

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Parts 771, 1420, and 1430****Federal Transit Administration****23 CFR Parts 1420 and 1430****49 CFR Parts 622 and 623**

[FHWA Docket No. FHWA-99-5989]

FHWA RIN 2125-AE64; FTA RIN 2132-AA43

**NEPA and Related Procedures for Transportation Decisionmaking, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites**

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

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

**SUMMARY:** The FHWA and the FTA are issuing this notice of proposed rulemaking to update and revise their National Environmental Policy Act of 1969 (NEPA) implementing regulation for projects funded or approved by the FHWA and the FTA. The current regulation was issued in 1987 and experience since that time as well as changes in legislation, most recently by the Transportation Equity Act for the 21st Century (TEA-21), call for an updated approach to implementation of NEPA for FHWA and FTA projects and actions. Under this proposed rulemaking, the FHWA/FTA regulation for implementing NEPA would be redesignated and revised to further emphasize using the NEPA process to facilitate effective and timely decisionmaking.

This NPRM is being issued concurrently with another notice of proposed rulemaking on metropolitan and statewide transportation planning. This coordinated approach to rulemaking will further the goal of the FTA and the FHWA to better coordinate the results of the planning processes with project development activities and decisions associated with the NEPA process.

**DATES:** Comments must be received on or before August 23, 2000. For dates of public information meetings see **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** Submit written, signed comments to the docket number appearing at the top of this document. You must submit your comments to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All

comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. To receive notification of receipt of comments you must include a pre-addressed, stamped envelope or postcard. For addresses of public information meetings see **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** For the FHWA: Mr. Fred Skaer, (202) 366-2058, Office of Planning and Environment, HEPE, or Mr. L. Harold Aikens, (202) 366-0791, Office of the Chief Counsel, HCC-31. For the FTA: Mr. Joseph Ossi, (202) 366-0096, Office of Planning, TPL-22, or Mr. Scott Biehl, (202) 366-0952, Office of the Chief Counsel, TCC-30. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Internet users may access all comments received by the U.S. DOT Dockets, Room PL401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded by using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

**Contents of Preamble**

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**Public Information Meetings**

We will hold a series of seven public briefings within the comment period for the NPRM. The purposes of these briefings is to explain the content of the NPRM and encourage public input to the final rulemaking. The meetings will address this NPRM, the companion NPRM on the metropolitan and

statewide planning process and the NPRM on Intelligent Transportation Systems Architecture consistency. The meetings will be scheduled from approximately 8 a.m. to 5 p.m. at the locations listed below. Changes in the information below will be made available after the publication of this NPRM through the FHWA and the FTA websites, other public announcement avenues and the newsletters and websites of major stakeholder groups. Individuals wishing information but without access to these sources may contact the individuals listed above.

The structure of the meetings will emphasize brief presentations by the DOT staff regarding the content of the NPRM. A period for clarifying questions will be provided. Under current statutory and regulatory provisions, the DOT staff will not be permitted to engage in a substantive dialog regarding what the content of the NPRMs and the final regulations should be. Attendees wishing to express ideas and thoughts regarding the final content of the rules should direct those comments to the docket. Briefing sites will include: Boston, MA, Auditorium, Volpe National Transportation Systems Center, 55 Broadway, June 9, 2000; Atlanta, GA, Westin Peachtree Plaza Hotel, 210 Peachtree Street, June 20, 2000; Washington, D.C., Marriott Metro Center, 775 12th Street, NW, June 23, 2000; Chicago, IL, Holiday Inn Mart Plaza, 350 North Orleans Street, June 27, 2000; Denver, CO, Marriott City Center, 1701 California Street, June 30, 2000; Dallas, TX, Hyatt Regency Hotel Dallas, 300 Reunion Boulevard, July 11, 2000; and, San Francisco, CA, Radisson Miyako, 1625 Post Street, July 19, 2000.

As part of the outreach process planned for these proposed rules, the FHWA/FTA will be conducting a national teleconference on June 15, 2000 from 1 to 4 p.m., e.t., through the auspices of the Center for Transportation and the Environment at North Carolina State University. The teleconference will be accessible through numerous downlink locations nationwide and further information can be obtained from Ms. Katie McDermott at [kpm@unity.ncsu.edu](mailto:kpm@unity.ncsu.edu) or (919) 515-8034. The purpose of the teleconference is to describe the proposed new statewide and metropolitan planning, NEPA implementation, and Intelligent Transportation Systems (ITS) rules.

An overview of each of the three notices of proposed rulemakings (NPRMs) will be presented and the audience (remote and local) will have opportunities to ask questions and seek clarification of FHWA/FTA proposals. By sponsoring this teleconference it is

hoped that interest in the NPRMs is generated, that stakeholders will be well informed about FHWA/FTA proposals, and that interested parties will participate in the rulemaking process by submitting written suggestions, comments and concerns to the docket.

### Background

The FHWA and the FTA propose to update and revise the current regulation and guidance implementing the NEPA (42 U.S.C. 4321 *et seq.*) for transportation projects using Federal funds or requiring Federal approval.

In this notice of proposed rulemaking, we are clearly communicating that our NEPA responsibilities include an affirmative duty to facilitate the development of transportation proposals which represent responsible stewardship of community and natural environmental resources. In the 13 years since the NEPA regulation was last issued, the nature of the highway and transit programs has evolved to reflect our country's changing transportation needs and the impact that the transportation network can have on a complex set of environmental, community, and economic considerations. What has not changed is the role of State and local officials and Federal land management agency decision makers to define transportation investment strategies, plan for a future transportation system that best reflects their community needs, and select and set priorities for transportation projects.

The NPRM was developed by an interagency Task Force of the FHWA and the FTA with input from other DOT modal agencies, the U.S. Environmental Protection Agency (EPA), other Federal agencies and the Office of the Secretary, U.S. DOT. The Task Force reviewed all input received from the outreach process which is described below and through other sources that communicate regularly with U.S. DOT. In addition, input was provided from the field staff of the FHWA and the FTA.

Over the past thirteen years we have developed an increased understanding of effective environmental analysis, a greater commitment to prevention of adverse environmental impacts, and a realization of the increased value of integrated agency and public coordination. Given these developments, our role to ensure that transportation projects are developed through a more effective and collaborative NEPA process at the State, local, and Federal levels becomes that much more pivotal. Our environmental rule reflects the understanding that NEPA is an important tool for helping make transportation decisions, rather

than justifying decisions already made. In addition, we believe that a more coordinated approach to planning and project development (the NEPA process plus additional project level actions needed to prepare for project implementation) will contribute to more effective and environmentally sound decisions regarding investment choices and trade-offs.

By including the environmental streamlining provision in TEA-21, section 1309 of Public Law 105-178, 112 Stat. 108 at 232, the Congress intended that transportation planning and environmental considerations be better coordinated and that project delivery schedules be improved through a process that is efficient, comprehensive, and streamlined. Growing awareness of the need for a Federal role that would oversee development of a coordinated environmental review process is tempered with congressional intent that State and local decisions be respected. The most important Federal role in the transportation decisionmaking process is one where the FHWA and the FTA would facilitate other Federal agencies' early involvement and participation in NEPA activities so that redundant processes are identified and avoided. We will, in our role as lead agencies, highlight opportunities to use NEPA as a mechanism to address statutory responsibilities at Federal, State, and local levels of government. During the TEA-21 outreach process, there has been very strong support from our transportation and environmental partners for a better managed NEPA process which reflects these basic features: coordination, flexibility, and efficiency.

For these reasons, it is clear that a fundamentally new approach to NEPA is needed, one that emphasizes strong environmental policy, collaborative program solving approaches involving all levels of government and the public early in the process, and integrated and streamlined coordination and decisionmaking processes. Proposed approaches are included in this notice of proposed rulemaking. This NPRM fully supports "protection and enhancement of communities and the natural environment," one of five U.S. DOT strategic goals. Translating this strategic direction into day-to-day operations requires that appropriate changes be made to regulations and nonregulatory operating guidance.

### Overall Strategy for Regulatory Development

Our strategy for regulatory development has three principal

elements: (1) Outreach and listening to stakeholders; (2) developing improvements that will allow the FHWA, the FTA, States and metropolitan areas to demonstrate measurable progress toward achieving congressional intent and objectives; and (3) seeking ways to improve coordination and performance, both internally and with our Federal partner agencies.

### *Input to Development of Notice of Proposed Rulemaking*

We have used several venues to obtain feedback on how to improve the administration of NEPA. Of principal importance was the NEPA 25th Anniversary Workshop held in Chattanooga, Tennessee in 1995. Participants included a diverse group of governmental and nongovernmental individuals representing transportation and community interests, as well as those interested in protecting the natural environment. The blueprint document that resulted from the NEPA Workshop underscores the need for a fundamentally new approach to NEPA, one that focuses on decisionmaking rather than compliance.

The FHWA and the FTA, in concert with the Office of the Secretary and other modal administrations within the U.S. DOT, developed and implemented an extensive public outreach process on all elements of the TEA-21. The process began shortly after the legislation was enacted on June 9, 1998, and various types of outreach activities have been underway since that time. The initial six-month Departmentwide outreach process included twelve regional forums and over 50 focus groups and workshops (63 FR 40330, July 28, 1998). The U.S. DOT heard from over 3,000 people including members of Congress, Governors and Mayors, other elected officials, transportation practitioners at all levels, community activists and environmentalists, freight shippers and suppliers, and other interested individuals. The input received was valuable and has helped us shape implementation strategy, guidance, and regulations.

With respect to the planning and environmental provisions of TEA-21, we learned a great deal through the twelve regional forums and focus group sessions and subsequently implemented a second, more focused phase of outreach which included issuing a discussion paper, "TEA-21 Planning and Environmental Provisions: Options for Discussion," FHWA/FTA, February 1999. The content of the Options Paper reflected input received up to that time and built upon the existing statewide

and metropolitan planning regulations and our NEPA implementing regulation. We released the Options Paper on February 9, 1999, and received comments through April 30, 1999. More than 150 different sets of comments were received from State Departments of Transportation (DOTs), Metropolitan Planning Organizations (MPOs), counties, regional planning commissions, other Federal agencies, transit agencies, bicycle advocacy groups, engineering organizations, consultants, historical commissions, environmental groups, and customers—the American public. These comments were all reviewed and taken into consideration in the development of this NPRM. Another element of outreach has included meetings with our key stakeholder groups, other Federal agencies, and the regional and field staff within our agencies.

This proposed rule will be one part of a widespread agency effort to provide clear and consistent guidance on how the NEPA process can be most effectively used to help applicants make transportation decisions which reflect a concern for social, economic, and environmental well-being. It provides the framework upon which we, along with State DOTs, MPOs, transit agencies, and Federal land management agencies, can base our approach to transportation decisionmaking.

We recognize that a wide range of issues exist in the realm of transportation and the environment. Our outreach effort associated with TEA-21, as well as feedback to the Options Paper, have highlighted many areas of concern for which the FHWA and the FTA policy should be more clearly articulated. However, not all of these areas will be directly addressed as part of this rule. For many topics for which we feel regulatory treatment is unnecessary or inappropriate, we intend to issue a comprehensive package of materials to provide detailed, nonregulatory information on how to incorporate such considerations into the NEPA process. In addition, certain other topics will be the subject of individual, separate regulations or guidance.

The comprehensive package of informational materials is envisioned as a replacement both for the 1987 FHWA Technical Advisory 6640.8a on environmental documents and the FTA (formerly Urban Mass Transportation Administration) Circular 5620.1<sup>1</sup> on environmental assessments. The timing of its development is intended to be

consistent with the development of the regulations that will result from this NPRM. We anticipate that the comments we receive on the NPRM will help guide the creation of the informational materials, as well as the regulations. Thus, a more complete picture of our approach will be presented.

Further, we have been working with Federal environmental agencies to implement the environmental streamlining provisions of TEA-21. The results of those activities are described in the section-by-section analysis discussion later in this preamble.

The TEA-21 outreach effort and comments on the Options Paper have all helped guide us in developing this notice of proposed rulemaking. Comments on this NPRM are welcomed and will be taken into account prior to the issuance of a final regulation containing updated NEPA implementation requirements.

#### **Relationship to U.S. DOT's Statewide and Metropolitan Planning Regulation and Other Rulemaking Efforts**

There are four additional rulemaking activities either underway or planned which relate closely to this notice of proposed rulemaking. These include: the joint FHWA/FTA rules on statewide and metropolitan planning and on section 4(f), and the FHWA rules on acquisition of right-of-way and decision-build contracting. The relationship with the statewide and metropolitan planning rulemaking is described below, and the TEA-21 provisions and input received through the Options Paper on the other three issue areas follows:

##### *Statewide and Metropolitan Planning*

Concurrent with the release of this notice of proposed rulemaking, the U.S. DOT is issuing a notice of proposed rulemaking to update and revise its statewide and metropolitan planning regulations (23 CFR part 450 and 49 CFR part 613). As proposed in these coordinated rulemaking actions, the statewide and metropolitan planning rule and the NEPA and transportation decisionmaking rules would both be moved to new parts: 1410 and 1420, respectively. This co-location is intended to underscore the integrated nature of transportation planning and the NEPA process.

We intend to ensure that the regulatory provisions governing statewide and metropolitan planning and NEPA work in a consistent and complementary fashion, and result in sound transportation decisions. We view the changes in TEA-21 as opportunities to improve and integrate

planning and environmental processes to support more effective decisionmaking and it is in this context that both notices of proposed rulemaking were developed. It is our intent to establish consistency between the two regulations to allow our State and local transportation partners that choose to conduct social, economic, and environmental analysis at the planning stage to incorporate that analysis at the project development phase. This approach offers options for integrating project development efficiencies into the overall planning process, where States, MPOs, and transit agencies deem such action appropriate and desirable.

##### *Section 4(f) (49 U.S.C. 303)*

We propose to move the reference and citation for section 4(f)<sup>2</sup> in title 23 of the Code of Federal Regulations. This proposal removes the provisions on section 4(f) from the NEPA rule and establishes a separate regulation for section 4(f). Years of applying section 4(f) to new and unprecedented situations have led to a history of case experience which must be reflected in the regulation. As a result, the rules governing section 4(f) have grown to the point that they warrant their own part in the regulations. We can envision a separate effort to revise and update the section 4(f) rule; however, we are proposing minor changes at this time. Nevertheless, we invite comment on suggested changes to the Section 4(f) rule of a more substantive nature. A comprehensive package of informational materials that will be released concurrent with this final regulation will elaborate on the continued fully integrated relationship between the NEPA process and the section 4(f) evaluation process.

The information within the proposed section 4(f) regulation has not changed in concept. However, new information has been added to bring the administration of section 4(f) evaluations up-to-date with FHWA and FTA programs such as Transportation Enhancements, Transit Enhancements, the Symms National Trail Program, etc. There has been little substantive change in the requirements of the section 4(f) regulation; rather the format of the information presented has been changed

<sup>1</sup> The FHWA and the FTA internal directives are available for inspection and copying as prescribed at 49 CFR part 7.

<sup>2</sup> Section 4(f) of the Department of Transportation Act, which protected certain public lands and all historic sites, technically was repealed in 1983 when it was codified without substantive change, as 49 U.S.C. 303. This regulation continues to refer to section 4(f) because it would create needless confusion to do otherwise; the policies section 4(f) engendered are widely referred to as "section 4(f)" matters. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions.

to reflect these program changes and proposed organizational changes.

The separation of the section 4(f) and NEPA procedures into separate regulations is not intended to fragment compliance with section 4(f) and NEPA. Our intent is to continue a fully integrated implementation under the unified and coordinated process provided by the NEPA procedures as an umbrella for addressing all relevant responsibilities, including section 4(f). Placing the two regulations in sequence within the Code of Federal Regulations, with cross references between them, is intended to communicate the continued integration of section 4(f) and the NEPA process.

#### *Right-of-Way Acquisition*

Section 1301 of the TEA-21 allows the value of land acquired by a State or local government without Federal assistance to be credited to the State share of a federally-assisted project which uses that land. However, the law stipulated that the land acquisition must not influence the environmental assessment of the project, including the need to construct the project, the consideration of alternatives, and the selection of a specific location.

The FHWA considered, under a separate rulemaking, covering "Right-of-Way Program Administration" published as a final rule in the December 21, 1999, **Federal Register**, an "early acquisition" policy to accommodate the acquisition of land or other property interests (including "at-risk" activities) by State or local agencies that may be deemed necessary while NEPA considerations are being concluded. These acquisitions would be considered "at-risk" in that the Federal reimbursement for a share of the acquisition costs would be forthcoming only if the acquired property is subsequently used in a federally-assisted project. Interested parties should refer to the December 21, 1999, final rulemaking (64 FR 71284-71297) in the **Federal Register**.

Advance right-of-way acquisition was the subject of considerable debate during the TEA-21 outreach efforts. Several commenters including the Capital Area MPO in Albany, NY, argued that the advance acquisition of right-of-way in rapidly growing areas is desirable, cost effective and good policy. These commenters view land acquisition as environmentally neutral, in that unused land can be disposed of, often at a profit. Others, including the National Coalition to Defend NEPA, noted the inherent conflict between allowing advance right-of-way acquisition and corridor preservation

initiatives, and the selection of a preferred alternative as part of the NEPA process. The National Coalition to Defend NEPA argues that purchase of land represents a commitment to a particular project location and that it, therefore, would influence the assessment of the project under NEPA.

#### *Design-Build Contracting*

Section 1307 of the TEA-21 permits a State or local transportation agency to award a design-build contract during project development provided that final design shall not commence before the NEPA process has been completed.

We have been concerned about design-build contracts (also called "turnkey" contracts) for federally-assisted projects being let before the NEPA process has been completed. To do so could give the appearance that the State or local transportation agency is fully committed to a single course of action, and that the NEPA process is simply a clearance exercise and not a true decisionmaking process. There may, however, be some situations in which design-build procurement can be structured to allow for the design-builders to work on an alternative emerging from the NEPA process. Our agencies recognize that the emerging interest in design-build contracting may warrant specific regulatory language or guidance addressing the relationship between design-build procurement and NEPA.

During the TEA-21 outreach efforts, some commenters suggested that design-build contracting provisions could include clauses that would preclude work on construction or the "building" of projects until after the NEPA Record of Decision<sup>3</sup> is made. The American Road and Transportation Builders Association (ARTBA) suggested that any work done on projects using this type of procurement method would be "at-risk" until the NEPA Record of Decision is announced, meaning that the work may have to be discarded if the NEPA process ultimately results in selection of an alternative project. In these cases, the State or local agency would not be eligible to receive Federal reimbursement until that time, and only if the action was consistent with the Record of Decision. The Virginia DOT suggested that design-build procurement awards should not be made until after the NEPA process had been concluded, at which point the

specifics of the location and design decisions would be known. This approach has been used by the FTA in its Turnkey Demonstration Program. The Orange County Transportation Corridors Agency suggested that having a design-build agency on board at the earliest possible time is actually environmentally beneficial, since it can contribute valuable input in a timely way, to arrive at implementable and cost effective recommendations.

For highway projects, the FHWA's Office of Infrastructure is responsible for developing regulations which implement this TEA-21 provision. It is currently engaged in fact-finding and consultation among transportation partners including the American Association of State Highway and Transportation Officials (AASHTO), and anticipates beginning the formal rulemaking process next year. Achieving a balance between realizing the fullest time-savings potential of design-build contracting and maintaining the integrity of the NEPA process will be the subject of considerable discussion during that rulemaking process.

