance with State environmental laws and regulations may not serve as a substitute for the Secretary's responsibilities regarding compliance with any other Federal environmental laws.

§ 778.105 Application requirements for participation in the Program.

(a) To apply to participate in the Program, a State must submit an application to the Federal Highway Administration, Federal Railroad Administration, or Federal Transit Administration, as appropriate.

(b) Each application submitted must contain the following information:

(1) A full and complete description of the alternative environmental review and approval procedures the State proposes, including:

(i) The procedures the State uses to engage the public and consider alternatives to the proposed action; and

(ii) The extent to which the State considers environmental consequences or impacts on resources potentially impacted by the proposed actions (such as air, water, or species).

(2) Each Federal environmental requirement the State is seeking to substitute, within the limitations of § 778.103(b);

(3) Each State environmental law and regulation the State intends to substitute for a Federal environmental requirement, within the limitations of § 778.103(b);

- (4) A detailed explanation (with supporting documentation incorporated by reference) of the basis for concluding the State environmental law or regulation intended to substitute for a Federal environmental requirement is at least as stringent as that Federal requirement;
- (5) A description of the projects or classes of projects for which the State anticipates exercising the authority that may be granted under the Program;
- (6) Verification that the State has the financial and personnel resources necessary to fulfill its obligations under the Program;
- (7) Evidence that the State has sought public comments on its application prior to the submittal and the State's response to any comments it received;
- (8) A point of contact for questions regarding the application and a point of contact regarding potential implementation of the Program (if different);
- (9) 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 enter into the Program, and that the State consents to exclusive Federal court jurisdiction for the compliance, discharge, and enforcement of any responsibility under this Program;
- (10) 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 the Freedom of Information Act, 5 U.S.C. 552 (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; and

(11) The State Governor's (or in the case of the District of Columbia, the Mayor's) or the State's top ranking transportation official's signature approving the application.

§ 778.107 Application review and approval.

- (a) The Operating Administration must solicit public comments on the application and must consider comments received before making a decision to approve or disapprove the application. Materials made available for this public review must include the State's application and may include additional supporting materials.
- (b) After receiving an application Operating Administration deems complete, the Operating Administration must make a decision on whether to approve or disapprove the application within 120 calendar days. The Operating Administration must transmit the decision in writing to the State with a statement explaining the decision.
- (c) The Operating Administration will approve an application only if it determines the following conditions are satisfied:
 - (1) The State is party to an agreement with the Operating Administration under 23 U.S.C. 327;
 - (2) The Operating Administration has determined, after considering any public comments received, the State has the capacity, including financial and personnel, to undertake the alternative environmental review and approval procedures; and
 - (3) The Operating Administration, in consultation with the Office of the Secretary with the concurrence of the Chair of CEQ, and after considering public

comments received, has determined that the State environmental laws and regulations described in the State's application are at least as stringent as the Federal requirements for which they substitute.

- (d) The State must enter into a written agreement with the Operating Administration.
- (e) The written agreement must:
 - (1) Be executed by the Governor or top-ranking transportation official in the State charged with responsibility for highway construction;
 - (2) Provide that the State agrees to assume the responsibilities of the Program, as identified by the Operating Administration;
 - (3) Provide that the State expressly consents to accept Federal court jurisdiction for the compliance, discharge, or enforcement of any responsibility undertaken as part of the Program;
 - (4) Certify that State laws and regulations exist that authorize the State to carry out the responsibilities of the Program;
 - (5) Certify that State laws and regulations exist that are comparable to FOIA (5 U.S.C. 552), including a provision that any decision regarding the public availability of a document under the State laws and regulations is reviewable by a court of competent jurisdiction;
 - (6) Contain a commitment that the State will maintain the personnel and financial resources necessary to carry out its responsibilities under the Program;
 - (7) Have a term of not more than 5 years, the term of a State's agreement with the Operating Administration in accordance with 23 U.S.C. 327, or a term ending on December 4, 2027, whichever is sooner; and

- (8) Be renewable.
- (f) The State must execute the agreement before the Operating Administration executes the agreement and approves the application. The Operating Administration's execution of the agreement will constitute approval of the application.
- (g) The agreement may be renewed at the end of its term, but may not extend beyond December 4, 2027.
- (h) A State approved to participate in the Program may further apply the approved alternative environmental review and approval procedures to locally administered projects, for up to 25 local governments at the request of those local governments. For such locally administered projects, the State shall be responsible for ensuring that the requirements of the approved alternative State procedures are met.

§ 778.109 Criteria for Determining Stringency

To be considered at least as stringent as a Federal requirement under this Program, the State laws and regulations, must, at a minimum:

- (a) Define the types of actions that normally require an environmental impact assessment, including government-sponsored projects such as those receiving Federal financial assistance or permit approvals. (42 U.S.C. 4332(2)(C); 40 CFR 1508.18);
- (b) Ensure an early process for determining the scope of the action and issues that need to be addressed, identifying the significant issues, and for the classification of the appropriate environmental impact assessment in accordance with the significance of the likely impacts. For actions that may result in significant

impacts on the human environment the scoping process should be an open and public process. (23 U.S.C. 139(e); 40 CFR 1501.3, 1501.4, 1501.7, 1507.3(b), 1508.14, and 1508.25);

