

DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 771

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA-2012-0092]

FHWA RIN 2125-AF46

FTA RIN 2132-AB04

Environmental Impact and Related Procedures

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

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

SUMMARY: This NPRM provides interested parties with the opportunity to comment on proposed changes to the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) joint procedures that implement the National Environmental Policy Act (NEPA). The revisions are prompted by enactment of Public Law 112-141, 126 Stat. 405, the Moving Ahead for Progress in the 21st Century Act (MAP-21). This NPRM proposes to modify an existing categorical exclusion (CE) for emergency repair projects under 23 U.S.C. 125 to include emergency projects as described in Section 1315 of MAP-21. This NPRM also requests comments on whether additional activities ought to be expressly included in the CE, consistent with the principles underlying emergency projects and sound transportation asset management. The FHWA and the FTA seek comments on the proposals contained in this notice.

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

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

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12-140, Washington, DC 20590-0001;
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., between 9 a.m. 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329;
- Instructions: You must include the agency name and docket number DOT-FHWA-or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For the Federal Highway Administration: Adam Alexander, Office of Project Delivery and Environmental Review, HEPE-10, (202) 366-1473, or Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001. For the Federal Transit Administration: Megan Blum at (202) 366-0463, Office of Planning and Environment (TPE); or Dana Nifosi at (202) 366-

4011, Office of Chief Counsel (TCC), Federal Transit Administration. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On July 6, 2012, President Obama signed into law MAP-21, which contains new requirements that the FHWA and the FTA must meet in complying with NEPA (42 U.S.C. 4321-4347). One of these requirements, in Section 1315(a), is that the FHWA and the FTA, acting on behalf of the Secretary, must publish an NPRM to categorically exclude the repair or reconstruction of any road, highway, or bridge damaged by an emergency that is either (1) declared by the Governor of the State and concurred in by the Secretary of Transportation; or (2) declared by the President under the Stafford Act if such repair or reconstruction activity is in the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the declaration; and is commenced within a 2-year period beginning on the date of the declaration.

Currently, 23 CFR 771.117(c)(9) categorically excludes emergency repairs made during and immediately following a disaster to restore essential traffic, minimize the extent of the damage, or to protect the remaining facilities if the work is eligible under 23 U.S.C. 125.

In addition, pursuant to Section 1315(b) of MAP-21, the FHWA and the FTA must ensure that the rulemaking helps to conserve Federal resources and protects public safety and health by providing for periodic evaluations to determine whether reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities. “Reasonable alternatives” is defined in Section 1315(b)(2) as

including actions that could reduce the need for Federal funds to be expended on such repair and reconstruction activities, better protect public safety and health and the environment, and meet transportation needs as described in relevant and applicable Federal, State, local, and tribal plans. There are no equivalent requirements in the FHWA/FTA environmental regulation to perform periodic review or a consideration of alternatives as outlined in Section 1315(b).

General Discussion of the Proposals

The FHWA and the FTA propose to address Section 1315(a) within 23 CFR Part 771 by revising Section 771.117(c)(9) by changing the heading for paragraph (9) to “Emergencies” and adding two new provisions under paragraph (9) describing the covered actions. New paragraph (9)(i) would include all emergency repairs under 23 U.S.C. 125, which is the same language used in the CE for emergency repairs under the existing Section 771.117(c)(9). New paragraph (9)(ii) would add the actions described in MAP-21 Section 1315(a), which include emergency repair or reconstruction activities for any road, highway, or bridge that is in operation or under construction when damaged by an emergency declared by the Governor of the State and concurred in by the Secretary, or for a disaster or emergency declared by the President under the Robert T. Stafford Act (42 U.S.C. 5121), subject to the conditions specified in the remainder of the proposed section 771.117(c)(9)(ii). Such conditions are that the repair or reconstruction under section 771.117(c)(9)(ii) must be in the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the emergency declaration, and the work must be commenced within a 2-year period beginning on the date of the emergency declaration.