Our agencies intend to adopt consistent policies on the NEPA-related aspects of the design-build issue for two reasons: (1) Transit projects should not have procedural disadvantages in comparison to highway projects, and (2) Federal transit law (49 U.S.C. 5304(e)) requires that the FTA and the FHWA conform their NEPA processes to each other's.

#### **Section-by Section Analysis of the Proposed Rule on NEPA and Related Procedures for Transportation Decisionmaking**

This section of the notice of proposed rulemaking includes a section-by-section analysis of the proposed rule on NEPA and incorporates summary information on comments received on the Options Paper. All comments on the Options Paper are contained in the docket. The comments are, of necessity, summarized in each of the relevant sections of the proposed rule and are intended to provide an overall perspective on the comments submitted to the FHWA and the FTA. Details on specific comments and input can be obtained by reviewing the materials in the docket.

The proposed regulations have been reordered as to content and organized into the following four subparts:

- Subpart A—Purpose, Policy, and Mandate;
- Subpart B—Program and Project Streamlining;

<sup>3</sup> NEPA Record of Decision is the documentation of final action by the FHWA and the FTA regarding their decision on a project action (final alternative chosen, impacts, mitigation and basis for decision, etc.) addressed in an Environmental Impact Statement.

Subpart C—Process and Documentation Requirements; and  
Subpart D—Definitions.

The following table highlights the reordering and organization for each proposed subpart:

Proposed Section	Current Section
Subpart A—Purpose, Policy, and Mandate .....	None.
1420.101 Purpose of this regulation .....	771.101 Purpose.
1420.103 Relationship of this regulation to the CEQ regulation and other guidance.	771.103 [Reserved]
1420.105 Applicability of this regulation .....	771.109(a) Applicability and responsibilities and 771.111(f) Early coordination, public involvement, and project development.
1420.107 Goals of the NEPA process .....	None.
1420.109 The NEPA umbrella .....	771.105 Policy.
1420.111 Environmental justice .....	771.105 Policy.
1420.113 Avoidance, minimization, mitigation, and enhancement responsibilities.	771.105 Policy.
Subpart B—Program and Project Streamlining .....	None.
1420.201 Relationship of planning and project development processes.	None.
1420.203 Environmental streamlining .....	None.
1420.205 Programmatic approvals .....	None.
1420.207 Quality assurance process .....	771.125 Final environmental impact statements.
1420.209 Alternate procedures .....	None.
1420.211 Use of this part by other U.S. DOT agencies .....	None.
1420.213 Emergency action procedures .....	771.131 Emergency action procedures.
Subpart C—Process and Documentation Requirements .....	None.
1420.301 Responsibilities of the participating parties .....	771.109 Applicability and responsibilities.
1420.303 Interagency coordination .....	771.111 Early coordination, public involvement, and project development.
1420.305 Public involvement .....	771.111 Early coordination, public involvement, and project development.
1420.307 Project development and timing of activities .....	771.111 Early coordination, public involvement, and project development, and 771.113 Timing of administration activities.
None .....	771.115 Classes of actions.
1420.309 Classes of actions .....	771.117 Categorical exclusion.
1420.311 Categorical exclusions .....	771.119 Environmental assessments.
1420.313 Environmental assessments .....	771.121 Findings of no significant impacts.
1420.315 Findings of no significant impacts .....	771.123 Draft environmental impact statements.
1420.317 Draft environmental impact statements .....	771.125 Final environmental impact statements.
1420.319 Final environmental impact statements .....	771.127 Record of decision.
1420.321 Record of decision .....	771.129 Re-evaluations.
1420.323 Re-evaluations .....	771.130 Supplemental environmental impact statements.
1420.325 Supplemental environmental impact statements .....	None.
Subpart D—Definitions .....	None.
1420.401 Terms defined elsewhere .....	None.
1420.403 Terms defined in this part .....	771.107 Definitions.

### Subpart A—Purpose, Policy and Mandate

This proposed subpart sets out the framework for the FHWA/FTA NEPA process. It complements and supplements the United States Council on Environmental Quality (CEQ) provisions that serve a similar function for the entire Federal government.

#### Section 1420.101 Purpose of This Regulation

Current § 771.101 would be redesignated as § 1420.101 and revised to establish that the focus of the proposed regulation is to conduct a decisionmaking process for transportation projects that, under NEPA, integrates and streamlines compliance with all transportation and environmental laws applicable to decisionmaking during project

development. Reference is made to the regulations for transportation planning as being a contributing factor to this decisionmaking process.

#### Section 1420.103 Relationship of This Regulation to the CEQ Regulation and Other Guidance

The proposed § 1420.103 does not appear in the current regulation. It clarifies that this regulation is to be read as a supplement to the CEQ's governmentwide regulations for implementing NEPA (40 CFR parts 1500–1508) and contains specific provisions for Federal surface transportation actions under our jurisdiction. Further, the proposed section acknowledges that, in addition to issuing revised NEPA regulations, we will conduct and fulfill our responsibilities under NEPA using any

combination of approaches including, but not limited to, nonregulatory guidance, training, and technical assistance.

The CEQ regulations cover regulatory definition and general environmental procedural requirements (*e.g.*, acceptable development and evaluation of an acceptable range of alternatives). These are not repeated in this proposed rule because we want to avoid confusion by repeating or paraphrasing CEQ requirements. Reproducing requirements in the FHWA and the FTA environmental regulations that are identical to CEQ requirements could create potential conflicts and confusion as to the applicability of CEQ provisions not reproduced. Instead, the chosen approach makes a discernible connection between the different regulations, and provides the

opportunity for general practitioners to increase their familiarity with and understanding of the CEQ regulations, a familiarity of which is essential to their ability to comply fully with all of the environmental requirements applicable to transportation projects.

#### *Section 1420.105 Applicability of This Regulation*

The proposed section revises current §§ 771.109 and 771.111, Applicability and responsibilities and Early coordination, public involvement, and project development, respectively. The language appearing in paragraph (a) of the proposed section is a shortened version of paragraph (a) of current § 771.109. Paragraph (b) in the proposed section is essentially the existing criteria for allowable segmentation of projects, taken from paragraph (f) of § 771.111.

#### *Section 1420.107 Goals of the NEPA Process*

Proposed section § 1420.107 is to be read in close conjunction with the subsequent proposed § 1420.109. Section 1420.107 would establish the goals of the FHWA/FTA transportation decisionmaking process. The goals are drawn from a variety of statutory mandates, including NEPA itself, and provisions of the various transportation laws that authorize our programs. The NEPA process is a partnership among Federal, State, and local governments and, at times, private entities. Our intent in this section is to establish a common understanding within the partnership of the goals to be achieved through the NEPA process.

The FHWA and the FTA reaffirm their role as lead Federal agencies, and underscore their responsibility to manage the NEPA process with the objective of achieving these goals. This responsibility extends to ensuring that Federal NEPA decisions pay appropriate deference to State and local decisions made in good faith and not coerce a particular Federal point of view. State and local decisions made with full consideration of a broad range of social, economic, and environmental factors, and with the advice of appropriate Federal and other State resource agencies (i.e., the agencies responsible under law for the protection or management of natural and community resources) and with public involvement are those most likely to advance the NEPA goals.

#### *Section 1420.109 The NEPA Umbrella*

Proposed § 1420.109 would replace portions of current § 771.105, Policy. The proposed section sets forth our basic policy regarding how the

decisionmaking process for surface transportation projects is to be conducted. The proposed section states the intent of our agencies to use the NEPA process as the overarching procedural construct under which the varied legal requirements, environmental issues, and public interests relevant to the transportation decision are brought to bear; hence the term "NEPA umbrella" is used to describe the concept. The consideration of a proposed action under NEPA concludes with a decision made in the best overall public interest: one that balances the need for safe and efficient transportation with the project's social, economic, environmental benefits and impacts, and the attainment of relevant environmental protection goals.

Experience in administering the NEPA process has shown that many practitioners do not fully understand or practice our approach of using the NEPA process as an umbrella for integrating their studies, reviews, or consultations and satisfying all relevant requirements in a single, integrated decisionmaking process. Instead, many have chosen to approach the various requirements as obstacles or hurdles to be addressed in a less than comprehensive fashion. Many delayed projects or failed processes can be traced back to a disintegrated and disconnected approach to meeting NEPA and other requirements. This section of the regulation is intended to clarify the preferred approach and explicitly demonstrate the multitude of factors that can influence Federal decisionmaking. Setting forth these expectations will contribute to a better, more efficient and timely NEPA process, one that is envisioned in the TEA-21 and highlighted in its section 1309 on environmental streamlining.

#### *Section 1420.111 Environmental Justice*

Subsequent to the previous regulatory revision in 1987, the 1994 Executive Order 12898 on Environmental Justice was issued to address disproportionately high and adverse human health and environmental effects of Federal government programs, policies, and activities on minority populations and low income populations. This section would be added to present regulatory language from our policy on environmental justice that is articulated in the DOT Order 5610.2 on Environmental Justice (62 FR 18377, April 15, 1997).

#### *Section 1420.113 Avoidance, Minimization, Mitigation, and Enhancement Responsibilities*

This section would present our policy regarding NEPA's mandate that Federal agencies, to the fullest extent possible, use all practicable means to restore and enhance, and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

Our policy towards correcting adverse impacts is contained in the hierarchical but not necessarily sequential concepts of avoidance, minimization, and mitigation of impacts, and in the evaluation of environmental enhancements. The policy is consistent with the CEQ's approach to mitigation presented in 40 CFR 1500.2(f) and elsewhere, and would revise the language concerning mitigation of adverse impacts currently provided at § 771.105(d). The proposed language reflects also the broadened Federal funding eligibility for enhancement measures, such as transportation enhancement activities and transit enhancements, enacted with ISTEA and TEA-21. The section would address the eligibility for Federal funding (to the extent authorized by law), of measures to avoid, minimize, or mitigate impacts, or to provide or implement enhancements.

Our general responsibility for ensuring that mitigation is carried out would be presented in paragraph (d) of the proposed section, NEPA Commitments. These provisions would be redesignated from § 771.109(b) to streamline the subject matter of the new regulations; the original text would be revised to detail the responsibility for implementing mitigation measures and environmental enhancements that resulted from commitments made in the FHWA/FTA NEPA process.

#### **Subpart B—Program and Project Streamlining**

This subpart would group together a set of provisions aimed at improving the NEPA process, either on individual projects or on a programwide basis, so that transportation decisions can be made in a timely and environmentally sensitive manner. It would respond in part to the TEA-21 chapter on flexibility and streamlining, which addresses major investment study integration (section 1308) and contains the provisions on environmental streamlining (section 1309).

#### *Section 1420.201 Relation of Planning and Project Development Processes*

This section would clarify the relationship of the transportation

planning process and the project development process which is the subject of this NPRM. It reflects coordination with our concurrent proposed Metropolitan and Statewide Planning regulations; § 1420.318 of that proposed rule, and its preamble, provide further discussion of the relationship between the planning and project development processes. The section also stresses that the record of prior transportation planning activities, such as development of purpose and need and the systems-level evaluation of alternatives, shall be incorporated into the scoping or early coordination phases of an EIS or EA, respectively, in order to establish the alternatives to be advanced to the NEPA process.

Our agencies feel it is essential to clarify the nature of the linkage between planning and the NEPA process in this NPRM. The transportation planning process needs to be better coordinated with the project development/NEPA process so that transportation planning decisions can ultimately support the development of the individual projects which arise from transportation plans. During the TEA-21 outreach efforts, opinions varied over whether regulatory language or guidance should be used to integrate planning and programming activities, but most commenters agreed that the linkage between planning and project development needs to be cultivated. Many commenters, including the AASHTO and many State DOTs, opposed any regulatory language which would place requirements of NEPA into the planning process. Others, including the National Coalition to Defend NEPA, pointed to the need for the core values of the NEPA process to be incorporated into the planning process and suggested that regulatory language is in order.

The Options Paper discussed the notion that the establishment of purpose and need and the broad scale evaluation of alternatives can often be best accomplished during the planning process. How to frame the statement of purpose and need so that it is neither too narrow nor too broad is a continuing challenge. If too narrowly conceived, purpose and need can constrain the process with an unreasonably limited set of possible solutions; if too broadly constructed purpose and need may lead to an unmanageably large set of alternatives that unnecessarily bog down the process. Options to provide clearer direction regarding what constitutes an acceptable statement of purpose and need are being explored and we invite specific comments on this issue.

There was considerable support for allowing States and MPOs the option of

addressing purpose and need in the planning process, and even to initiate the NEPA process at that time. This would allow stakeholders to conduct broad ranging planning and subregional studies, reach agreement on purpose and need during the planning process, and benefit from such analyses by using them directly in the NEPA process. There was also strong support for establishing a point during the NEPA process at which the participants would discuss and concur in a statement of purpose and need.

However, a considerable number of commenters, including many State DOTs and MPOs, objected to any mandate for the determination of purpose and need during planning and argued that it would burden the planning process and add considerable delay by seeking a determination of need at an inappropriate juncture.

The Surface Transportation Policy Project (STPP) recommended a two-stage NEPA process where the first phase would evaluate the range of social, fiscal, and environmental costs and benefits of various alternative visions for a corridor or community. Based on this evaluation, an initial statement of purpose and need would be articulated. This purpose and need statement would be very broad, an articulation of the goals for the area already arrived at through the planning process, for example. The STPP proposed that a wide field of inquiry would be maintained at this stage. Subsequent to this phase of evaluation, and once a detailed review of options is complete, an agency would have the information necessary to propose a revised, more specific statement of purpose and need. It would be this revised statement of purpose and need that would serve as the basis for a detailed review of alternatives under NEPA. Under both phases, the choice of a project purpose would be subject to public input.

The Environmental Law and Policy Center argued for the allowance of lower-cost and lesser impact project alternatives to be selected through the NEPA process even if they do not fully meet the stated purpose and need. Both the U.S. EPA and the U.S. Department of Interior argued for broadly defined purpose and need during planning to ensure that a full range of modal alternatives are considered.

The National Coalition to Defend NEPA expressed concern over the development of purpose and need during planning. It felt this could prematurely preclude options and alternatives and argued that, until the DEIS is completed, insufficient

information is available with which to make such decisions. In short, it is concerned that defining purpose and need so early (in planning) could have the effect of "setting in stone" projects without adequate consideration of alternatives.

Commenters asked for examples, best practices and information on issues related to purpose and need determination, and there was general consensus that improvements in defining purpose and need are warranted. They felt that the difficulties articulated in the Options Paper relating to broad versus narrow statements of purpose and need are indeed real problems and that our agencies could provide useful guidance in this area.

We intend to provide continuity between the systems planning and project development processes so that the results of analysis performed during the planning stage, including project purpose and need, alternatives, public input, and environmental concerns are brought forward into project development. The proposed integration of the planning and project development process embodied in this regulation would enable a more broadly defined statement of purpose and need to be addressed at appropriate points in the integrated process.

There has also been much discussion of the standing given to planning decisions on alternatives to be advanced or dropped from consideration. The proposed regulation envisions an active discussion of this issue during scoping, with the involvement of the responsible planning agencies (*i.e.*, the MPO and/or the State DOT). Ultimately, the U.S. DOT agency, in cooperation with the applicant, must decide the range of alternatives to be evaluated in detail in the NEPA document. The proposed regulation allows these agencies to recognize planning decisions made with adequate supporting documentation. Though the form and content of this support will not be specified in the regulation, we expect to see some or all of the following offered in this context: technical studies as envisioned by proposed § 1420.318(b), documentation of public reviews and comments, formal policy board resolutions in the case of MPO actions, or other supporting materials. For proposed major transit investments, this review will also decide whether the documented planning activities constitute the Alternatives Analysis required by 49 U.S.C. 5309(e) or, alternatively, if the requirement must still be satisfied in the NEPA process.

We propose to provide more detailed treatment on the subjects of purpose and

need, and the development, analysis, and evaluation of alternatives in the comprehensive package of informational materials. This would include how to address alternatives which in the past have been rejected for not fully meeting traditional concepts of purpose and need. Further, we plan to showcase examples of successful practices which demonstrate how effective integration of planning and project development can protect communities and environmental resources and save time in providing needed transportation improvements.

Examples of issues that might be covered include: the further consideration of alternatives that may not fully meeting traditional concepts of purpose and need; more broadly defined purpose and need statements during the planning stage so that a full range of modal alternatives are considered; an alternative analysis that examines non-construction alternatives that use transportation demand strategies; and flexibility to encourage the consideration of alternatives which may have lower than originally desired levels of transportation service if there are cost, time, and impact savings that justify the lower levels of transportation service.

We are soliciting comments on a suggestion that specifically addressing the requirements of the major investment study in the planning process would enhance that process by forging a clearer link between the planning and the project-level NEPA processes, leading to greater streamlining at the project level.

#### *Section 1420.203 Environmental Streamlining*

This new section would be added to reflect the requirements of section 1309 of the TEA-21. The basic premise of section 1309 of the TEA-21 was to address concerns relating to delays, unnecessary duplication of efforts and costs associated with the development of highway and transit projects. Section 1309 also stipulates that nothing in section 1309 shall affect the applicability of NEPA or any other federal environmental statute or affect the responsibility of any federal offices to comply with or enforce such statutes. The rule responds to the TEA-21 environmental streamlining provisions by establishing a process intended to coordinate Federal agency involvement in major highway and transit projects with the goals of identifying decision points and potential conflicts as early as possible, integrating the NEPA process as early as possible, encouraging the full and early participation of all relevant agencies, and establishing coordinated

time schedules for agencies to act on a project.

This proposed section of the regulation establishes the "coordinated environmental review process" which section 1309 of the TEA-21 directed the Secretary of Transportation to develop and implement. Paragraph (a) lays out the elements of this coordinated environmental review process, providing a substantive but flexible set of actions to be taken by the U.S. DOT in cooperation with the applicant to ensure that the goals of section 1309 are met. An important element of this coordinated environmental review process is reaching closure among the Federal agencies on the scoping process. This paragraph calls for agency concurrence at the end of scoping, which could take various forms depending upon the mutual understandings and agreements of the Federal agencies. In the event of nonconcurrence, this paragraph provides also for means to resolve interagency disagreements at the earliest possible time. Paragraph (b) describes the process for applying the coordinated environmental review process to State level environmental reviews. Paragraph (c) would implement the provisions of the statute which allow the Secretary to decide not to apply section 1309 to the preparation of an environmental assessment. Paragraph (d) would implement the CEQ NEPA regulation provisions on paperwork reduction and clarifies that the NEPA documentation need not explicitly contain a finding that a particular impact does not exist. For example, if the environmental inventory revealed that there were no wetlands in the project area, a specific finding indicating that the project would have no impacts on wetlands would not be required. This provision would help to focus NEPA documents on important issues in accordance with the CEQ NEPA regulations' provision on paperwork reduction.

One consistent theme that emerged through the outreach process pointed to the need for early and up-front involvement of Federal agencies in the NEPA process and for close coordination and cooperation among the Federal agencies throughout the process. The State DOTs, the MPOs, the National Association of County Engineers, the U.S. EPA, and the U.S. Department of Interior all felt that Federal agency involvement is critical to successful implementation of the environmental streamlining provisions. They also recommend that our field offices and the resource agencies' field offices throughout the country have the authority to participate in, review, and

respond to issues associated with the NEPA process.