- (c) Prohibit agencies and non-governmental proponents from taking action concerning the proposal until the environmental impact evaluation is complete when such action would:
 - (1) Have adverse environmental impacts or
 - (2) Limit the choice of reasonable alternatives. (40 CFR 1506.1 and 1506.10(b)).
- (d) Protect the integrity and objectivity of the analysis by requiring the agency to take responsibility for the scope and content of the analysis and by preventing conflicts of interest among the parties developing the analysis and the parties with financial or other interest in the outcome of the project. (42 U.S.C. 4332(2)(D); 40 CFR 1506.5);
- (e) Based on a proposed action's purpose and need, require objective evaluation of reasonable alternatives to the proposed action (including the alternative of not taking the action) if it may result in significant impacts to the human environment or, for those actions that may not result in significant impacts, consideration of alternatives if they will involve unresolved conflicts concerning alternative uses of available resources (42 U.S.C. 4332(2)(C)(iii); 42 U.S.C. 4332(2)(E); 23 U.S.C. 330(b)(1)(A); 40 CFR 1502.13, 1502.14, and 1508.9);
- (f) Require an assessment of the reasonably foreseeable direct, indirect, and cumulative impacts of a proposed action (and any reasonable alternatives) on the human environment, and a comparison of those potential impacts with existing

environmental conditions (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(B); 40 CFR 1502.16, 1508.9(b), and 1508.4);

- (g) Require the consideration of appropriate mitigation for the impacts associated with a proposal and reasonable alternatives (including avoiding, minimizing, rectifying, reducing or eliminating the impact over time, and compensating for the impact) (40 CFR 1502.14(f), 1502.16(h), and 1508.20);
- (h) Provide for adequate interagency participation, including appropriate coordination and consultation with State, Federal, tribal, and local agencies with jurisdiction by law, special expertise, or an interest with respect to any environmental impact associated with the proposal, and for collaboration that would eliminate duplication of reviews For actions that may result in significant impacts to the human environment, the process should allow for the development of plans for interagency coordination and public involvement, and the setting of timetables for the review process (42 U.S.C. 4332(2)(C); 23 U.S.C. 139(d) and 139(g); 40 CFR 1500.5(e), 1501.6, 1502.25, and part 1503);
- (i) Provide an opportunity for public participation and comment that is commensurate with the significance of the proposal's impacts on the human environment, and require public access to the documentation developed during the environmental review and a process to respond to public comments (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(A); FAST Act, Sec. 1309(c)(2)(B)(ii); 40 CFR 1502.19, part 1503, and 1506.6; and E.O. 11514, Sec. 1(b));
- (j) Include procedures for the elevation and resolution of interagency disputes prior to a final decision on the proposed project (23 U.S.C. 139(h); 40 CFR part 1504);

- (k) Require, for the conclusion of the process, a concise documentation of findings (for actions that would not likely result in significant impacts to the human environment) or, for actions that may result in significant impacts, a concise record that states the agency decision that:
- (i) Identifies all alternatives considered (specifying which were environmentally preferable),
 - (ii) Identifies and discusses all factors that were balanced by the agency in making its decision and states how those considerations entered into the decision,
 - (iii) States whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not; and
 - (iv) Describes the monitoring and enforcement program that will be adopted where applicable for any mitigation (40 CFR 1501.4 and 1505.2).
- (l) Require the agency to supplement environmental impact assessments if there are substantial changes in the proposal that are relevant to environmental concerns or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. (23 U.S.C. 330(e)(3); 40 CFR 1502.9); and
- (m) Allow for the use of procedures that facilitate process efficiency such as the identification of categories of actions that do not individually or cumulatively have a significant impact on the human environment and which have been found to not have such effect with procedures that require the consideration of extraordinary circumstances that would warrant a higher level of analysis, the use

of tiering, programmatic approaches, adoption, incorporation by reference, approaches to eliminate duplication with other Federal requirements, and special procedures to address emergency situations (23 U.S.C. 139(b)(3); 40 CFR 1502.20, 1502.21, 1502.25, 1506.2, 1506.3, 1506.4, 1507.3(b)(ii), and 1508.4).

§ 778.111 Review and Termination

(a) *In General.* The Program shall terminate December 4, 2027.

(b) *Review.* The Operating Administration must review each participating State's performance in implementing the requirements of the Program at least once every 5 years.

(1) The Operating Administration must provide notice and an opportunity for public comment during the review.

(2) At the conclusion of its last review prior to the expiration of the term, the Operating Administration may extend a State's participation in the Program for an additional term of not more than 5 years (as long as such term does not extend beyond the termination date of the Program) or terminate the State's participation in the Program.

(c) *Early Termination.* (1) If the Operating Administration, in consultation with the Office of the Secretary and the Chair of CEQ, determines that a State is not administering the Program consistent with the terms of its written agreement, or the requirements of this part or 23 U.S.C. 330, the Operating Administration must provide the State notification of that determination.

(2) After notifying the State of its determination under paragraph (c)(1), the Operating Administration must provide the State a maximum of 90 days to take

the appropriate corrective action. If the State fails to take such corrective action, the Operating Administration may terminate the State's participation in the Program.

TITLE 49 -- Transportation

PART 264 – PROGRAM FOR ELIMINATING DUPLICATION OF ENVIRONMENTAL REVIEWS AND THE SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM

4. The authority citation for part 264 is revised to read as follows:

Authority: 23 U.S.C. 327; 49 CFR 1.81; 23 U.S.C. 330.

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

6. Revise § 264.101 to read as follows:

§ 264.101 Procedures for complying with the surface transportation project delivery program application requirements and termination and the procedures for participating in and complying with the program for eliminating duplication of environmental reviews.

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. The procedures for participating in and complying with the program for eliminating duplication of environmental reviews are set forth in part 778 of title 23 of the Code of Federal Regulations.

PART 622 – ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

7. 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, 327, and 330; Pub. L. 109-59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts

1500-1508; 49 CFR 1.81; Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316, 1317, and 1318; and Pub. L. 114-94, section 1309.

8. 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. The procedures for participating and complying with the program for eliminating duplication of environmental reviews are set forth in part 778 of title 23 of the Code of Federal Regulations.

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