The FHWA and the FTA also seek comments on whether language should be added to the new CE to make it apply to certain types of activities that, in some cases, might be considered outside the scope of both the current emergency CE in Section 771.117(c)(9) and the language of Section 1315(a). The FHWA and the FTA are interested in comments that identify additional activities that would be important to include in an emergency repair project that do not typically involve significant environmental impacts. Specifically, the FHWA and the FTA seek comments on whether the emergency activities categorically excluded under the revised CE also should include: (1) construction of engineering and design changes to a damaged facility to meet current design standards; (2) repair and reconstruction of adjacent transportation facilities within the right-of-way damaged by the emergency (such as bike paths or ancillary structures); (3) construction of betterments to the damaged facilities beyond those eligible under 23 U.S.C 125; (4) construction of engineering and design changes to a damaged facility for the purpose of seismic retrofitting; (5) construction of engineering and design changes to a damaged facility to deal with future extreme weather events and sea level rise; and (6) construction of other engineering and design changes to a damaged facility to address concerns such as safety and environmental impacts. The agencies also seek comment on whether the CE should include actions to repair, reconstruct, or replace a facility that has experienced catastrophic failure regardless of cause. A catastrophic failure is considered to be the sudden and complete failure of a major element or segment of the facility that causes a devastating impact on transportation services. The FHWA and the FTA seek comments from grantees about their experiences with these kinds of projects and activities described in this paragraph and the environmental impacts of such projects.

The requirements in Section 1315(b) of MAP-21 will be addressed through questions presented in this NPRM and then more specifically through rulemaking for other relevant sections of MAP-21. The MAP-21 creates requirements for both the FHWA and the FTA to develop asset management and other programs. For the FHWA, MAP-21 Section 1106 creates a new requirement for States to develop risk-based asset management plans pursuant to 23 U.S.C. 119. The FHWA proposes to address the requirements of Section 1315(b) in the implementing regulations for MAP-21 Section 1106. The FHWA will also consider comments received in response to this NPRM in upcoming rulemaking proceedings to address other MAP-21 requirements related to asset management and the emergency relief program.

The FTA proposes to address the requirements of Section 1315(b) through rulemaking to implement other MAP-21 provisions for transit projects. Including proposed regulations to address 1315(b) in other FHWA and FTA rulemakings would incorporate the periodic review and evaluation of alternatives in a program management process, which the FHWA and the FTA believe is the appropriate approach to achieve the most effective results.

The FHWA and the FTA will use this rulemaking to obtain input on how to best approach the periodic evaluations required under Section 1315(b). With respect to Section 1315(b) of MAP-21, the FHWA and the FTA specifically seek comment on the following questions regarding approaches to the requirement for periodic evaluations to determine whether reasonable alternatives exist to roads, highways, or bridges that repeatedly require repair and reconstruction activities:

- (1) Is it appropriate to incorporate the Section 1315(b) review into any periodic

evaluation of transportation assets conducted by the State for its risk-based asset management plan developed pursuant to 23 U.S.C. 119, or into similar transit programs? Are there other periodic reviews for either highways or transit into which the Section 1315(b) review could be incorporated?

(2) How frequently should the evaluations be conducted? Should a time frame be specified in the regulation, or remain at the discretion of the State or transit agency?

(3) How should the evaluations consider the risk of recurring damage and the cost of future repair under both current and future environmental conditions?

(4) What factors ought to be considered in the evaluations to assess the risk of recurring damage, the protection of public safety and health and the environment, and the cost of future repairs?

Section-by-Section Discussion of the Proposals

This proposal would amend 23 CFR 771.117(c)(9) by changing the heading for paragraph (9) to “Emergencies” and adding two new provisions under paragraph (9) describing the covered actions. The new paragraph (9)(i) would include all emergency repairs under 23 U.S.C. 125, which is the same language used in the CE for emergency repairs under the existing Section 771.117(c)(9). The new subparagraph (9)(ii) would add the new covered actions described in MAP-21 Section 1315(a) by adding emergency repair or reconstruction activities for any road, highway, or bridge that is in operation or under construction when damaged by an emergency declared by the Governor of the State and concurred in by the Secretary, or for a disaster or emergency declared by the President under the Robert T. Stafford Act (42 U.S.C. 5121), subject to the conditions specified in the subsection. The conditions would appear in two subparagraphs under the

proposed 23 CFR 771.117(c)(9)(ii), and would require the repair or reconstruction under the CE be in the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the emergency declaration, and the work must be commenced within a 2-year period beginning on the date of the emergency declaration. These conditions are required under Section 1315(a).