Inasmuch as stakeholder sentiments echoed a need for early collaboration and close coordination with all interested and affected parties, they also strongly reinforced the need for flexibility at the State and local levels for implementing the goals of streamlining. A "one-size-fits-all" regulatory approach was soundly rejected by an overwhelming majority of stakeholders, other Federal agencies, practitioners, project sponsors, and field offices.

We believe that successful implementation of environmental streamlining must be based upon a number of principles, and are pursuing a process that will ensure effective environmental decisionmaking in a timely manner. Both transportation and resource agencies must improve their environmental review processes. The U.S. DOT will provide national leadership on environmental streamlining, and is working with CEQ and headquarters offices of the EPA, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. National Park Service, the U.S. National Oceanic and Atmospheric Administration, the Advisory Council on Historic Preservation and others to obtain commitments to better decisionmaking. The framework for this commitment to the environment and to streamlining the environmental process is set forth in the national Memorandum of Understanding (MOU) which was entered into by the aforementioned agencies in July 1999.<sup>4</sup> We fully expect to track the commitments reflected in the national MOU. We recognize that tangible progress will evolve locally, and State by State, at different rates, based largely on good working relationships and trust established among the agencies at the field office level.

We are proposing to implement the environmental streamlining requirements largely outside of the regulatory process through the following means: (1) U.S. DOT memoranda of understanding with Federal or State agencies; (2) establishment of dispute resolution processes; (3) streamlining pilot efforts; (4) authorization of the U.S. DOT to approve State DOT or transit agency requests to reimburse Federal agencies for expenses associated with meeting expedited time frames; and (5) establishing performance measures to evaluate and measure success in both

<sup>4</sup> This Memorandum of Understanding is available electronically from FHWA's website at <http://www.fhwa.dot.gov/environment/strming.htm>.

environmental stewardship and environmental streamlining. We have established an environmental streamlining page on the FHWA website to keep the public up to date on our ongoing activities and resources (<http://www.fhwa.dot.gov/environment/streaming.htm>). We are also providing a detailed description of our work to date on the following:

#### (1) National MOU

The central effort on the national MOU has been to craft an agreement among agencies which demonstrates a commitment to key principles and upon which further agreements can be executed at a local or regional level to address more specific issues. Establishing and maintaining clear and frank communication has been at the heart of the national MOU and would be the primary guide to further interagency agreements.

The process of developing the national MOU was aimed chiefly at responding to the concerns regarding early and up-front involvement of Federal agencies in the NEPA process and for close coordination and cooperation between Federal agencies throughout the process. We are working with representatives of other Federal agencies at the headquarters and field levels to develop a common understanding of the environmental streamlining provision and a coordinated implementation strategy. The development of the national MOU has followed the suggestion of AASHTO, Association of Metropolitan Planning Organizations (AMPO), and many State DOTs that the MOU include broad principles of agreement on how the NEPA process would be carried out but that project-specific or program-specific MOU's need to be developed at the State, regional, or local level, based upon these broad principles, and tailored to specific local circumstances or projects.

#### (2) Dispute Resolution Procedures

Procedures for resolving conflict at the national, regional, and State levels are under development. Mediation methods and systems for alternative dispute resolution are being developed and training programs in these methods will be established. This approach will enable parties to seek timely intervention over disputes during the project development process, as a way to circumvent and minimize the number of environmentally unacceptable projects that may otherwise be referred to CEQ for resolution, by either reestablishing consensus on the need for the project or reaching consensus to

drop the project entirely. Alternative dispute resolution strategies will be defined so that they can be effectively applied to improve institutional relationships among parties or to resolve conflicts surrounding specific project issues.

On the matter of dispute resolution procedures, commenters made three key points. They felt that explicit time frames for document reviews are needed and should be agreed to, to the fullest extent possible, up-front in the process. Secondly, they supported an approach where the parties to the MOU agree, at an early stage, on the level of information and detail that is needed at various steps in the NEPA process. Resource agencies expressed frustration with the timing and level of detail of information that they are asked to consider and act upon, and State and local implementing agencies expressed frustration due to uncertainties over what specific information and level of detail would be required of them by the Federal resource, regulatory and permitting agencies. A third point made by many stakeholders was that procedures on coordination, documentation, and communications should be agreed to as early as possible. They felt that this would help to resolve differences that arise at various points in the process and which can contribute to delays.

#### (3) Pilot Efforts Are One Effective Mechanism for Testing and Evaluating Change

One specific topic suggested for pilot projects was from the North Carolina DOT and the American Road and Transportation Builders Association, which suggested the testing of alternative approaches to gaining interagency cooperation during the NEPA process. The Virginia DOT suggested that pilot project efforts should be directed at finding ways to resolve differences between Federal agencies. A third suggestion was that pilot projects should test approaches to providing States flexibility in carrying out the NEPA process.

Not all commenters supported the concept of pilot projects, however, and the National Coalition to Defend NEPA questions the legal authority of our agencies to conduct pilot projects and cautioned against using pilot projects to "back-door" the NEPA process. It was also concerned that pilot efforts not only involve partnership development between Federal and non-Federal partners and resource permitting agencies, but also include groups representing the public as well.

Based on the input received on the issue of pilot efforts, we are not proposing to establish a formal process for pilots at this time, through regulation or any other means. Instead, we will participate in pilot efforts on a case-by-case basis. These pilot efforts might be focused on a single project or on improving a particular process, but would not include the delegation of Federal NEPA responsibilities to States that was considered but not enacted in the TEA-21. We will continue to coordinate closely with the U.S. EPA, the AASHTO and others who are developing pilot efforts, and will actively assist in sharing information on efforts including lessons learned.

#### (4) Use of Titles 23 and 49, U.S.C., Funds To Pay for Environmental Agency Work

The agency reimbursement language in the environmental streamlining provisions of the TEA-21 offers an opportunity to partially overcome an historic obstacle, that Federal agencies cannot involve themselves in the process early enough or regularly enough due to resource constraints within agencies. The TEA-21 includes specific conditions allowing States and transit agencies to use Federal transportation funds for reimbursement of expenses related to work done to meet the expedited time schedules required by section 1309 of the TEA-21. In addition, other statutory authorities exist for agency reimbursement, and we are exploring the full range of options for reimbursing agencies through any of the available authorities. Furthermore, approaches to developing collaborative efforts with other Federal agencies are being explored in order to develop model reimbursement agreements, and to facilitate the implementation of such agreements by Federal agency field staff.

Due to the need for flexibility and the different practices and needs of various State and resource agencies, it was determined that nonregulatory guidance would most appropriately address the use of Federal transportation funds for reimbursing costs associated with streamlining. Hence, we engaged participation by many other affected Federal agencies to develop a single guidance package that would be useful to transportation and environmental agencies, including State DOT's and transit agencies and Federal, State, and local resource agencies. The breadth of situations that might be addressed under this provision was such that the guidance does not try to anticipate them all. Rather, it reinforces the Federal government's belief in effective interagency coordination and

demonstrates a commitment from Headquarters offices to support field efforts in implementing this provision of the TEA-21.

There were a number of comments on this TEA-21 provision and a suggestion from the American Road and Transportation Builders Association that the principles to apply to reimbursement should include a provision that reimbursement for Federal agency activities to expedite NEPA reviews must be linked to a specific project, set of tasks, and person or position to be involved on behalf of the Federal agency. Others, including the Nevada and Missouri DOTs, felt that reimbursing an agency for working on one project over another is not a good approach. Reimbursing agencies for doing their jobs, it was argued, would introduce a bias into the NEPA process which would result in an expedited review or enhanced level of participation on some projects over others.

#### (5) Performance Measures

Our agencies have a joint effort underway to evaluate the timeliness and the effectiveness of the NEPA process at arriving at decisions that are in the best overall public interest. Further information on this effort can be obtained from the FHWA.

#### *Section 1420.205 Programmatic Approvals*

Section 1420.205 would be added to establish in regulation the FHWA/FTA practice of using programmatic environmental approvals as one way of addressing recurring situations in a streamlined manner.

This practice has been especially effective with categorical exclusions for meeting the NEPA requirements in uncomplicated and non-controversial situations. One example of this are programmatic categorical exclusion approvals in which FHWA and a State DOT established a set of environmental impact thresholds, which, if not exceeded, allow the State DOT to apply the categorical exclusion approval without a project specific review by FHWA. Periodically, the FHWA reviews a sample of projects after-the-fact to ensure that the approval was appropriately applied. Other examples of programmatic approvals include section 4(f) approvals for minor uses of parkland and approval to delegate certain USDOT responsibilities under the recently issued regulations implementing section 106 of the National Historic Preservation Act. The proposed section explicitly recognizes the appropriateness of programmatic

approaches for compliance with NEPA and related statutes, but does not specify the types of actions for which programmatic approaches would be created. Programmatic approaches to meeting the NEPA requirements which would not directly involve project level Federal approvals would be subject to periodic process reviews to ensure that they are being properly applied. This would enable the Federal agencies to focus limited resources on more problematic project-level decisions and to maintain a quality assurance role for projects with beneficial or de minimis environmental impacts. There was general support for such an approach in comments on the Options Paper. We invite comments on public notice and interagency coordination processes appropriate for making programmatic approvals.

#### *Section 1420.207 Quality Assurance Process*

This new proposed section would establish an internal responsibility for our agencies to employ appropriate quality management methods to assure that the NEPA responsibilities are carried out in a competent and timely manner. Such a process is intended to streamline the process by institutionalizing lessons learned throughout the administration of our programs and NEPA so that mistakes are not repeated and innovative approaches are fully implemented.

The requirements in the current regulation for legal sufficiency review of Final Environmental Impact Statements (FEIS) and prior concurrence of the Headquarters on certain FEISs would be incorporated into this proposed section. These processes have proven helpful in assuring the quality of analysis, coordination, and documentation and can prevent costly and timely lawsuits and conflicts. As proposed, the nature of legal sufficiency review and the threshold for requiring prior concurrence at Headquarters would not be specified in regulation, but would be the subject of internal orders.

#### *Section 1420.209 Alternate Procedures*

This new section would be added to establish the procedures for processing and approving alternate procedures for complying with this regulation. This would give us the flexibility to partner with CEQ and State DOTs or transit agencies on NEPA reinvention efforts that achieve the goals of the NEPA process by using alternate methods or procedures that are more in tune with and supportive of non-Federal decisionmaking requirements.

#### *Section 1420.211 Use of This Part by Other U.S. DOT Agencies*

In 1993, the U.S. DOT National Performance Review effort recommended that the NEPA procedures of the various modes be blended into a single process. Efforts to accomplish this unified procedure were purposely delayed until after passage of the surface transportation reauthorization which became TEA-21. Recent discussions within the U.S. DOT are now pointing toward a dual effort, one element of which would cover the entire department, the other of which is this proposed regulation covering just the FHWA and the FTA. To advance the first element, U.S. DOT would revise the U.S. DOT Order on NEPA to update the departmentwide statement of environmental policy and to remove barriers to collaboration between the U.S. DOT modes on NEPA issues. It would provide authority for one U.S. DOT agency to use the NEPA procedures of another U.S. DOT agency or to act as the agent for another U.S. DOT agency when a situation warrants. This proposed section clarifies in regulation that the internal order is considered legally sufficient to provide these authorities. The further action at the departmental level to amend the U.S. DOT Order on NEPA is under development.

Most Options Paper commenters, including State DOTs, MPOs, associations, and authorities supported a coordinated approach to NEPA within the U.S. DOT and its modal administrations. There was strong support for the elimination of differences in how the FHWA and the FTA manage the NEPA process and for a consolidation of these approaches in the updated regulation. In addition, there was strong support from New York DOT, the American Road and Transportation Builders Association and others for the elimination of provisions duplicating the CEQ regulations, which many thought would lead to a streamlined regulation. Finally, many commenters supported the notion of the FHWA and the FTA having strong oversight over the NEPA process. Equally important, commenters noted, is that there be a true partnership between Federal agencies and State and local agencies.

#### *Section 1420.213 Emergency Action Procedures*

This proposed section would contain the provision currently found at 23 CFR 771.131.

### Subpart C—Process and Documentation Requirements

This proposed subpart describes the requirements of carrying out the NEPA process, including establishing the roles of various governmental agencies and the public in the process, determining the appropriate level of environmental documentation under NEPA, and laying out the procedural requirements for processing NEPA documents. It complements and supplements the CEQ regulations that provide the general NEPA framework for the entire Federal government. In addition to the regulatory requirements described in this subpart, the FHWA's and FTA's comprehensive package of informational materials will provide detailed nonregulatory approaches to many of the subjects herein.

#### *Section 1420.301 Responsibilities of the Participating Parties*

This is a new section that addresses some of the items currently contained within § 771.109. Paragraph (a) of the proposed section utilizes the current CEQ regulations (40 CFR 1500–1508) to define terms and set forth concepts, such as: Lead and cooperating agencies; the relationship between Federal agencies, applicants, and contractors; and enhancing the efficiency of the NEPA process through cooperation between Federal, State, and local agencies.

Paragraph (b) would clarify in regulation current practice for administering the NEPA process for projects implemented directly by the Federal government on Federal lands. Namely, it is a shared responsibility of the U.S. DOT and the Federal land management agency. The precise nature of the responsibility is specified in agreements or standard operating procedures.

In the previous regulations, the provision in 23 CFR 771.109(c) on agency responsibilities is largely repetitive of what is also found in CEQ's regulations on NEPA. For this rulemaking effort, we are reluctant to propose regulatory language which simply restates existing sections of another regulation, and would streamline this section accordingly. Paragraph (c) of the proposed section addresses the use of contractors in the NEPA process for contracting for environmental and engineering services. The proposed rule allows a State to procure the services of a consultant, under a single contract, for environmental impact assessment and for subsequent post-NEPA engineering and design work in accordance with the

provisions of 23 U.S.C. 112(g), as amended by the TEA–21.

Section 1205 of the TEA–21 allows a State to procure under a single contract, the services of a consultant to prepare environmental documents for a project, and to perform subsequent final engineering and design work on the project. This would only occur if the State conducted a review assessing the objectivity of the environmental documentation. Experience has shown that, although on many projects consultants do prepare the bulk of the detailed analyses and NEPA documentation, this process involves close oversight by the State or local public agency and by the lead Federal agency. It is the ongoing responsibility of our agencies to ensure that all consultant work reflected in the NEPA process and documentation meets appropriate standards of objectivity and professionalism.

The contracting provisions were included in the TEA–21 to clarify our agencies' positions on the use of contractors for environmental and engineering design work for Federal transportation projects, and were chiefly aimed at addressing concerns of potential conflict of interest on the part of the consultants.

The U.S. DOT believes that more detailed nonregulatory guidance will best address the specifics of disclosure statements, other requirements of 40 CFR 1505.5(c), and the requirement for a review of the objectivity of the environmental document.

Generally speaking, commenters on the Options Paper felt that current level of oversight and review is sufficient, and that additional documentation to ensure objectivity is unnecessary. The EPA suggested the need for the development of Federal procedures for monitoring, investigating, and resolving conflicts that might result from this TEA–21 provision.

#### *Section 1420.303 Interagency Coordination*

The proposed section would revise the current § 771.111 (a) through (e). The proposed section would simplify the current section by focusing on key terms and concepts that are the basis of an integrated decisionmaking process conducted under the NEPA umbrella. For example, the proposed section features the term “interagency coordination” to supplement the current “early coordination” in order to better express the collaborative intent of the FHWA/FTA NEPA process. The proposed section provides an explanation of the role and function of interagency coordination in the NEPA

process. The term “interested agencies” would be added. The proposed section briefly outlines a procedure for notifying affected Federal, State, and local entities of the availability of approved documents for classes of action other than an EIS.

Scoping and early coordination can set the tone, positive or negative, for subsequent project development activities. Experience has shown that many of the conflicts which delay Federal approvals of highway and transit projects are somewhat predictable, and might be better anticipated and managed by using the scoping process as an early warning system. In addition, the development of interest-based negotiating and collaborative problem solving skills can help to craft implementable solutions. Two possible solutions emerged through the outreach process that could assist Federal agencies and applicants in performing more effective project scoping. One approach to the scoping of complex projects is that agencies agree on review schedules, but only after sufficient information on issues has emerged to allow them to gauge the required level of effort for their respective agencies. Another approach might make the scoping process, as part of an aggressive, high visibility project management role by our agencies as the lead Federal agency(ies), a mechanism for identifying the issues, and agreeing on roles, time frames and methodologies associated with advancing the project, and possibly memorializing that agreement in a project MOU.

Both program reviews and feedback from stakeholders indicate that the FHWA and the FTA need to take a stronger leadership role in the NEPA process. Commenters including the National Coalition to Defend NEPA, the AASHTO, the American Road and Transportation Builders Association, and others reinforced this point in their comments on the Options Paper. These groups said that the FHWA and the FTA staff should attend meetings and serve as conflict resolution agents and mediators between other agencies. Also, they told us that we should provide information, such as, handbooks, best practices on scoping, and training for practitioners. As was the case in many areas, stakeholders including MPOs, State DOTs and others feel that much progress can be made in better integrating environmental and other considerations into the planning process through training, examples of where new approaches are working, handbooks and other useful materials.

Many of the detailed considerations of the scoping process are outside the

scope of this proposed rule, and will be addressed separately. Effective project scoping and interagency coordination is a chief topic of our environmental streamlining efforts, and will be given more detailed treatment in the comprehensive package of informational materials to be issued in conjunction with the final rule. Scoping may also be the subject of further guidance on its own. We will make full use of input received through the outreach efforts, as well as through our ongoing coordination with transportation and environmental agencies, in the development of this additional guidance.

#### *Section 1420.305 Public Involvement*

Current § 771.111(h) would be redesignated as § 1420.305. It remains relatively unchanged for State DOTs except that the separate requirements specific to the FHWA and the FTA programs would be deleted; and new references specific to public involvement procedures, notification requirements, and accommodations for those with disabilities would be added. A requirement would be added to specifically ascertain if public involvement is warranted whenever a reevaluation is being conducted. Also a minimum 45-day public comment period would be established whenever public involvement procedures are initially adopted or revised.

The proposed rule also aims to consolidate requirements of our two agencies for public involvement so that the U.S. DOT can offer a more consistent approach on this subject. Based upon comments to the Options Paper, there was resounding support for a consistent approach to public involvement requirements between the FHWA and the FTA and this was cited by the National Coalition to Defend NEPA as one way to make the planning process more accessible and understandable to the public. This consolidation may mean that some transit agencies may have to formalize their public involvement procedures through board adoption, or revise their procedures to ensure their applicability to the NEPA process. The FTA does not expect to find many transit agencies without existing adopted procedures applicable to project development, but invites comment on this concern. We recognize the importance of public involvement to informed decisionmaking, and have issued a number of publications which provide nonregulatory guidance on how to increase the effectiveness of applicants' public involvement efforts.

The new § 1420.305(d) recognizes the need for public involvement on certain re-evaluations where the elapsed time may have altered public expectations.

#### *Section 1420.307 Project Development and Timing of Activities*

Current § 771.113 would be redesignated as § 1420.307 and revised. The proposed section would clarify the circumstances in which the FHWA/FTA would not approve initiation and funding for certain activities, such as, final design activities. The proposed section would encourage compliance with the requirements of all applicable environmental laws, regulations, executive orders, and other related requirements be demonstrated prior to approval of the final environmental documents or categorical exclusion (CE) designation. Conditions under which agencies responsible for metropolitan and statewide planning would be notified in order to satisfy the planning and programming requirements of proposed 23 CFR part 1410 would be identified.

However, under the NPRM the FHWA and the FTA would not prevent State and local governments and private entities from taking certain actions that are "at risk" of being rendered useless by the final NEPA decision. Such actions include final design or land acquisition prior to NEPA approval, but do not include those that would have an adverse impact, such as, demolition or construction. The FHWA and the FTA would view at risk activities that actually substantially harm environment as so subverting the NEPA process that we would inform applicants that the action would be ineligible for FHWA or FTA financial assistance. The FHWA and the FTA would not finance such "at risk" actions, and would not allow their decisions to be influenced by the actions taken by others. For projects that will be federally-funded, the present regulation prohibits final design and land acquisition (with certain limited exceptions) prior to the completion of the NEPA process. The enforcement of this prohibition has been confounded by the fact that specific funding sources, especially for smaller projects, are often not identified until late in project development. Hence, the applicability of the Federal requirements that attach only to Federal funding sources is not yet determined at the time the "at risk" activities are initiated.

We are considering issuing guidance on how to handle such situations, especially in terms of disclosure responsibilities.

We propose to clarify that full compliance with the transportation

conformity rule (40 CFR parts 51 and 93) is required prior to the *approval of the final EIS, FONSI or CE*<sup>5</sup> designation. As a result, this proposal would allow preliminary engineering for project development activities to be done prior to final NEPA approval without having to meet conformity requirements. We request public comment on our proposed clarification.

We believe that this proposed change is allowed under current regulations. While the conformity rule requires that a project come from a conforming plan and transportation improvement program (TIP) before final NEPA approval, the rule does not explicitly specify that the project must be in a conforming plan and TIP in order to initiate the NEPA process. In fact, 40 CFR 93.126, table 2, identifies as exempt, "engineering to assess social, economic, and environmental effects of the proposed alternatives to that action." We feel that this is an important distinction that may help to improve the quality of the NEPA process leading to more effective, efficient, and environmentally sound judgments, without compromising the planning process and air quality analysis.

We believe that the emissions impacts of the project should be considered as early as possible and continue to encourage the inclusion of projects in the plan and TIP conformity analysis as early as feasible prior to the completion of the NEPA process where it is feasible. Earlier inclusion of the project in the plan and TIP is beneficial for the overall development of the plan and TIP because regional analysis is used as a long term indicator of the area's emissions impacts and associated problems. Early analysis of projects in the plan and TIP allows a more comprehensive long term assessment of how emissions impacts can be minimized, whether through changes in the timing of projects or changes to the composition of the plan and TIP.

However, a major problem with this approach is that it is counterproductive to corridor planning, prejudices alternatives and can limit thorough exploration of all feasible alternatives throughout the project development process. It can be counterproductive to, rather than supportive of, good long term transportation systems planning in certain circumstances. The reason for this is that in order for a project to be included in the regional plan and TIP and regional analysis prior to

<sup>5</sup> Environmental Impact Statement (EIS), Finding of No Significant Impact (FONSI), categorical exclusion (CE).

completion of NEPA, certain assumptions must be made about the project and related emissions impacts. It is difficult to define project design concept and scope that early in the planning process, especially for those projects requiring the highest level of environmental review and scrutiny. When taking complex projects through the project development process, it is very difficult to simply define two points of connection to the network, the number of lanes and facility type (that which is needed for regional analysis). Complex projects and corridor projects often examine multimodal options, some of which are not fully developed until later in the NEPA process. Under this scenario, the assumptions for regional analysis for conformity purposes may encourage an overly narrow alternatives analysis and constrain the environmental review process. We request comment on whether similar experiences have occurred in practice when accounting for preliminary engineering for project development in regional conformity analyses.

It is important to note that, under this proposal, preliminary development of new projects could proceed during a conformity lapse, since such activities would not need to meet conformity requirements. However, final NEPA documents on new projects could not be approved under this proposal until a new conforming plan and TIP are in place.

We believe the frequency requirements for conformity are sufficient to ensure that full emissions impacts of the projects are accounted for before projects move into the final design; therefore, long term risks are minimal and the projects must be included in the regional conformity emissions analysis prior to the completion of NEPA. The regional emissions analysis and conformity determinations can be made as frequently as once a year, but at a minimum at least every three years; therefore, it is reasonable to allow environmental reviews and the NEPA process to be initiated without the project being included in the conformity analysis.

#### *Section 1420.309 Classes of Actions*

Current § 771.115 would be redesignated as § 1420.309 and the text would remain the same, except for the addition of certain intercity railroad and intermodal actions.

#### *Section 1420.311 Categorical Exclusions*

The proposed § 1430.311 would make several changes from the list of CEs in the current § 771.117 to reflect changes in the FHWA and the FTA programs since 1987. Modal limitations would be eliminated wherever possible. In addition, the CEs would be reordered and regrouped so that similar actions are listed together. The CEs would continue to be organized into two major groupings: those in paragraph (c) that require no further U.S. DOT agency approval, and those in paragraph (d) that require a written demonstration that the CE is appropriate. Paragraph (c) would clarify the need for NEPA approval by the U.S. DOT agency for listed CEs to which other environmental laws (e.g., section 106 of the National Historic Preservation Act) apply.

The proposed changes in CEs in paragraph (c) would be as follows:

Paragraph (c)(1) (non-construction activities) would incorporate the text of current § 771.117(c)(1), (c)(20), and part of (c)(16) without substantive change. It would add designations to the National Highway System to the list.

Paragraph (c)(2) (resurfacing) would move part of the text of current § 771.117(d)(1) to paragraph (c). Experience has shown that simple resurfacing of an existing pavement does not require additional written information for a CE determination.

Paragraph (c)(3) (routine maintenance) is not explicitly covered in the current § 771.117, but it is an important program activity, especially for transit with the re-definition of preventive maintenance as a capital expense.

Paragraph (c)(4) (ITS elements) is not explicitly covered in the text of current § 771.117. Installation of isolated ITS elements is proposed for paragraph (c), but an areawide coordination of multiple ITS elements that would have greater impact on the transportation system is proposed for paragraph (d)(2).

Paragraph (c)(5) (safety programs) would incorporate the text of current § 771.117(c)(4) and would add a current CE of the Federal Railroad Administration related to safety.

Paragraph (c)(6) (support facility improvements) would incorporate the current § 771.117(c)(12), but would extend it to cover toll facilities, control centers, and vehicle test centers, facilities that are similar in size and activity to those in the current CE.

Paragraph (c)(7) (carpool programs) uses a defined term to incorporate the text of current § 771.117(c)(13) except that carpool activities requiring land

acquisition and construction (such as new parking lots) would be excluded and covered in paragraph (d)(6).

Paragraph (c)(8) (emergency repairs) would incorporate the text of current § 771.117(c)(9), but extends it to cover modes other than highways.

Paragraph (c)(9) (operating assistance) would incorporate the second part of the text of current § 771.117(c)(16) without substantive change.

Paragraph (c)(10) (vehicle acquisition) would incorporate the text of current § 771.117(c)(17) without substantive change.

Paragraph (c)(11) (purchase and lease of equipment) would incorporate the text of current § 771.117(c)(19), but would extend it to cover leases and the capital cost of contracting for transit services.

Paragraph (c)(12) (vehicle rehabilitation) would incorporate the current § 771.117(c)(14), but would extend it to cover conversions to alternative fuels.

Paragraph (c)(13) (track maintenance) would incorporate the text of current § 771.117(c)(18), but would extend it to cover wayside systems in addition to tracks and railbeds.

Paragraph (c)(14) (bicycle-pedestrian facilities) would incorporate the text of current § 771.117(c)(3) except that bicycle and pedestrian projects requiring land acquisition and construction (such as bike paths on new right-of-way) would be excluded and covered in paragraph (d)(19).

Paragraph (c)(15) (ADA accessibility) would incorporate the text of current § 771.117(c)(15) without substantive change.

Paragraph (c)(16) (signing, etc.) would incorporate the text of current § 771.117(c)(8) without substantive change.

Paragraph (c)(17) (property management) would incorporate the text of current § 771.117(c)(2), (5), and (11), and similar property management activities under the transit program. In addition, disposal of excess property would be moved from § 771.117(d)(6) because experience has shown that the sale or transfer of property does not have significant impact in and of itself, and the U.S. DOT agency does not have the statutory authority to control the subsequent use of property after it has been sold by the applicant.

Paragraph (c)(18) (transportation enhancements) would incorporate the text of current § 771.117(c)(7) and (10), and would add other transportation enhancement activities and transit enhancements to the list.

Paragraph (c)(19) (noise walls) would incorporate the current § 771.117(c)(6) without substantive change.

Paragraph (c)(20) (mitigation banking) would be added due to the transportation enhancement provisions and changes in the mitigation policies of Federal resource agencies that allow or encourage this form of mitigation.

The proposed changes in CEs in paragraph (d) would be as follows:

Paragraph (d)(1) (highway rehabilitation) would incorporate the text of current § 771.117(d)(1) except that simple resurfacing is now proposed to be moved to paragraph (c) and would not require a written CE demonstration.

Paragraph (d)(2) (operational improvements) would incorporate part of the text of current § 771.117(d)(2), with clarification through examples of the ITS systems that would be covered.

Paragraph (d)(3) (safety improvements) would incorporate parts of the text of current § 771.117(d)(2) and (3) without substantive change. It would add safety-related programs of recent importance including seismic retrofit and mitigation of wildlife hazards.

Paragraph (d)(4) (bridge rehabilitation) would incorporate part of the text of current § 771.117(d)(3) with the clarification that the approaches to the bridge or tunnel would also be included in the project and that historic bridges and bridges providing access to ecologically sensitive areas are excluded.

Paragraph (d)(5) (bridge replacement) would incorporate the remaining part of the text of current § 771.117(d)(3). If applicable, "section 106" (National Historic Preservation Act (16 U.S.C. 470 *et seq.*)), "4(f)" (49 U.S.C. 303), "section 404" (Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 to 1376)) and coastal zone management issues must be addressed in the CE documentation and coordinated with the other agencies in accordance with those statutes.

Paragraph (d)(6) (parking facilities) would incorporate activities from the current § 771.117(c)(13) and (d)(4), but would apply to all parking facilities, not just those on transportation fringes, if the CE conditions are met.

Paragraph (d)(7) (new operations centers) would be added as a CE primarily covering the construction of buildings to house the control centers from which ITS systems are operated and managed.

Paragraph (d)(8) (support facility construction) would incorporate the text of current § 771.117(d)(5) with the addition of other similarly sized support facilities.

Paragraph (d)(9) (access control) would incorporate the text of current § 771.117(d)(7) without substantive change.

Paragraph (d)(10) (track improvements) would incorporate the text of current § 771.117(c)(18) in situations where land acquisition is needed.

Paragraph (d)(11) (storage yards and shops) would incorporate the text of current § 771.117(d)(8) and (11) without substantive change.

Paragraph (d)(12) (building renovation) would incorporate the text of current § 771.117(d)(9) without substantive change.

Paragraph (d)(13) (transfer facilities) would incorporate the text of current § 771.117(d)(10) without substantive change.

Paragraph (d)(14) (ferry facilities) would be added as an explicit statement that work on existing ferry facilities may be a CE, but concern for water-related impacts necessitates its inclusion in paragraph (d) so that a written CE demonstration must be provided.

Paragraph (d)(15) (rail service demonstrations) would be added as a CE, based on our experience with previous similar cases. If the service demonstration were to lead to proposal for permanent service involving Federal financial support, that permanent project would be separately evaluated for its impacts.

Paragraph (d)(16) (advance land acquisition) would have three parts to it as follows:

(1) Paragraph (d)(16)(i) would allow the acquisition primarily of underutilized private railroad rights-of-way (ROW). It reflects current FTA practice where present or recent rail operations on the ROW ensure that adjacent land uses remain generally compatible with the continued transportation use of the ROW;

(2) Paragraph (d)(16)(ii) would respond to the provisions of the TEA-21 section 1301 without attempting to elaborate on those provisions. Such elaboration would be covered in separate guidance on the issue of advance land acquisition; and,

(3) Paragraph (d)(16)(iii) would incorporate the text of current § 771.117(d)(12) covering hardship and protective acquisitions, without substantive change.

Paragraph (d)(17) (joint development) would incorporate part of the text of current § 771.117(d)(6) without substantive change.

Paragraph (d)(18) (bicycle facilities) would incorporate activities covered in the text of current § 771.117(c)(3). With this change, bicycle projects involving

land acquisition and construction would require a written CE demonstration.

Paragraph (d)(19) (storm water management) would add a new CE that covers a transportation enhancement activity that may involve land acquisition and construction of storm water detention or retention ponds. It is, therefore, proposed to be included in the list where a CE demonstration is required.

Paragraph (d)(20) (historic transportation facilities) would add a new CE that covers a transportation enhancement activity that will have section 106 (historic preservation) implications. It is, therefore, proposed to be included in the list where a CE demonstration is required.

Paragraph (d)(21) (other transportation enhancements) would add a new CE that covers the other transportation enhancement activities and transit enhancements that are not explicitly listed.

We propose additional, nonregulatory guidance on situations where a group of different, but related, categorically excluded actions may need to be evaluated as a whole if they have a net effect that warrants further environmental analysis (e.g., ITS projects throughout a corridor).

Some commenters including the Michigan DOT, the AASHTO and others requested that advance right-of-way acquisition be added to the categorical exclusion list. The U.S. EPA was concerned about coordinating any expansions of the list with other Federal agencies and was particularly concerned about wetlands mitigation needs. The Ohio DOT suggested that rather than expand the list of categorical exclusions, our agencies develop "thresholds of significance" whereby projects within those thresholds would be those considered for categorical exclusions. Finally, a number of commenters, including the Ventura County Transportation Commission, the ARTBA, and the Oregon DOT supported the categorical exclusion of transportation enhancement activities and suggested categorically excluding congestion mitigation and air quality program (CMAQ) eligible projects. We have considered these comments in devising the proposed list. Nevertheless, we invite comment on these suggestions and on the appropriateness of the activities proposed to be categorically excluded, including whether or not specific activities should be included in the list under paragraph (c) or the list under paragraph (d). We encourage commenters to provide examples or information drawn from their

experience bearing on the appropriateness of the proposed categorical exclusions. We also invite comments on the practice, begun with the 1987 regulation, of using an open-ended list of examples of activities that can be categorically excluded only after appropriate documentation has been prepared and approved on a case-by-case basis by the USDOT agency.

#### *Section 1420.313 Environmental Assessments*

Current § 771.119 would be redesignated as § 1420.313 with some minor editing changes.

#### *Section 1420.315 Findings of No Significant Impact*

Current § 771.121 would be redesignated as § 1420.121 with minor editing changes.

#### *Section 1420.317 Draft Environmental Impact Statements*

The proposed section would revise the current § 771.123 by expanding the description of both public involvement procedures and the information products developed in accordance to the proposed 23 CFR part 1410. Paragraph (b) would specifically indicate that the scoping process must consider the results of the planning process including public involvement and interagency coordination. Items related to mitigation would be expanded to

include environmental enhancements. Paragraph (b) would now emphasize public involvement and interagency coordination. Paragraph (c) would add language to our goals and policies in terms of implementing NEPA. The discussion on the use of consultants in the development of the draft EIS would be removed to avoid repetition with proposed § 1420.301.

#### *Section 1420.319 Final Environmental Impact Statements*

Current § 771.125 would be redesignated as § 1420.319. Information would be added in paragraph (a)(1) to require any additional environmental studies, public involvement, and/or coordination to consider refinements of alternatives and mitigation to be presented in the FEIS.

#### *Section 1420.321 Record of Decision*

Current § 771.127 would be redesignated as § 1420.321. In paragraph (a), the information about preparation of the notice of availability would be expanded to indicate where and to whom the notice should be provided. In paragraph (c), wording would be added to emphasize that mitigation and enhancement features associated with the selected alternative become enforceable conditions of any U.S. DOT actions.

#### *Section 1420.323 Re-evaluations*

Current § 771.129 would be redesignated as § 1420.323. Paragraphs (a) through (c) are essentially unchanged from the current regulation. Paragraph (d) has been added to ensure public involvement and interagency coordination when the situation warrants. Guidance will be provided on this subject. We invite comment on how effective the proposed reevaluation provision would be in addressing projects which are implemented over an extended period of time, with construction occurring under multiple contracts. We also invite comment on the appropriate role of public involvement in reevaluations.

#### *Section 1420.325 Supplemental Environmental Impact Statements*

Current § 771.130 would be redesignated as § 1420.325. It is essentially unchanged from the current regulation except that supplementation now includes consideration of public involvement and interagency coordination.

### **Section-by-Section Analysis of the Proposed Rule on Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites**

For ease of reference, a distribution table is provided for the current sections and proposed sections as follows:

Current Section	Proposed Section
None .....	1430.101 Purpose.
771.109(a)(1) and (2) and part of 771.135(b) .....	1430.105 Applicability.
771.135(a) .....	1430.103 Mandate.
771.135(c) and (e) .....	1430.109 Significance.
771.135(p)(1), (2), (4), and (7) .....	1430.107 Use of land.
771.135(d), (f), (g), (h), and (p)(5) .....	1430.111 Exceptions.
771.135(a)(2), part of (b), part of (i), (j), (k), (l), (p)(3), and (p)(6) .....	1430.113 Evaluations under NEPA.
771.135(m) and (o) .....	1430.115 Separate evaluations.
771.135(i)[last sentence] .....	1430.117 Programmatic evaluations.
771.135(o) .....	1430.119 Linkage to planning.
None .....	1430.121 Definitions.

#### *Section 1430.101 Purpose*

This new section would be added to state that this regulation implements 49 U.S.C. 303 and 23 U.S.C. 138 (section 4(f)).

#### *Section 1430.103 Mandate*

Current § 771.135(a)(1) would be redesignated as § 1430.103 without substantive change in text.

#### *Section 1430.105 Applicability*

Current §§ 771.109(a)(1) and (2) provide the basis for this proposed section. Also, part of § 771.135(b) would be incorporated to make clear that the

U.S. DOT agency decides the applicability of section 4(f).

#### *Section 1430.107 Use of Land*

Current § 771.135(p)(1), (2), (4), and (7) would be redesignated as § 1430.107 without substantive change.

#### *Section 1430.109 Significance of the Section 4(f) Resource*

Current § 135(c) and (e) would be redesignated as § 1430.109 without substantive change.

#### *Section 1430.111 Exceptions*

Current § 771.135(d), (g), (h), and (p)(5) would be redesignated as

§ 1430.111 without substantive change. The proposed section also incorporates the current § 771.135(f), except that the consultation requirement has been modified to be consistent with the new 36 CFR part 800 recently published by the Advisory Council on Historic Preservation. As proposed, the provision is silent with respect to the relationship between "adverse effects" under 36 CFR part 800 and "constructive use" under this regulation. We invite comment as to whether or not a specific relationship should be established in this regulation. We also invite comment as to other measures that we might take to better

coordinate the section 4(f) process with the process established under 36 CFR 800. The proposed section also has three new provisions in paragraphs (a), (b), and (c), stating that section 4(f) would not apply to park roads, parkways, trails, transportation enhancement activities, and transit enhancements where the purpose of the U.S. DOT agency approval of transportation funding is to improve the section 4(f) resource.