Rulemaking Analyses and Notices

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

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The FHWA and the FTA have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 nor would it be significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR

11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impact of this rulemaking would be minimal. The changes that this rule proposes are requirements mandated by MAP-21 intended to streamline environmental review by making changes in the agencies' environmental review procedures. The activities this NPRM proposes to add to section 771.117(c)(9), which are described in Section 1315(a), are inherently limited in their potential to cause significant environmental impacts. These proposed changes would not adversely affect, in any material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Public Law 96-354, 5 U.S.C. 601-612), the FHWA and the FTA have evaluated the effects of this proposed rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. The proposed revision could streamline environmental review and thus would be less than any current impact on small business entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 109 Stat. 48, March 22, 1995.). This proposed rule will not result in the expenditure by State, local, and tribal

governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

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

Executive Order 13175 (Tribal Consultation)

The FHWA and FTA have analyzed this action under Executive Order 13175, dated November 6, 2000, and believe that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on

Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Accordingly, the FHWA and the FTA solicit comments on this issue.

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

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

forth at 40 CFR 1505.1 and 1507.3. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), aff'd, 230 F.3d 947, 954-55 (7th Cir. 2000). Finally, this action is intended to streamline the environmental process for reviewing proposed highway and transit projects, including projects that will be environmentally beneficial. It is consistent with, and promotes the purposes of, Executive Order 13604 (Improving Performance of Federal Permitting and Review of Infrastructure Projects).

Regulation Identification Number

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

List of Subjects

49 CFR Part 622 Environmental impact statements, Grant programs—transportation, Public transit, Recreation areas, Reporting and record keeping requirements.

23 CFR Part 771 Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public lands, Recreation areas, Reporting and record keeping requirements.

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

TITLE 49

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

1. The authority citation for part 622 is revised to read as follows: Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303, 5301(a) and (e), 5323(b), and 5324; 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.51; and Pub. L. 112-141, 126 Stat. 405, sections 1315 and 20017.

TITLE 23 PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES.

2. The authority citation for part 771 is revised to read as follows: Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303, 5301(a) and (e), 5323(b), and 5324; 40 CFR Parts 1500-1508; 49 CFR 1.48(b) and 1.51; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, sections 1106 and 1315.

3. Amend § 771.117 by revising paragraph (c)(9) to read as follows: § 771.117

Categorical exclusions.* * * * *

(c)(9) Emergencies

(i) Emergency repairs under 23 U.S.C. 125.

(ii) The repair or reconstruction of any road, highway, or bridge that is in operation or under construction when damaged by an emergency declared by the Governor of the State and concurred in by the Secretary, or for a disaster or emergency

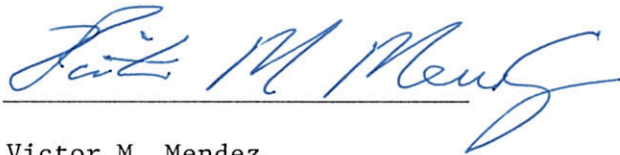
declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121) if the repair or reconstruction activity is:

- (A) In the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the declaration, and
- (B) Commenced within a 2-year period beginning on the date of the declaration.

* * * * *

Issued on: [Insert date] September 21, 2012

The date of issuance is the signature date.



Victor M. Mendez
Administrator
Federal Highway Administration

Peter Rogoff
Administrator
Federal Transit Administration


declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121) if the repair or reconstruction activity is:

- (A) In the same location with the same capacity, dimensions, and design as the original road, highway, or bridge as before the declaration, and
- (B) Commenced within a 2-year period beginning on the date of the declaration.

* * * * *

Issued on: [Insert date] September 21, 2012

The date of issuance is the signature date.



Peter Rogoff
Administrator
Federal Transit Administration