*Section 1430.113 Section 4(f) Evaluations and Determinations Under the NEPA Umbrella*

Current § 771.135(a)(2), (j), (k), (l), (p)(3), (p)(6), most of (i), and part of (b) would be redesignated as § 1430.113 without substantive change. The proposed section also would include a new provision in proposed paragraph (b) allowing consideration of the products of the planning process in the section 4(f) evaluation. Both the current and proposed regulation continue to codify in regulation language of the Supreme Court decision in *Overton Park* (401 U.S. 402 (1971)) that an avoidance alternative must be preferred unless the evaluation demonstrates that there are "unique problems or unusual features associated with it, or that the cost, the social, economical, or environmental impacts, or the community disruption resulting from such alternatives reach extraordinary magnitudes." We invite comment on whether or not this standard deserves further definition in regulation or in guidance in light of changes to the highway program in the years since the court's decision. In particular, we would appreciate views on whether or not the qualitative importance or value of the section 4(f) resource should be explicitly taken into account in determining whether or not an avoidance alternative is "feasible and prudent," especially when balancing the impacts of the various alternatives.

*Section 1430.115 Separate Section 4(f) Evaluations*

Current § 771.135(m) and (n) would be redesignated as § 1430.115 without substantive change.

*Section 1430.117 Programmatic Section 4(f) Evaluations*

The last sentence of current § 771.135(i) would be redesignated as § 1430.117, including a new explanatory introductory sentence. The proposed provision would provide a clear regulatory basis for programmatic section 4(f) evaluations and approvals, a practice which the Department of Transportation has used from time to time. For example, programmatic

section 4(f) evaluations have been prepared for the following situations: Bikeways, historic bridges, projects involving minimal use of property for historic properties and projects involving minimal use of parkland. We invite suggestions of additional situations that would be appropriate subjects of future programmatic section 4(f) evaluations.

*Section 1430.119 Linkage with Transportation Planning*

Current § 771.135(o) would be redesignated as § 1430.119 and would remain substantively unchanged except that the concept of a preliminary section 4(f) evaluation has been extended to the planning process in exactly the same way it previously applied to first-tier EISs.

*Section 1430.121 Definitions*

A new § 1430.121 would be added to provide a consistent set of definitions of terms used in the planning regulations (23 CFR part 1410), the NEPA regulation (23 CFR part 1420), and this regulation (23 CFR part 1430).

**Rulemaking Analyses and Notices**

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address or via the electronic addresses provided above. The FHWA and the FTA will file comments received after the comment closing date in the docket and will consider late comments to the extent practicable. The FHWA and the FTA may, however, issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA and the FTA will also continue to file in the docket relevant information becoming available after the comment closing date, and interested persons should continue to examine the docket for new material.

**Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

We have determined that this proposed action is a significant regulatory action within the meaning of Executive Order 12866, and under the Department of Transportation regulatory policies and procedures because of substantial State, local government, congressional, and public interest. These interests involve receipt of Federal financial support for transportation investments, appropriate compliance with statutory requirements,

and balancing of transportation mobility and environmental goals. We anticipate that the economic impact of this rulemaking will be minimal. Most costs associated with these rules are attributable to the provisions of the TEA-21, the ISTEA, the Clean Air Act (as amended), and other statutes including earlier highway acts.

We consider this proposal to be a means to simplify, clarify, and reorganize existing regulatory requirements. There have been no changes to NEPA or CEQ regulations. These rules would merely revise existing NEPA regulations of the FHWA and the FTA and conform those regulations to the environmental streamlining requirements of TEA-21. In response to congressional direction in TEA-21, the U.S. DOT is proposing to implement improved coordinated environmental review processes for highway and transit projects. States have been carrying out statewide transportation planning activities with title 23, U.S.C., and FTA planning and research funds for many years. Neither the individual nor the cumulative impact of this action would be significant because this action would not alter the funding levels available to the States for Federal or federally-assisted programs covered by the TEA-21.

The amendments impose no additional requirements. The environmental streamlining process under section 1309 of TEA-21 establishes coordinated environmental review processes by which U.S. DOT would work with other Federal agencies to assure that major highway and transit projects are advanced according to cooperatively determined time frames. Such processes have been incorporated into a memorandum of understanding between U.S. DOT and other Federal agencies.

**Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-602), we have evaluated the effects of this rule on small entities, such as local governments and businesses. The TEA-21 provides the flexibility for these agencies to provide the resources necessary to meet any time limits established under environmental streamlining. Additionally, the FHWA has issued guidance concerning transportation funding for Federal agency coordination using a full range of options for reimbursement under appropriate authorities. Accordingly, the FHWA and the FTA certify that this action would not have a significant economic impact on a substantial

number of small entities. This proposed action would merely update and clarify existing procedures. We specifically invite comments on the projected economic impact of this proposal, and will actively consider such information before completing our Regulatory Flexibility Act analysis when adopting final rules.

#### **Environmental Impacts**

We have also analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and preliminarily conclude that this action would not have any effect on the quality of the human and natural environment and is therefore categorically excluded under 23 CFR 771.117(c)(20). The TEA-21 directs the implementation of a coordinated environmental review process for highway construction projects, yet, also ensures that such concurrent review shall not result in a significant adverse impact to the environment or substantively alter the operation of Federal law. Time periods for review shall be consistent with time periods established by the Council on Environmental Quality under 40 CFR 1501.8 and 1506.10. As stated in the TEA-21, nothing in section 1309 (the environmental streamlining section) shall affect the applicability of NEPA or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute.

#### **Executive Order 13132 (Federalism Assessment)**

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined that this action does not have a substantial direct effect or sufficient Federalism implications on States and local governments that would limit the policymaking discretion of the States. Nothing in this document directly preempts any State law or regulation. The TEA-21 directs the DOT to establish an integrated NEPA review and permitting process and to encourage approvals as early as possible in the scoping and planning process, yet also to maintain an emphasis on a strong environmental policy. Throughout the proposed regulation there is an effort to keep administrative burdens to a minimum.

#### **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205,

Highway planning and construction (or 20.217, Motor Carrier Safety). The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

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

This rule does not impose a Federal mandate resulting in the expenditure by State, local, tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. (2 U.S.C. 1531 *et seq.*).

#### **Paperwork Reduction Act**

This proposal contains no new collection of information requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520. This notice of proposed rulemaking would encourage the coordination of approvals by Federal agencies involved in the NEPA process and could reduce the level of recordkeeping.

The information prepared by non-Federal parties pursuant to this proposed regulation is exempt from the requirements of the Paperwork Reduction Act. First, the collection of information does not entail reporting of information in response to identical questions. NEPA documents do not involve answering specific questions; they address issues relating to the requirements of multiple Federal environmental statutes. There are too many variables relating to the proposed action, the location in which the action is to be taken, and the statutes that are implicated (and to what extent) to permit a standardized format or content. The issues to be addressed in NEPA documents are therefore determined on a case by case basis. Each is a one of a kind document.

Second, the information is not requested of non-Federal entities but of Federal agencies. The State and local transportation departments and transit agencies compiling information are voluntarily serving as consultants to FHWA and FTA for their own convenience. As the proposers of the actions subject to NEPA, and the owners, operators, and maintainers of the resulting facility, and key decisionmakers regarding the choices involved in project development, it is easier for them to prepare the NEPA documents. Information is not requested of outside entities except within the PRA exception relating to "facts or opinions submitted in response from general solicitations of comments for the general public (5 CFR 1320.3(h)(4))."

Third, State and local departments of transportation and transit agencies develop this information reported to FHWA/FTA as a normal part of doing business. NEPA documents contain engineering and environmental information that is integral to developing projects in a way that conforms to State and local laws. The development of engineering and environmental information is an unavoidable step in project development whether or not the Federal government is involved. We invite comments on this analysis.

#### **Executive Order 12630 (Taking of Private Property)**

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### **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 13045 (Protection of Children)**

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to healthy or safety that may disproportionately affect children.

#### **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 771**

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

##### **23 CFR Part 1420**

Environmental impact statements, Grant programs—transportation, Highways and roads, Mass

transportation, Reporting and recordkeeping requirements.

#### 23 CFR Part 1430

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

#### 49 CFR Part 622

Environmental impact statements, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

#### 49 CFR Part 623

Environmental protection, Grant programs—transportation, Mass Transportation, Public lands, Recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

### Federal Highway Administration

#### 23 CFR Chapter I

For reasons set forth in the preamble, and under the authority of 23 U.S.C. 109, 128, 134, 138, and 315, the Federal Highway Administration proposes to amend Chapter I of title 23, Code of Federal Regulations, as follows:

#### PART 771—[REMOVED]

1. Remove part 771.

#### 23 CFR Chapter IV

For reasons set forth in the preamble, the Federal Highway Administration and the Federal Transit Administration propose to amend proposed Chapter IV in title 23, Code of Federal Regulations (published elsewhere in this **Federal Register**), as set forth below:

2. Add parts 1420 and 1430 to read as follows:

### PART 1420—NEPA AND RELATED PROCEDURES FOR TRANSPORTATION DECISIONMAKING

#### Subpart A—Purpose, Policy, and Mandate

Sec.

- 1420.101 Purpose.
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- 1420.403 Terms defined in this part.

**Authority:** 23 U.S.C. 109, 128, 134, 138 and 315; 42 U.S.C. 2000d–2000d–4, 4321 *et seq.*, and 7401 *et seq.*; 49 U.S.C. 303, 5301(e), 5303, 5309, and 5324 (b) and (c); 49 CFR 1.48, and 1.51; 33 CFR 115.60(b); 40 CFR parts 1500–1508.

#### Subpart A—Purpose, Policy, and Mandate

##### § 1420.101 Purpose.

The purpose of this part is to establish policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 (NEPA) as amended, and to supplement the regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508. In concert with 23 CFR 1410 this part sets forth a NEPA process that integrates and streamlines the compliance with all applicable transportation and environmental laws that govern Federal transportation decisionmaking.

##### § 1420.103 Relationship of this regulation to the CEQ regulation and other guidance.

The CEQ regulation lays out NEPA responsibilities for all Federal agencies. This FHWA/FTA regulation supplements the CEQ regulation with specific provisions regarding the FHWA/FTA approach to implementing NEPA for the Federal surface

transportation actions under their jurisdiction. For a full understanding of NEPA responsibilities relative to the FHWA/FTA actions, the reader must refer to both this regulation and the CEQ regulation. In addition, the FHWA/FTA will rely on nonregulatory guidance materials, training courses, and documentation of best practices in the management of their NEPA responsibilities. The available materials and training course schedules are posted on the FHWA and the FTA web sites and can be obtained by contacting Planning and Environment Program Manager, Federal Highway Administration, Washington, DC 20590 or Associate Administrator for Planning, Federal Transit Administration, Washington, DC 20590.

##### § 1420.105 Applicability of this part.

(a)(1) The provisions of this part and the CEQ regulation apply to actions where a U.S. DOT agency exercises sufficient control and has the statutory authority to condition the action or approval. Actions taken by the applicant or others that do not require any U.S. DOT agency approval or over which a U.S. DOT agency has no discretion, including, but not limited to, projects or maintenance on Federal-aid highways or transit systems not involving Federal-aid funds or approvals, and actions from which the U.S. DOT agency are excluded by law or regulation, are not subject to this part.

(2) This part does not apply to, or alter approvals by the U.S. DOT agencies made prior to the effective date of this part.

(3) NEPA documents accepted or prepared by the U.S. DOT agency after the effective date of this part shall be developed in accordance with this part.

(b) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the actions covered by each environmental impact statement (EIS) or environmental assessment (EA), or designated a categorical exclusion (CE) shall:

(1) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made;

(2) Connect logical termini, if linear in configuration, and be of sufficient length or size to address environmental matters over a sufficiently wide area that all reasonably foreseeable impacts are considered; and

(3) Not restrict consideration of alternatives for other reasonably

foreseeable transportation improvements.

#### **§ 1420.107 Goals of the NEPA process.**

(a) It is the intent of the U.S. DOT agencies that the NEPA principles of environmental stewardship and the Transportation Equity Act for the 21st Century (TEA-21) objective of timely implementation of transportation facilities and provision of transportation services should guide Federal, State, local, and tribal decisionmaking on all transportation actions subject to these laws. Accordingly, in administering their responsibilities under numerous transportation and environmental laws, the U.S. DOT agencies will manage the NEPA process to maximize attainment of the following goals:

(1) *Environmental ethic.* Federal actions reflect concern for, and responsible choices that preserve, communities and the natural environment, in accordance with the purpose and policy direction of NEPA (42 U.S.C. 4321 and 4331), and the specific mandates of statutes, regulations, and executive orders.

(2) *Environmental justice.* Disproportionate adverse effects on minority and low income populations are identified and addressed; no person, because of handicap, age, race, color, sex, or national origin, is excluded from participating in, denied the benefits of, or subject to discrimination under any U.S. DOT agency program or activity conducted in accordance with this regulation.

(3) *Integrated decisionmaking.* Federal transportation approvals are coordinated in a logical fashion with other Federal reviews and approvals, and with State, local, and tribal governmental actions, and actions by private entities, in recognition of interdependencies of decisions by the various parties and the procedural umbrella that the NEPA process provides for facilitating decisionmaking.

(4) *Environmental streamlining.* Federal transportation and environmental reviews and approvals are completed in a timely fashion through a coordinated review process.

(5) *Collaboration.* Transportation decisions are made through a collaborative partnership involving Federal, State, local, and tribal agencies, communities, interest groups, private businesses, and interested individuals.

(6) *Transportation problem solving.* Transportation decisions represent cost effective solutions to current and future problems based on an interdisciplinary evaluation of alternative courses of action.

(7) *Financial stewardship.* Public funds are used to achieve the maximum benefit for the financial investment in accordance with governing statutes and regulations.

#### **§ 1420.109 The NEPA umbrella.**

(a) In keeping with the above goals, it is the policy of the FHWA/FTA that the NEPA process be the means of bringing together all legal responsibilities, issues, and interests relevant to the transportation decision in a logical way to evaluate alternative courses of action, and that it lead to a single final decision regarding the key characteristics of a proposed action (such as, location, major design features, mitigation measures, and environmental enhancements). This decision shall be made in the best overall public interest based on a balanced consideration of the need for safe and efficient transportation; the social, economic, and environmental benefits and impacts of the proposed action; and the attainment of national, State, tribal, and local environmental protection goals.

(b) Any environmentally related study, review, or consultation required by Federal law should be conducted within the framework of the NEPA process to assure integrated and efficient decisionmaking. The State is encouraged to conduct its activities during the NEPA process toward the same goal.

(c) Federal responsibilities to be addressed in the NEPA process whenever applicable to the decision on the proposed action include, but are not limited to the following protections of:

##### **(1) Individual rights:**

(i) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) and related statutes;

(ii) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*), as amended;

(iii) Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*);

(iv) 49 U.S.C. 5332,

nondiscrimination;

(v) 49 U.S.C. 5324(a), relocation requirements;

(vi) 23 U.S.C. 128 and 49 U.S.C. 5323(b), public hearing requirements;

##### **(2) Communities and community resources:**

(i) Executive Order 12898 (59 FR 7629, 3 CFR, 1995 comp., p. 859), environmental justice for minority and low-income populations;

(ii) 49 U.S.C. 303, protection of public parks and recreation areas;

(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;

(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;

(v) 23 U.S.C. 109(i), highway noise standards;

(vi) Clean Air Act (23 U.S.C. 109(j), 42 U.S.C. 7509 and 7521(a) *et seq.*), as amended;

(vii) Safe Drinking Water Act (42 U.S.C. 201 and 300);

(viii) Farmland Protection Policy Act of 1981 (7 U.S.C. 4201-4209);

(ix) National Flood Insurance Act (42 U.S.C. 1401, 2414, 4001 to 4127);

(x) Solid Waste Disposal Act (Public Law 89-272; 42 U.S.C. 6901 *et seq.*);

(xi) Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 *et seq.*);

(xii) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*);

(xiii) Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. 11001 to 11050);

(3) *Cultural resources and aesthetics:*  
(i) 49 U.S.C. 303, protection of historic sites;

(ii) National Historic Preservation Act (16 U.S.C. 470 *et seq.*);

(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;

(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;

(v) 23 U.S.C. 109(i), highway noise standards;

(vi) Clean Air Act (23 U.S.C. 109(j), 42 U.S.C. 7509 and 7521(a) *et seq.*), as amended;

(vii) Safe Drinking Water Act (42 U.S.C. 201 and 300);

(viii) Farmland Protection Policy Act of 1981 (7 U.S.C. 4201-4209);

(ix) National Flood Insurance Act (42 U.S.C. 1401, 2414, 4001 to 4127);

(x) Solid Waste Disposal Act (Public Law 89-272; 42 U.S.C. 6901 *et seq.*);

(xi) Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 *et seq.*);

(xii) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*);

(xiii) Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. 11001 to 11050);

(3) *Cultural resources and aesthetics:*  
(i) 49 U.S.C. 303, protection of historic sites;

(ii) National Historic Preservation Act (16 U.S.C. 470 *et seq.*);

(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;

(iv) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;

(v) Archeological and Historic Preservation Act (16 U.S.C. 469);

(vi) Archeological Resources Protection Act (16 U.S.C. 470aa to 47011);

(vii) Act for the Preservation of American Antiquities (16 U.S.C. 431 to 433);

(viii) American Indian Religious Freedom Act (42 U.S.C. 1996 *et seq.*);

(ix) Native American Grave Protection and Repatriation Act (25 U.S.C. 3001 to 3013);

(x) 23 U.S.C. 144(o), historic bridges;

(xi) 23 U.S.C. 530, wildflowers;

(xii) 23 U.S.C. 131, 136, 319, highway beautification;

(4) *Waters and water-related resources:*

(i) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;

(ii) 49 U.S.C. 5324(b), economic, social, and environmental effects of transit;

(iii) Federal Water Pollution Act, as amended (33 U.S.C. 1251 to 1376);

(iv) Wild and Scenic Rivers Act (16 U.S.C. 1271 to 1287);

(v) Land and Water Conservation Fund Act of 1965 (16 U.S.C. 460);

(vi) Water Bank Act (16 U.S.C. 1301 to 1311);

(vii) Executive Order 11990 (42 FR 26961; 3 CFR, 1977 comp., p. 121), protection of wetlands;

(viii) Emergency Wetlands Resources Act of 1986 (16 U.S.C. 3921 to 3931);

(ix) Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*);

(x) Executive Orders 11988 (42 FR 26951; 3 CFR, 1977 comp., p. 1171) and 12148 (44 FR 43239; 3 CFR, 1979 comp., p. 412), floodplain management;

(5) *Wildlife, plants and natural areas:*

(i) Endangered Species Act of 1973 (7 U.S.C. 136, 16 U.S.C. 1531 to 1543);

(ii) 49 U.S.C. 303, protection of wildlife and waterfowl refuges;

(iii) 23 U.S.C. 109(h), economic, social, and environmental effects of highways;

(iv) 9 U.S.C. 5324(b), economic, social, and environmental effects of transit;

(v) Marine Protection Research and Sanctuaries Act of 1972 (16 U.S.C. 1431 to 1445, 33 U.S.C. 1401 to 1445);

(vi) Fish and Wildlife Coordination Act (16 U.S.C. 661 to 666);

(vii) Wilderness Act (16 U.S.C. 1131 to 1136);

(viii) Wild and Scenic Rivers Act (16 U.S.C. 1271 to 1287);

(ix) Coastal Zone Management Act of 1972 (16 U.S.C. 1451 to 1464);

(x) Coastal Barrier Resources Act (16 U.S.C. 3501 to 3510, 42 U.S.C. 4028);

(xi) National Trails System Act (16 U.S.C. 1241 to 1249);

(xii) Executive Order 13112 (64 FR 6183), Invasive Species.

#### **§ 1420.111 Environmental justice.**

(a) In accordance with the goals established in Executive Order 12898, as implemented by DOT Order 5610.2 and the FHWA Order 6640.23,<sup>1</sup> and the requirements of the Civil Rights Act of 1964, Title VI, and its implementing regulations, proposed actions shall be developed in a manner to avoid or mitigate disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, on low income populations and minority populations. Adverse effects can include a denial of or reduction in benefits.

(b) In performing an environmental analysis of proposed actions, applicants must analyze data necessary to determine whether the actions will have disproportionately high and adverse effects on low income and minority communities. When disproportionately high and adverse effects are found, the applicant must identify measures to address these disproportionate effects, including actions to avoid or mitigate them, or it must explain and justify why such measures cannot be taken.

(c) The findings and determinations made pursuant to paragraphs (a) and (b) of this section must be documented as part of the NEPA document prepared for the proposed action, or in a supplemental document if the NEPA process has been completed.

(d) In accordance with Executive Order 12898, DOT Order 5610.2, and the FHWA Order 6640.23, nothing in this section is intended to, nor shall create, any right to judicial review of any action taken by the agency, its officers or its recipients taken under this section to comply with such Orders.

#### **§ 1420.113 Avoidance, minimization, mitigation, and enhancement responsibilities.**

(a) In accordance with the goals established in § 1420.107, it is the policy of the FHWA and the FTA that proposed actions be developed as described in this section, to the fullest extent practicable. For the purposes of this section, "practicable" means a common sense balancing of environmental values with safety, transportation need, costs, and other relevant factors in decisionmaking. No additional findings or paperwork are required.

(1) Adverse social, economic, and environmental impacts to the affected

human communities and the natural environment should be avoided.

(2) Where adverse impacts cannot be avoided, proposed measures should be developed to minimize adverse impacts.

(3) Measures necessary to mitigate unavoidable adverse impacts be incorporated into the action, or should be part of a mitigation program completed in advance of the action.

(4) Environmental enhancements should be evaluated and incorporated into the action as appropriate.

(b) Mitigation measures and environmental enhancements shall be eligible for Federal funding to the fullest extent authorized by law.

(c) NEPA commitments.

(1) It shall be the responsibility of the applicant in cooperation with the U.S. DOT agency to implement those mitigation measures and environmental enhancements, stated as commitments in the final EIS/ROD, EA/FONSI, or CE prepared or supplemented pursuant to this regulation, unless the commitment is modified or eliminated in a supplemental final EIS/ROD, EA/FONSI or CE, or re-evaluation approved by the U.S. DOT agency.

(2) If a final EIS/ROD, EA/FONSI, CE, or other U.S. DOT agency approval commits to coordination with another agency during the final design and construction phase, or during the operational phase of the action, the applicant is responsible for such coordination, unless the commitment is removed in a supplemental final EIS/ROD, EA/FONSI or CE, or re-evaluation approved by the U.S. DOT agency.

#### **Subpart B—Program and Project Streamlining**

##### **§ 1420.201 Relationship of planning and project development processes.**

(a) The planning products described in § 1410.318 shall be considered early in the NEPA process. The FTA and the FHWA encourage all Federal, State and local agencies with project level responsibilities for investments included in a transportation plan to participate in the planning process so as to maximize the usefulness of the planning products for the NEPA process and eliminate duplication.

(b) Applicants preparing documents under this part shall, to the maximum extent useful and practicable, incorporate and utilize analyses, studies, documents, and other sources of information developed during the transportation planning processes of 23 CFR part 1410 and other planning processes in satisfying the requirements of the NEPA process. The provisions of 40 CFR 1502.21 (incorporation by reference) will be used as appropriate.

<sup>1</sup> These documents are available for inspection and copying as prescribed at 49 CFR part 7.

(c) During scoping for an EIS or early coordination for an environmental assessment, the U.S. DOT agency and the applicant shall, in consultation with the transportation planning agencies responsible for inclusion of the project in the metropolitan (if applicable) and statewide plan and program, review the record of previously completed planning activities, including any existing statement of purpose and need and evaluation of alternatives. Where the U.S. DOT agency, in cooperation with the applicant, determines that planning decisions are adequately supported, the detailed evaluation of alternatives required under § 1420.313(b) or § 1420.317(c) may be limited to the no action and reasonable alternatives requiring further consideration. In deciding which of the evaluations and conclusions of the planning process are adequately supported and may be incorporated during the NEPA process, the U.S. DOT agency and the applicant shall take into account the following:

- (1) The validity and completeness of the supporting analyses,
- (2) The public involvement process associated with those planning products,
- (3) The degree of coordination with Federal, State, and local resource agencies with interest in or authority over the ultimate action(s); and
- (4) The level of formal endorsement of the analyses and conclusions by participants in the planning process.

#### **§ 1420.203 Environmental streamlining.**

(a) For highway and mass transit projects requiring an environmental impact statement, an environmental assessment, or an environmental review, analysis, opinion, or environmental permit, license, or approval by operation of Federal law, as lead Federal agency, the U.S. DOT agency, in cooperation with the applicant, shall perform the following:

- (1) Consult with the applicant regarding the issues involved, the likely Federal involvement, and project timing.
- (2) Early in the NEPA process, contact Federal agencies likely to be involved in the proposed action to verify the nature of their involvement and to discuss issues, methodologies, information requirements, time frames and constraints associated with their involvement.
- (3) Identify and use the appropriate means listed in 40 CFR 1500.4 and 1500.5 for reducing paperwork and reducing delay.
- (4) Document the results of such consultation and distribute to the

appropriate Federal agencies for their concurrence, identifying at a minimum the following:

- (i) Federal reviews and approvals needed for the action,
  - (ii) Those issues to be addressed in the NEPA process and those that need no further evaluation,
  - (iii) Methodologies to be employed in the conduct of the NEPA process,
  - (iv) Proposed agency and public involvement processes, and
  - (v) A process schedule.
- (5) Identify, during the course of completing the NEPA process, points of interagency disagreement causing delay and immediately take informal measures to resolve or reduce delay. If these measures are not successful in a reasonable time, the U.S. DOT agency shall initiate a dispute resolution process pursuant to section 1309 of the TEA-21.

(b) A State may request that all State agencies with environmental review or approval responsibilities be included in the coordinated environmental review process and, with the consent of the U.S. DOT agency, establish an appropriate means to assure that Federal and State environmental reviews and approvals are fully coordinated.

(c) At the request of the applicant, the coordinated environmental review process need not be applied to an action not requiring an environmental impact statement.

(d) In accordance with the CEQ regulations on reducing paperwork (40 CFR 1500.4), NEPA documents prepared by DOT agencies need not devote paper to impact areas and issues that are not implicated in the proposed action and need not make explicit findings on such issues.

#### **§ 1420.205 Programmatic approvals.**

(a) Nothing in this part shall prohibit the U.S. DOT agency from making approvals which apply to future actions consistent with the conditions established for such programmatic approvals.

(b) Applicants shall cooperate with the U.S. DOT agency in conducting program evaluations to ensure that such programmatic approvals are being properly applied.

#### **§ 1420.207 Quality assurance process.**

(a) The FHWA and the FTA shall institute a process to assure that actions subject to this part meet or exceed legal requirements and are processed in a timely manner.

(b) For actions processed with an environmental impact statement, this process shall include a legal sufficiency review and may require the prior

concurrence of the Headquarters office in accordance with procedures established by the FTA and the FHWA.

#### **§ 1420.209 Alternate procedures.**

(a) An applicant may propose to the U.S. DOT agency alternative procedures for complying with the intent of this part with respect to its actions.

(b) The U.S. DOT agency shall publish such alternative procedures in the **Federal Register** for notice and comment and shall consult with the CEQ pursuant to 40 CFR 1507.3.

(c) After taking into account comments received, and negotiating with the applicant appropriate changes to such alternative procedures, the U.S. DOT agency shall approve such alternative procedures only after making a finding that the alternative procedures will be fully effective at complying with NEPA and related responsibilities.

#### **§ 1420.211 Use of this part by other U.S. DOT agencies.**

As authorized by the Secretary, other U.S. DOT agencies may use this part for specific actions or categories of actions under their jurisdiction.

#### **§ 1420.213 Emergency action procedures.**

Requests for deviations from the procedures in this part because of emergency circumstances shall be referred to the U.S. DOT agency for evaluation and decision in consultation with the CEQ in accordance with 40 CFR 1506.11.

### **Subpart C—Process and Documentation Requirements**

#### **§ 1420.301 Responsibilities of the participating parties.**

(a) The CEQ regulation establishes rules for lead agencies (40 CFR 1501.5) and cooperating agencies (40 CFR 1501.6). It also encourages Federal agencies to cooperate with State and local agencies to eliminate duplication (40 CFR 1506.2) and defines the relationship between Federal agencies, applicants, and contractors (40 CFR 1506.5).

(b) For actions on Federal lands that are developed directly by the U.S. DOT agency in cooperation with the Federal land management agency, responsibilities for management of the NEPA process shall be as established by interagency agreement or procedure.

(c) Use of contractors.

(1) The U.S. DOT agency or an applicant may select and use contractors, in accordance with applicable contracting procedures, and the provisions of 40 CFR 1506.5(c), in support of their respective roles in the NEPA process. An applicant which is a

State agency with statewide jurisdiction may select a contractor to assist in the preparation of an EIS. Where the applicant is not a State agency with statewide jurisdiction, the applicant may select a contractor, after coordination with the U.S. DOT agency to assure compliance with 40 CFR 1506.5(c) relative to conflict of interest. Contractors that have a role in the actual writing of a NEPA document shall execute a disclosure statement in accordance with 40 CFR 1506.5(c), specifying that such contractor has no financial or other interest in the outcome of the action (other than engineering with the exception allowed by paragraph (c)(2) of this section, if applicable), and will not acquire such an interest prior to the approval of the final NEPA document by the U.S. DOT agency or the termination of the contractor's involvement in writing the NEPA document, whichever occurs first.

(2) A State may procure the services of a consultant, under a single contract, for environmental impact assessment and subsequent engineering and design work, provided that the State conducts a review that assesses the objectivity of the NEPA work in accordance with the provisions of 23 U.S.C. 112(g).

#### **§ 1420.303 Interagency coordination.**

(a) Interagency coordination during the NEPA process involves the early and continuing exchange of information with interested Federal, State, local public agencies, and tribal governments. Interagency coordination should begin early as part of the planning process and continue through project development, the preparation of an appropriate NEPA document, and, by agreement, into the implementation stage of the action. Interested agencies include those that express a continuing interest in any aspect of the actions during the planning process and project development processes. They include those agencies whose jurisdiction, responsibilities, or expertise may involve any aspect of the action or its alternatives. The purpose of interagency coordination is to aid in determining the class of action, the scope of the NEPA document, the identification of key issues, the appropriate level of analysis, methods of avoidance, minimization, and mitigation of adverse impact, opportunities for environmental enhancement, and related environmental requirements. Coordination early in the NEPA process must extend beyond agencies consulted during the planning process to those agencies whose interest begins only when preliminary designs of alternative

actions are being developed. The appropriate frequency and timing of coordination with a particular agency will depend on the interests of the agency consulted.

(b) Federal land management entities, neighboring States, and tribal governments, that may be significantly affected by the action or by any of the alternatives shall be notified early in the NEPA process and their views solicited by the applicant in cooperation with the U.S. DOT agency.

(c) Upon U.S. DOT agency written approval of an EA, FONSI, separate section 4(f) determination, or CE designation, the applicant shall send a notice of availability of the approved document, or a copy of the approved document itself, to the affected units of Federal, State, and local government. The notice shall briefly describe the action and its location and impacts. Cooperating agencies shall be provided a copy of the approved document.

#### **§ 1420.305 Public involvement.**

(a) The applicant must have a continuing program of public involvement which actively encourages and facilitates the participation of transportation and environmental interest groups, citizens groups, private businesses, and the general public including minority and low income populations through a wide range of techniques for communicating and exchanging information. The applicant shall use the products of the public involvement process developed during planning pursuant to 23 CFR 1410.212 and 1410.316, whenever such information is reasonably available and relevant, to provide continuity between the public involvement programs.

(b) Each applicant developing projects under this part must adopt written procedures to carry out the public involvement requirements of this section and 40 CFR 1506.6, and, as appropriate, 23 U.S.C. 128, and 49 U.S.C. 5323(b) and 5324(b). The applicant's public involvement procedures shall apply to all classes of action as described in § 1420.309 and shall be developed in cooperation with other transportation agencies with jurisdiction in the same area, so that, to the maximum extent practicable, the public is presented with a consistent set of procedures that do not vary with the transportation mode of the proposed action or with the phase of project development. Where two or more involved parties have separate established procedures, a cooperative process for determining the appropriate public involvement activities and their consistency with the separate agency's

procedures will be cooperatively established.

(c) Public involvement procedures must provide for the following:

(1) Coordination of public involvement activities with the entire NEPA process and, when appropriate, with the planning process. The procedures also must provide for coordination and information required to comply with public involvement requirements of other related laws, executive orders, and regulations;

(2) Early and continuing opportunities for the public to be informed about, and involved in the identification of social, economic, and environmental impacts and impacts associated with relocation of individuals, groups, or institutions;

(3) The use of an appropriate variety of public involvement activities, techniques, meeting and hearing formats, and notification media;

(4) A scoping process that satisfies the requirements of 40 CFR 1501.7;

(5) One or more public hearings or the opportunity for hearing(s) to be held at a convenient time and place that encourage public participation, for any project which requires the relocation of substantial numbers of people, substantially changes the layout or functions of connecting transportation facilities or of the facility being improved, has a substantial adverse impact on abutting property, substantially affects a community or its mass transportation service, otherwise has a substantial social, economic, environmental or other effect, or for which the U.S. DOT agency determines that a public hearing is in the public interest;

(6) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing where a hearing is determined appropriate. Such notice shall indicate the availability of explanatory information;

(7) Where appropriate, the submission to the U.S. DOT agency of a transcript of each public hearing and a certification (pursuant to 23 U.S.C. 128 or 49 U.S.C. 5324(b)(2)) that a required hearing or hearing opportunity was offered. The transcript should be accompanied by copies of all written statements from the public, submitted either at the public hearing or during an announced period after the public hearing;

(8) Specific procedures for complying with the public and agency involvement and notification requirements for the following: EAs, Findings of no significant impact (FONSI), Draft EISs, Final EISs, and Records of decision (ROD);

(9) Reasonable accommodations for participation by persons with disabilities, including, upon request, the provision of auxiliary aids and services for understanding speakers at meetings and environmental documents.

(d) Where a re-evaluation of NEPA documents is required pursuant to § 1420.323, the U.S. DOT agency and the applicant will determine whether changes in the project or new information warrant additional public involvement.

(e) A minimum public comment period of 45 days shall be provided prior to the initial adoption or substantial revision of public involvement procedures.

(f) Public involvement procedures in effect as of the date of this part remain valid, but will be reviewed periodically for effectiveness.

#### **§ 1420.307 Project development and timing of activities.**

(a) The FHWA and/or the FTA will not approve the initiation and will not authorize funding for final design activities, property acquisition (except the types of advance land acquisitions described in § 1420.311(d)(16)), purchase of construction materials or transit vehicles, or construction, until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion (CE), or  
(ii) A FONSI has been approved, or  
(iii) A final EIS has been approved, made available for the prescribed period of time, and a record of decision has been signed;

(2) The U.S. DOT agency has received transcripts of public hearings held, and any required certifications that a hearing or opportunity for a hearing was provided; and

(3) The planning and programming requirements of 23 CFR part 1410 have been met.

(b) Before completion of the NEPA document, if it becomes apparent that the preferred alternative will not be consistent with the design concept and scope of the action identified in the relevant plan and TIP, the applicant shall immediately notify the State agency responsible for the State TIP, and, in metropolitan areas, the MPO, so that the planning and programming requirements of 23 CFR part 1410 can be satisfied prior to the approval of a final EIS, Record of Decision, FONSI or CE.

(c) Compliance with the requirements of all applicable environmental laws, regulations, executive orders, and other related requirements as set forth in § 1420.109 should be completed prior to the approval of the final EIS, FONSI, or the CE designation. If full compliance is

not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. However, full compliance with the U.S. EPA's conformity regulation at 40 CFR parts 51 and 93 is required prior to the approval of the ROD, FONSI or CE designation. Approval of the NEPA document constitutes adoption of DOT agency findings and determinations that are contained therein unless otherwise specified. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128. The FTA approval of the appropriate NEPA document indicates compliance with 49 U.S.C. 5324(b) and fulfillment of the grant application requirements of 49 U.S.C. 5323(b), if such requirements are applicable to the action.

(d) The completion of the requirements set forth in this section is considered the U.S. DOT agency's acceptance of the location of the action and design concepts described in the NEPA document unless otherwise specified by the approving official. However, such acceptance does not commit the U.S. DOT agency to approve any future grant request to fund the preferred alternative.

#### **§ 1420.309 Classes of actions.**

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

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

(3) New construction or major extension of fixed rail transit facilities (e.g., rapid rail, light rail, automated guideway transit).

(4) New construction or major extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(5) New construction or major extension of an intercity railroad not located within existing railroad right-of-way.

(6) A multimodal or intermodal facility that includes or requires any of the other Class I actions.

(b) Class II (Categorical Exclusions). Actions that do not individually or cumulatively have a significant environmental impact are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is

set forth in § 1420.311(c). Additional actions not listed may be designated as CEs pursuant to § 1420.311(d), if documented environmental studies demonstrate that the action would not, either individually or cumulatively, have a significant environmental impact.

(c) Class III (EAs). Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate, subsequent NEPA document (i.e., Findings of no significant impact or EIS).

#### **§ 1420.311 Categorical exclusions.**

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

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

(1) Unique environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by 49 U.S.C. 303 (section 4(f)) or section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulation (40 CFR 1508.4) and § 1420.311(a) of this regulation. If other environmental laws (i.e., those listed in § 1420.109(c)) do not apply to the action, then it does not require any further NEPA approval by the U.S. DOT agency. If the U.S. DOT agency is not sure of the applicability of one of these CEs or of other environmental laws to a particular proposed action, the applicant will be

required to provide supporting documentation in accordance with paragraph (d) of this section. The following are CEs:

(1) Activities which do not involve or lead directly to construction, such as program administration (e.g., personnel actions, procurement of consulting services or office supplies); the promulgation of rules, regulations, directives, and legislative proposals; planning and technical studies; technical assistance activities; training and research programs; technology transfer activities; research activities as defined in 23 U.S.C. 501–507; archaeological planning and research; approval of a unified planning work program; development and establishment of management systems under 23 U.S.C. 303; approval of project concepts under 23 CFR part 476; preliminary engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; Federal-aid system revisions which establish classes of highways; and designation of highways to the National Highway System.

(2) Modernization of a highway by resurfacing.

(3) Routine maintenance or minor rehabilitation of existing transportation facilities, including pavements, tracks, railbeds, bridges, structures, stations, terminals, maintenance shops, storage yards, and buildings, that occurs entirely on or within the facility, where there is no change in the character and use of the facility, and no substantial disruption of service or traffic; purchase of associated capital maintenance items; preventive maintenance of transit facilities, vehicles, and other equipment.

(4) Incorporation of an Intelligent Transportation Systems (ITS) element into an existing transportation facility or service, including the development, purchase, installation, maintenance, improvement, and operation of a traveler information system, incident management and emergency response system, traffic management and control system, security system, or MAYDAY system that enables public agencies to detect and respond to emergency situations.

(5) Activities included in the State's highway safety program under 23 U.S.C. 402; enforcement of railroad safety regulations, including the issuance of emergency orders.

(6) Improvement of existing rest areas, toll collection facilities, truck weigh stations, traffic management and control centers, and vehicle emissions testing centers where no substantial land

acquisition or traffic disruption will occur.

(7) Carpool and vanpool projects, as defined in 23 U.S.C. 146, if no substantial land acquisition or traffic disruption will occur.

(8) Emergency repairs of highways, roads and trails under 23 U.S.C. 125; emergency repair of transit or railroad facilities after a natural disaster or catastrophic failure.

(9) Operating assistance to transit agencies.

(10) Acquisition of buses, rail vehicles, paratransit vehicles, and transit-support vehicles, where the use of these vehicles can be accommodated by existing facilities or by new facilities which are themselves CEs.

(11) Purchase or installation of operating or maintenance equipment to be located within an existing transportation facility with no significant impacts off the site; lease of existing facilities, vehicles, or other equipment for use in providing transit services; capital cost of contracting for transit services.

(12) Bus and rail car rehabilitation, including the retrofit or replacement of vehicles for alternative fuels, where the use of these vehicles can be accommodated by existing facilities or new facilities which are themselves CEs.

(13) Improvement of existing tracks, railbeds, communications systems, signal systems, security systems, and electrical power systems when carried out within the existing right-of-way without substantial service disruption.

(14) Construction of bicycle and pedestrian lanes, paths, and facilities within existing transportation facilities or right-of-ways; installation of equipment for transporting bicycles on transit vehicles.

(15) Alterations to transportation facilities or vehicles in order to make them accessible by persons with disabilities.

(16) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, lighting, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(17) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action; approvals of disposals of excess right-of-way; transfer of surplus assets, in accordance with 49 U.S.C. 5334(g); approval of utility installations along or across a transportation facility.

(18) Landscaping, streetscaping, public art and other scenic beautification; control and removal of outdoor advertising; acquisition of scenic easements and scenic or historic

sites for the purpose of preserving the site.

(19) Installation of noise barriers or other alterations to existing facilities to provide for noise reduction; alterations to existing non-historic buildings to provide for noise reduction.

(20) Contributions to statewide or regional efforts to conserve, restore, enhance, and create wetlands or wildlife habitats.

(d) Additionally, for individual proposed actions to be categorically excluded under this section, the applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied, that significant environmental effects will not result, that the applicant's public involvement process is consistent with the procedures adopted pursuant to § 1420.305, that any appropriate interagency coordination has occurred, and that any other applicable environmental laws (e.g., those listed in § 1420.109(c)) have been satisfied. This demonstration may require investigations of specific areas of impact to determine whether the CE criteria are satisfied. If the DOT agency is not certain that the appropriateness of the CE has been demonstrated, additional documentation or an EA or EIS will be required of the applicant. Examples of actions for which a CE demonstration may be possible include, but are not limited to:

(1) Modernization of a highway through restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing lanes), or travel lanes in the median of an existing facility, including any such action necessary to accommodate other transportation modes on an existing facility.

(2) Transportation operational improvements, including those that use ITS, such as, freeway surveillance and control systems, traffic signal monitoring and control systems, transit management systems, electronic fare payment systems, and electronic toll collection systems.

(3) Transportation safety improvements and programs; hazard eliminations, including construction of grade separation to replace existing highway-railway grade crossings; projects to mitigate hazards caused by wildlife; and seismic retrofit of existing transportation facilities or structures.

(4) Rehabilitation or reconstruction of tunnels, bridges, and other structures, and the approaches thereto.

(5) Modification or replacement of an existing bridge on essentially the same alignment or location.

(6) Construction of parking facilities or carpool and vanpool projects that involve land acquisition and construction.

(7) Construction of new buildings to house transportation management and control centers, carpool and vanpool operations centers, or vehicle emissions testing centers.

(8) Construction of new rest areas, toll collection facilities, truck weigh stations or auto emissions testing or safety testing facilities.

(9) Approvals for changes in highway access control.

(10) Improvement of existing tracks, railbeds, communications systems, signal systems, security systems, and electrical power systems, including construction of sidings or passing tracks; extension or expansion of rail electrification on existing, operating rail lines.

(11) Construction of new bus or rail storage and maintenance facilities in undeveloped areas or areas used predominantly for industrial or transportation purposes, where such facility is compatible with existing zoning, the site is located on or near a street with adequate capacity to handle anticipated traffic, and there is no significant air or noise impact on the surrounding community.

(12) Renovation, reconstruction, or improvement of existing rail, bus, and intermodal buildings and facilities, including conversion to use by alternative-fuel vehicles.

(13) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) or intermodal transfer facilities, when located in a commercial area or other high activity center in which there is adequate street capacity for projected traffic.

(14) Rehabilitation, renovation, or improvement of existing ferry terminals, piers, and facilities.

(15) Short-term demonstrations of rail service on existing tracks.

(16) An acquisition of land or property interests that meets the criteria of paragraph (d)(16)(i), (ii) or (iii) of this section may be evaluated against the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section separately from any planned action that would use the land or property interests. Any subsequent action that would use the acquired right-of-way or property interests and would require a DOT agency action must be separately reviewed in accordance with this part prior to any construction on, or change in the land.

The following types of acquisitions may qualify as CEs:

(i) Acquisition of an existing transportation right-of-way which is linear in its general configuration and is not publicly owned, such as a railroad or a private road, for the purpose of either maintaining preexisting levels of transportation service on the facility or of preserving the right-of-way for a future transportation action or transportation enhancement activity.

(ii) Acquisition of land, easements, or other property interests with the intent of preserving alternatives for a future transportation action, where the following conditions are met: The transportation action that would use the land or property interests has been specifically included in a transportation plan for the area adopted pursuant to 23 CFR part 1410 and such plan has been found by the U.S. DOT agency to conform to air quality plans in accordance with 40 CFR parts 51 and 93, if applicable; and the acquisition will not limit the evaluation of alternatives to the planned action that would use the land or property interests including shifts in alignment that may be required.

(iii) Acquisition of land or property interests for hardship or protective purposes where the following conditions are met: The transportation action that would use the land or property interests has been specifically included in a transportation plan for the area adopted pursuant to 23 CFR part 1410 and such plan has been found by the U.S. DOT agency to conform to air quality plans in accordance with 40 CFR parts 51 and 93, if applicable; the hardship and protective buying will be limited to a particular parcel or a small number of parcels related to the planned transportation action; and the acquisition will not limit the evaluation of alternatives to the planned action that would use the land or property interests, including shifts in alignment that may be required.

(17) Approvals for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(18) Construction of a bicycle transportation facility on its own, new right-of-way.

(19) Mitigation of water pollution due to storm water runoff from transportation facilities.

(20) Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad or bus facilities and canals).

(21) Transportation enhancement activities and transit enhancements

defined in 23 U.S.C. 101 and 49 U.S.C. 5302.

#### **§ 1420.313 Environmental assessments.**

(a) An EA shall be prepared by the applicant in consultation with the U.S. DOT agency for each action(s) that is not a CE and does not clearly require the preparation of an EIS, or where the U.S. DOT agency believes an EA would assist in determining the need for an EIS.

(b) The EA shall evaluate the social, economic, and environmental impacts of the proposed action, reasonable alternatives that would avoid or reduce adverse impacts, measures which would mitigate adverse impacts, and environmental enhancements if any that would aid in harmonizing the action with the surrounding community. The EA shall discuss compliance with other related environmental laws, regulations, and executive orders.

(c) The EA is subject to U.S. DOT agency approval before it is made available to the public as a U.S. DOT agency document.

(d) For actions that require an EA, the applicant, in consultation with the U.S. DOT agency, shall do the following:

(1) Conduct interagency coordination in accordance with § 1420.303, beginning at the earliest appropriate time, to advise agencies of the proposed action and to achieve the following objectives: Determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might avoid or mitigate adverse impacts; identify environmental enhancements that might aid in harmonizing the action with the surrounding community; and identify other environmental review and coordination requirements which should be performed concurrently with the EA. The results of interagency coordination to the time of EA approval by the U.S. DOT agency shall be included in the EA.

(2) Provide for public involvement in accordance with the procedures established pursuant to § 1420.305. Public involvement to the time of EA approval by the U.S. DOT agency shall be summarized in the EA.

(e) The EA need not be circulated for comment but the document must be made available for inspection in public places readily accessible to the affected community in accordance with paragraphs (f) and (g) of this section. Notice of availability of the EA, briefly describing the action(s) and its impacts, or a copy of the EA, shall be sent by the applicant to the affected units of Federal, State and local government.

(f) When, in accordance with the public involvement procedures established pursuant to § 1420.305, a public hearing on an action evaluated in an EA is held, the following shall occur:

(1) The EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing.

(2) The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed.

(3) Pursuant to 40 CFR 1501.4(c) comments shall be submitted in writing to the applicant or the U.S. DOT agency within 30 days of publication of the notice of availability of the EA unless the U.S. DOT agency determines, for good cause, that a different period is warranted.

(g) When, in accordance with the public involvement procedures established pursuant to § 1420.305, a public hearing on an action evaluated in an EA is not held, the following shall occur:

(1) The applicant shall place a notice in a newspaper(s) similar to a public hearing notice at an appropriate stage of development of the action.

(2) The notice shall advise the public of the availability of the EA, state where information concerning the action may be obtained, and invite comments from all parties with an interest in the social, economic, or environmental aspects of the action.

(3) Pursuant to 40 CFR 1501.4(c) comments shall be submitted in writing to the applicant or the U.S. DOT agency within 30 days of the publication of the notice unless the U.S. DOT agency determines, for good cause, that a different period is warranted.

(h) If no significant impacts are identified, the applicant shall consider the public and agency comments received; revise the EA as appropriate; furnish the U.S. DOT agency a copy of the revised EA, the public hearing transcript, where applicable, and copies of any comments received and responses thereto; and recommend a FONSI. The revised EA shall also document compliance, to the fullest extent possible, with other related environmental laws, regulations, and executive orders applicable to the action, or provide reasonable assurance that the requirements will be met. Full compliance with the transportation conformity rule (40 CFR parts 51 and 93) and the planning regulation (23 CFR part 1410) is required before completion of the FONSI.

(i) If, at any point in the EA process, the U.S. DOT agency determines that the action is likely to have a significant

impact on the environment, the preparation of an EIS will be required.

(j) Any action which normally would be classified as an EA but could involve unusual circumstances, such as, substantial controversy on community impact and/or environmental grounds, will require the U.S. DOT agency, in cooperation with the applicant, to determine if the EA is the appropriate level of documentation.

#### **§ 1420.315 Findings of no significant impact.**

(a) The U.S. DOT agency will review the EA and other documents submitted pursuant to § 1420.313 (e.g., copies of any hearing transcript and written comments, and the applicant's responses). If the U.S. DOT agency agrees with the applicant's recommendation of a FONSI, it will make such finding in writing and incorporate by reference the EA and any other related documentation.

(b) Pursuant to 40 CFR 1501.4(e)(2), for proposed actions which are either similar to ones normally requiring an EIS or are without precedent and the U.S. DOT agency is processing the action with an EA and expects to issue a FONSI, copies of the EA and proposed FONSI shall be made available for review by the public and affected units of government for a minimum of 30 days before the U.S. DOT agency makes its final decision. This public availability shall be announced by a notice similar to a public hearing notice.

(c) After a FONSI has been made by the U.S. DOT agency, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government, and the document shall be available from the applicant and the U.S. DOT agency upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(d) Where substantial changes are made to the project and/or its potential impacts after the public review period for the EA, the applicant, pursuant to § 1420.323(c), shall make copies of the revised EA and the FONSI available for review by the public and affected units of government for a minimum of 30 days before the U.S. DOT agency makes its final decision, unless the U.S. DOT agency determines, for good cause, that a different period is warranted.

(e) If another Federal agency has issued a FONSI on an action which includes an element proposed for U.S. DOT agency action, the U.S. DOT agency will evaluate the other agency's EA/FONSI. If the U.S. DOT agency

determines that this element of the action and its environmental impacts have been adequately identified and assessed, the U.S. DOT agency will issue its own FONSI in accordance with paragraphs (a), (b), (c) and (d) of this section, incorporating the other agency's FONSI and any other related documentation. If environmental issues have not been adequately identified and assessed, the U.S. DOT agency will require appropriate environmental studies to complete the assessment.

#### **§ 1420.317 Draft environmental impact statements.**

(a) A draft EIS shall be prepared when the U.S. DOT agency determines that the action(s) is likely to cause significant impacts on the environment or if the preparation of an EIS is otherwise appropriate. When the decision has been made by the U.S. DOT agency to prepare an EIS, the U.S. DOT agency will publish a Notice of Intent (40 CFR 1508.22) in the **Federal Register**. Applicants must announce the intent to prepare an EIS by appropriate means at the local level in accordance with the public involvement procedures established pursuant to § 1420.305.

(b) The U.S. DOT agency, in cooperation with the applicant, will publish the Notice of Intent and begin a scoping process to establish the scope of the draft EIS and the work necessary for its preparation. The documented results of the planning process relevant to the action, including the public involvement and interagency coordination that has occurred, must be considered in scoping. Scoping is normally achieved through the actions taken to comply with the public involvement procedures and interagency coordination required by §§ 1420.303 and 1420.305. The scoping process will: Review the range of alternatives and impacts and the major issues to be addressed in the EIS; aid in determining which aspects of the proposed action have potential for social, economic, or environmental impact; help identify measures which might mitigate adverse environmental impacts; identify environmental enhancements that might aid in harmonizing the action with the surrounding community; identify other environmental review and coordination requirements that must be performed concurrently with the EIS preparation; and achieve the other objectives of 40 CFR 1501.7 and environmental streamlining (§ 1420.203). If a public scoping meeting is to be held, it must be announced in the U.S. DOT agency's Notice of Intent and by an appropriate means at the local level.

(c) The draft EIS shall be prepared by the U.S. DOT agency in cooperation with the applicant or, where permitted by 40 CFR 1506.5, by the applicant with appropriate guidance and participation by the U.S. DOT agency. The draft EIS shall evaluate all reasonable alternatives and may rely on information developed in accordance with 23 CFR part 1410. The draft EIS shall discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall evaluate the social, economic, and environmental impacts of the proposed action, reasonable alternatives that would avoid or reduce adverse impacts, measures which would mitigate adverse impacts, and environmental enhancements that would aid in harmonizing the action with the surrounding community. Alternatives must be sufficiently well-defined to allow full evaluation of the specific alignment and design variations that would avoid or minimize adverse impacts. The draft EIS shall summarize the public involvement and interagency coordination to the time of its approval. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by other related environmental laws, regulations, and executive orders to the extent appropriate at this stage in the environmental process.

(d) The U.S. DOT agency, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(e) A lead, joint lead, or a cooperating agency shall be responsible for printing and distributing the draft EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requests for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with U.S. DOT agency concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy and also must be informed of the nearest location where the draft EIS may be reviewed without charge.

(f) The draft EIS shall be circulated for comment by the applicant on behalf of the U.S. DOT agency. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to the following:

(1) Public officials, interest groups, and members of the public known to

have an interest in the proposed action or alternatives;

(2) Federal, State and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) Neighboring States and Federal land management entities which may be affected by any of the alternatives.

(g) Public hearing requirements are to be carried out in accordance with the provisions of § 1420.305 and this section. Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(h) Through the U.S. Environmental Protection Agency's notice of availability (40 CFR 1506.10), the U.S. DOT agency shall establish a period of not less than 45 days for the receipt of comments on the draft EIS. The draft EIS or a transmittal letter sent with each copy of the draft EIS shall identify where comments are to be sent and when the comment period ends.

#### **§ 1420.319 Final environmental impact statements.**

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the U.S. DOT agency in cooperation with the applicant or, where permitted by 40 CFR 1506.5, by the applicant with appropriate guidance and participation by the U.S. DOT agency. Preparation of the final EIS will involve such additional public involvement, interagency coordination, and engineering or environmental studies as are necessary to consider the appropriateness of refinements in the alternatives and the incorporation of mitigation measures and environmental enhancements in response to comments received on the draft EIS.

(2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If major issues remain unresolved, the final EIS shall identify those issues and the coordination and other efforts made to resolve them.

(3) The final EIS shall evaluate all reasonable alternatives considered and identify the preferred alternative. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement and interagency coordination, and describe the environmental design features, including mitigation measures and environmental enhancements, that are incorporated into the proposed action. Environmental design features or other mitigation measures presented as commitments in the final EIS shall be incorporated into the action. The final EIS shall also document compliance with other related environmental laws, regulations, and executive orders applicable to the action, and, if full compliance is not possible, provide reasonable assurance that the requirements will be met.

(b) The U.S. DOT agency will indicate approval of the final EIS by signing and dating the cover page. Approval of the final EIS does not commit the U.S. DOT agency to approve any future grant request.

(c) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with U.S. DOT agency concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy and also must be informed of the nearest location where the final EIS may be reviewed without charge.

(d) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS and to anyone requesting a copy, no later than the time the document is filed with the U.S. EPA. In the case of lengthy documents, the U.S. DOT agency may allow alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13<sup>2</sup> which implements Executive Order 12372. The final EIS shall be available for public review at the applicant's offices and at appropriate DOT agency offices for at least 30 days after the U.S. EPA publication of the **Federal Register** notice of availability. Copies should also be made available for public review at institutions such as local government

<sup>2</sup> This document is available for inspection and copying as prescribed in 49 CFR part 7.

offices, libraries, and schools, as appropriate.

#### **§ 1420.321 Record of decision.**

(a) The U.S. DOT agency will complete and sign a record of decision (ROD) no sooner than 30 days after the U.S. EPA publication in the **Federal Register** of the notice of availability for the final EIS or 90 days after the U.S. EPA publication of the notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures and environmental enhancements that have been incorporated into the action, and document any required section 4(f) approval in accordance with 23 CFR part 1430. Until the ROD has been signed, no further approvals relative to the action may be given except those for administrative activities taken to secure further project funding and for other activities consistent with the limitation on actions in 40 CFR 1506.1. The applicant, in coordination with the U.S. DOT agency shall publish a notice of availability of the ROD for public review in a newspaper of general circulation, and, to the extent practicable, provide the approved ROD to all persons, organizations, and agencies that received a copy of the final EIS pursuant to § 1420.319(d).

(b) After issuance of a ROD, the U.S. DOT agency shall issue a revised ROD if it wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS or proposes to make substantial changes to the mitigation measures or findings discussed in the original ROD. Before issuing the revised ROD, the U.S. DOT agency shall consider whether additional notification, interagency coordination, and public involvement are needed in accordance with § 1420.303 and § 1420.305. To the extent practicable the approved revised ROD shall be provided to all persons, organizations and agencies that received a copy of the Final EIS pursuant to § 1420.319(d).

(c) Upon approval of the ROD, the mitigation and environmental enhancements in the final EIS associated with the alternative selected in the ROD become enforceable conditions of any subsequent grant related to the action or other DOT agency approval of the action. The U.S. DOT agency will ensure implementation of mitigation and environmental enhancements as described in § 1420.113.

#### **§ 1420.323 Re-evaluations.**

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the U.S. DOT agency if a final EIS is not approved by the U.S. DOT agency within three years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major DOT agency approval or grant.

(c) After approval of the EIS, FONSI, or CE designation, the applicant shall consult with the U.S. DOT agency prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested U.S. DOT action. These consultations will be documented when determined necessary by the U.S. DOT agency.

(d) A re-evaluation under this section shall include additional notification, interagency coordination, and public involvement as appropriate in accordance with § 1420.303 and § 1420.305.

#### **§ 1420.325 Supplemental environmental impact statements.**

(a) A draft EIS or final EIS may be supplemented whenever the U.S. DOT agency determines that supplementation would improve decisionmaking, better inform the agency or the public, or serve other purposes. An EIS shall be supplemented whenever the U.S. DOT agency determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS.

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) A supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in the actual lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts

that are significant and were not evaluated in the EIS; or

(2) The U.S. DOT agency decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a ROD shall be prepared and circulated in accordance with § 1420.321.

(c) Where the U.S. DOT agency is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the U.S. DOT agency deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the U.S. DOT agency determines that a supplemental EIS is not necessary, the U.S. DOT agency shall so indicate in the project file.

(d) A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required. Public involvement and interagency coordination commensurate with the nature and scope of the supplemental EIS shall be conducted in accordance with § 1420.305 and the public involvement procedures developed thereunder.

(e) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily prevent the granting of new approvals; require the withdrawal of previous approvals; or require the suspension of project activities for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a new evaluation of the entire action, or more than a limited portion of the overall action, the U.S. DOT agency shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

### **Subpart D—Definitions**

#### **§ 1420.401 Terms defined elsewhere.**

The definitions contained in the CEQ regulation (40 CFR 1508) and in titles 23 (23 U.S.C. 101) and 49 of the United States Code (49 U.S.C. 14202) are applicable except as modified in § 1420.403.

**§ 1420.403 Terms defined in this part.**

The following definitions apply to this part and to part 1430 of this chapter:

*Action* means a surface transportation infrastructure or service investment (e.g., highway, transit, railroad, or mixed mode) proposed for direct implementation by the U.S. DOT agency or for the U.S. DOT agency financial assistance; and other activities, such as, joint or multiple use of right-of-way, changes in access control, that require a U.S. DOT agency approval or permit, but may or may not involve a commitment of Federal funds; and other FHWA or FTA program decisions, such as, promulgation of regulations and approval of programs, unless specifically defined by statute or regulation as not being an action.

*Applicant* means the Federal, State or local governmental authority that the U.S. DOT agency works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the U.S. DOT agency or the Federal land management agency will take on the responsibilities of the applicant described herein.

*Environmental enhancement* means a measure which contributes to blending the proposed project harmoniously with its surrounding human communities and the natural environment and extends beyond those measures necessary to mitigate the specific adverse impacts resulting from a proposed transportation action. This includes measures eligible for Federal funding, such as transportation enhancement activities or transit enhancements, and measures funded by the applicant or by others.

*Environmental studies* means the investigations of potential social, economic, or environmental impacts conducted:

- (1) As part of the metropolitan or statewide transportation planning process under 23 CFR part 1410,
- (2) To determine the NEPA class of action and scope of analysis, and/or
- (3) To provide information to be included in a NEPA decision process.

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

*Planning process* means the process of developing metropolitan and statewide transportation plans and programs in accordance with 23 CFR part 1410.

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

*Section 4(f)* means the provision in law which provides protection to certain public lands and all historic properties (now codified in 49 U.S.C. 303 and 23 U.S.C. 138).

*Transportation conformity* means the process for assuring or conformity of transportation projects, programs, and plans with the purpose of State plans for attainment and maintenance of air quality standards under the U.S. EPA regulation at 40 CFR parts 51 and 93. The process applies only to areas designated as nonattainment or maintenance for a transportation related pollutant.

*U.S. DOT agency* means the FHWA, the FTA, or the FHWA and the FTA together. In addition, U.S. DOT agency refers to any other agency within the U.S. Department of Transportation that uses this part as provided for in § 1420.209.

*U.S. DOT agency approval* means the approval by FHWA/FTA of the applicant's request relative to an action. The applicant's request may be for Federal financial assistance, or it may be for some other U.S. DOT agency approval that does not involve a commitment of Federal funds.

## **PART 1430—PROTECTION OF PUBLIC PARKS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES**

Sec.

- 1430.101 Purpose.
- 1430.103 Mandate.
- 1430.105 Applicability.
- 1430.107 Use of land.
- 1430.109 Significance of the section 4(f) resource.
- 1430.111 Exceptions.
- 1430.113 Section 4(f) evaluations and determinations under the NEPA umbrella.
- 1430.115 Separate section 4(f) evaluations.
- 1430.117 Programmatic section 4(f) evaluations.
- 1430.119 Linkage with transportation planning.
- 1430.121 Definitions.

**Authority:** 23 U.S.C. 138 and 315; 49 U.S.C. 303; 49 CFR 1.48 and 1.51.

**§ 1430.101 Purpose.**

The purpose of this part is to implement 49 U.S.C. 303 and 23 U.S.C. 138 which were originally enacted as section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as section 4(f).

**§ 1430.103 Mandate.**

(a) The U.S. DOT agency may approve a transportation project that uses publicly owned land from a significant public park, recreation area, or wildlife and waterfowl refuge, or any land from a significant historic site only if the U.S. DOT agency has determined that:

(1) There is no feasible and prudent alternative to the use of land from the property; and

(2) The project includes all possible planning to minimize harm to the property resulting from such use.

(b) [Reserved]

**§ 1430.105 Applicability.**

(a) This part applies to transportation projects that require an approval by the U.S. DOT agency, where the U.S. DOT agency has sufficient control and the statutory authority to condition the project or approval.

(b) The U.S. DOT agency will determine the applicability of section 4(f) in accordance with this part.

(c) This part does not apply to or alter approvals by the U.S. DOT agency made prior to the effective date of this regulation.

**§ 1430.107 Use of land.**

(a) Except as set forth in paragraph (b) of this section and § 1430.111, use of land occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse to the statutory purpose of preserving the natural beauty of that land, as determined by the criteria in paragraph (b) of this section; or

(3) When there is a constructive use of land as determined by the criteria in paragraph (c) of this section.

(b) A temporary occupancy of land occurs when the use is so minimal that it does not constitute a use within the meaning of section 4(f) (§ 1420.403) when the following conditions are satisfied:

(1) The duration of the occupancy must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

(4) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and

(5) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

(c) A constructive use of section 4(f) land occurs when the transportation project does not incorporate land from the section 4(f) resource, but the impacts of the project on the resource due to its proximity are so severe that the activities, features, or attributes that qualify the resource for the protection of section 4(f) are substantially impaired. The U.S. DOT agencies have reviewed the following situations and have determined that constructive use occurs when:

(1) The projected noise level increase attributable to the transportation project substantially interferes with the use and enjoyment of a noise-sensitive facility that is a resource protected by section 4(f), such as hearing the performances at a public outdoor amphitheater, sleeping in the sleeping area of a public campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes;

(2) The proximity of the project to the section 4(f) resource substantially impairs aesthetic features or attributes of a resource protected by section 4(f), where such features or attributes make an important contribution to the value of the resource. For example, substantial impairment of visual or aesthetic qualities occurs where a transportation structure is located in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part from its setting;

(3) The project restricts access to the section 4(f) property and, as a result, substantially diminishes the utility of the resource;

(4) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource, such as vibration levels from a rail project that are great enough to affect the structural integrity of a

historic building or substantially diminish the utility of the building; or

(5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

#### **§ 1430.109 Significance of the section 4(f) resource.**

(a) Consideration under section 4(f) is required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire section 4(f) resource is significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant, unless the U.S. DOT agency and the officials with jurisdiction have agreed, formally or informally, that the resource is not significant. The U.S. DOT agency will review the significance determination to assure its reasonableness.

(b) Section 4(f) applies to all properties on or eligible for the National Register of Historic Places. The U.S. DOT agency, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify such historic sites. Section 4(f) applies only to historic sites on or eligible for the National Register unless the U.S. DOT agency determines that the application of section 4(f) to a historic site is otherwise appropriate.

#### **§ 1430.111 Exceptions.**

(a) Consideration under section 4(f) is not required for any park road or parkway project developed in accordance with 23 U.S.C. 204.

(b) Consideration under section 4(f) is not required for trail-related projects funded through the Symms National Recreational Trails Act of 1991 (16 U.S.C. 1261).

(c) Consideration under section 4(f) is not required for "transportation enhancement activities" as defined in 23 U.S.C. 101(a) and transit enhancements as defined in 49 U.S.C. 5302(a)(15) if:

(1) The use of the section 4(f) property is solely for the purpose of preserving or enhancing the activities, features, or attributes that qualify the property for section 4(f) protection; and

(2) The Federal, State, or local official having jurisdiction over the property agrees in writing that the use is solely for the purpose of preserving or enhancing the section 4(f) activities, features, or attributes of the property

and will, in fact, accomplish this purpose.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses and are, in fact, managed for multiple uses, section 4(f) applies only to those portions of such lands which function as significant public parks, recreation areas, or wildlife refuges, or which are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife purposes or historic sites. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The determination of significance shall apply to the entire area of lands which so function or are so designated. The U.S. DOT agency will review these determinations to assure their reasonableness.

(e) Consideration under section 4(f) is not required for the restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

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

(2) The SHPO has been consulted and has not objected to the U.S. DOT agency finding in paragraph (e)(1) of this section.

(f) Archeological sites.

(1) Section 4(f) applies to all archeological sites on or eligible for inclusion in the National Register, including those discovered during construction except as set forth in paragraph (f)(2) of this section. When section 4(f) requirements apply to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made in the project. The review process, including the consultation with other agencies, will be shortened as appropriate.

(2) Section 4(f) requirements do not apply to archeological sites where the U.S. DOT agency, after consultation with the SHPO, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the U.S. DOT agency decides, with agreement of the SHPO, not to recover the data in the resource.

(g) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made, and determinations of significance changed, late in the development of a project. With the exception of the treatment of archeological resources in paragraph (f) of this section, the U.S. DOT agency may permit a project to proceed without consideration under section 4(f) if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to acquisition.

(h) Constructive use normally does not occur when:

(1) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places results in an agreement of no adverse effect;

(2) The projected traffic noise levels of a proposed nearby highway project do not exceed the FHWA noise abatement criteria given in Table 1, 23 CFR part 772, or the projected operational noise levels of a proposed nearby transit project do not exceed the noise impact criteria in the FTA guidelines (Federal Transit Administration, Transit Noise and Vibration Impact Assessment, April 1995, available from the FTA offices);

(3) The projected noise levels exceed the relevant threshold in paragraph (h)(2) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(4) A proposed transportation project will have proximity impacts on a section 4(f) property, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the U.S. DOT agency approval of a final NEPA document established the location of the project before the designation, establishment, or change in the significance of the section 4(f) property. However, if the property in question is a historic site that would be eligible for the National Register except for its age at the time that the project location is established, and construction of the project would begin after the site became eligible, then constructive use of the historic site may occur and such use must be evaluated;

(5) There are proximity impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. The following examples of such concurrent planning or development include, but are not limited to:

(i) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource; or

(ii) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other;

(iii) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);

(iv) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(v) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(vi) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

#### **§ 1430.113 Section 4(f) evaluations and determinations under the NEPA umbrella.**

(a) Alternatives to avoid the use of section 4(f) properties and measures to minimize harm to such land shall be developed and evaluated by the applicant in cooperation with the U.S. DOT agency. Such evaluation shall be initiated early when alternatives are under study. An alternative that avoids section 4(f) property must be preferred unless the evaluation demonstrates that there are unique problems or unusual factors associated with it, or that the cost, the social, economic, or environmental impacts, or the community disruption resulting from such alternative reach extraordinary magnitudes.

(b) In accordance with the concept of the NEPA umbrella in 23 CFR 1420.109, the section 4(f) evaluation is normally presented in the draft environmental impact statement (EIS), the environmental assessment (EA), or the categorical exclusion (CE) documentation. The evaluation may

incorporate relevant information from the planning process in accordance with § 1430.119. A separate section 4(f) evaluation may be necessary as described in section § 1430.115.

(c) The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the U.S. Department of the Interior, and as appropriate to the U.S. Department of Agriculture and the U.S. Department of Housing and Urban Development. A minimum of 45 days shall be established by the U.S. DOT agency for receipt of comments.

(d) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, the finding of no significant impact (FONSI), the CE documentation, or the separate section 4(f) evaluation shall specifically address the following:

(1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and

(2) All measures incorporated into the project that will be taken to minimize harm to the section 4(f) property.

(e) The U.S. DOT agency is not required to determine that there is no constructive use. However, such a determination may be made at the discretion of the U.S. DOT agency. When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(1) Identification of the current activities, features, or attributes of a resource that qualify it for protection under section 4(f) and which may be sensitive to proximity impacts;

(2) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and

(3) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.

(f) For actions processed with an EIS, the U.S. DOT agency will make the section 4(f) determination either in its approval of the final EIS or in the record of decision (ROD). Where the section 4(f) approval is documented in the final EIS, the U.S. DOT agency will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and

proposed to be processed with a FONSI or classified as a CE, shall not proceed until the U.S. DOT agency has given notification of section 4(f) approval. For these actions, any required section 4(f) approval will be documented in the FONSI, in the CE approval, if one is provided, or in a separate section 4(f) document.

(g) The final section 4(f) evaluation will be reviewed for legal sufficiency.

**§ 1430.115 Separate section 4(f) evaluations.**

(a) Circulation of a separate section 4(f) evaluation will be required when:

(1) A proposed modification of the alignment or design would require the use of section 4(f) land after the CE, FONSI, draft EIS, or final EIS has been processed;

(2) A proposed modification of the alignment, design, or measures to minimize harm after an original section 4(f) approval, would result in a substantial increase in the use of section 4(f) land or a substantial reduction in the measures to minimize harm included in the project;

(3) The U.S. DOT agency determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property; or

(4) An agency whose actions are not subject to section 4(f) requirements is the lead agency for the NEPA process on an action that involves section 4(f) property and requires a U.S. DOT agency action.

(b) If the U.S. DOT agency determines under paragraph (a) of this section or otherwise, that section 4(f) is applicable after the CE, FONSI, or ROD has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental NEPA document. Where a separately circulated section 4(f) evaluation is prepared after the CE, FONSI, or ROD has been processed, such evaluation does not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities for any activity not affected by the new section 4(f) evaluation.

**§ 1430.117 Programmatic section 4(f) evaluations.**

The U.S. DOT agency, in consultation with the U.S. Department of the Interior and other agencies, as appropriate, may make a programmatic section 4(f) determination for a class of similar projects. Uses of section 4(f) land

covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

**§ 1430.119 Linkage with transportation planning.**

(a) An analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed during the planning process or in a tiered EIS.

(b) When a planning document or a first-tier EIS is intended to provide the basis for subsequent project development as provided in § 1420.201 and 40 CFR 1502.20, the detailed information necessary to complete the section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made of the potential impacts that a proposed action will have on section 4(f) land and whether those impacts could have a bearing on the decision to be made. A preliminary determination may be made at this time as to whether there are feasible and prudent locations or alternatives for the action to avoid the use of section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm, to the extent that the level of detail at this stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the project development process have not been precluded by decisions made at this stage. This preliminary determination is then incorporated into official planning documents or the first-tier EIS.

(c) A section 4(f) approval made when additional design details are available will include a determination that:

(1) The preliminary section 4(f) determination made pursuant to paragraph (a) remains valid; and

(2) The criteria of § 1430.103 and § 1430.113(a) have been met.

**§ 1430.121 Definitions.**

The definitions contained in 23 CFR 1420.403, 23 U.S.C. 101(a), 49 U.S.C. 5302, and 40 CFR part 1508 are applicable to this part.

**Federal Transit Administration**

**49 CFR Chapter VI**

For the reasons set forth in the preamble, the Federal Transit Administration proposes to amend chapter VI of title 49, Code of Federal Regulations, as follows:

3. Revise part 622 to read as follows:

**PART 622—NEPA AND RELATED PROCEDURES FOR TRANSPORTATION DECISIONMAKING**

**Subpart A—Purpose, Policy, and Mandate**

Sec.

622.101 Cross-reference to subpart A of 23 CFR part 1420.

**Subpart B—Program and Project Streamlining**

622.201 Cross-reference to subpart B of 23 CFR part 1420.

**Subpart C—Process and Documentation Requirements**

622.301 Cross-reference to subpart C of 23 CFR part 1420.

**Subpart D—Definitions**

622.401 Cross-reference to subpart D of 23 CFR part 1420.

**Authority:** 23 U.S.C. 109, 128, 134 and 138; 42 U.S.C. 2000d–2000d–4, 4321 *et seq.*, and 7401 *et seq.*; 49 U.S.C. 303, 5301(e), 5303, 5309, and 5324(b) and (c); 49 CFR 1.51.

**Subpart A—Purpose, Policy, and Mandate**

**§ 622.101 Cross-reference to subpart A of 23 CFR part 1420.**

The regulations for complying with this subpart are set forth in subpart A of 23 CFR part 1420.

**Subpart B—Program and Project Streamlining**

**§ 622.201 Cross-reference to subpart B of 23 CFR part 1420.**

The regulations for complying with this subpart are set forth in subpart B of 23 CFR part 1420.

**Subpart C—Process and Documentation Requirements**

**§ 622.301 Cross-reference to subpart C of 23 CFR part 1420.**

The regulations for complying with this subpart are set forth in subpart C of 23 CFR part 1420.

**Subpart D—Definitions**

**§ 622.401 Cross-reference to subpart D of 23 CFR part 1420.**

The regulations for complying with this subpart are set forth in subpart D of 23 CFR part 1420.

4. Add a new part 623 to read as follows:

**PART 623—PROTECTION OF PUBLIC  
PARKS, WILDLIFE AND WATERFOWL  
REFUGES, AND HISTORIC SITES**

Sec.

623.101 Cross-reference to 23 CFR part  
1430.

**Authority:** 49 U.S.C. 303; 49 CFR 1.51.

**§ 623.101 Cross-reference to 23 CFR part  
1430.**

The regulations for complying with 49  
U.S.C. 303 are set forth in 23 CFR part  
1430.

Issued on: May 18, 2000.

**Vincent F. Schimmoller,**

*Acting Executive Director, Federal Highway  
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**Nuria I. Fernandez,**

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