DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 773

Federal Railroad Administration

49 CFR Part 264

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA–2013–0022]

FHWA RIN 2125–AF50
FRA RIN 2130–AC45
FTA RIN 2132–AB15

Surface Transportation Project Delivery Program Application Requirements

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

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

SUMMARY: This NPRM provides interested parties with the opportunity to comment on proposed regulations that would govern the application requirements for the Surface Transportation Project Delivery Program (Program). The proposed regulations are prompted by enactment of the *Moving Ahead for Progress in the 21st Century Act* (MAP–21), which converted the Surface Transportation Project Delivery Pilot Program into a permanent program, allows any State to apply for the Program, expanded the scope of the Secretary's responsibilities that may be assigned and assumed under the Program, and created a renewal process for Program participation. The FHWA, FTA, and FRA, hereinafter referred to as the ''Agencies,'' seek comments on the proposals contained in this NPRM.

DATES: Comments must be received on or before October 29, 2013.

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., W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.
- *Instructions:* You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For FHWA: Carol Braegelmann, Office of Project Delivery and Environmental Review (HEPE), (202) 366–1701, or Jomar Maldonado, Office of the Chief Counsel (HCC), (202) 366–1373, Federal Highway Administration, 1200 New Jersey Ave., SE., Washington, DC 20590–0001. For FTA: Adam Stephenson, Office of Planning and Environment (TPE), (202) 366–5183, or Dana Nifosi, Office of Chief Counsel (TCC), (202) 366–4011. For FRA: David Valenstein, Office of Railroad Policy and Development (RPD), (202) 493–6368, or Zeb Schorr Office of Chief Counsel (RCC), (202) 493–6072. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Section 6005 of the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA–LU), 109 Public Law 59, 119 Stat. 1144, 1868–1872 (codified at 23 United States Code (U.S.C.) 327), established a pilot program allowing the Secretary to assign, and for certain States to assume, the Federal responsibilities for the review of highway projects under the National Environmental Policy Act of 1969 (NEPA) and responsibilities for environmental review, consultation or other action required under any Federal environmental law pertaining to the review. The pilot program was limited to five States and was set to expire on September 30, 2012. Pursuant to 23 U.S.C. 327(b)(2), FHWA promulgated regulations in part 773 of title 23 of the Code of Federal Regulations (CFR) on the information that States must submit as part of their applications to participate in the pilot program (72 FR 6470 (Feb. 12, 2007)).

On July 6, 2012, President Obama signed into law the *Moving Ahead for Progress in the 21st Century Act* (MAP–21), Public Law 112–141, 126 Stat. 405, which contains new requirements that the Secretary of Transportation (Secretary) must meet in complying with various environmental requirements. Section 1313 amended 23 U.S.C. 327, by: (1) Converting the pilot program into a permanent program (Program); (2) removing the five-State limit; (3) expanding the scope of assignment and assumption for the Secretary's responsibilities to include railroad, public transportation, and multimodal projects; and (4) allowing a renewal option for program participation. Section 1313 also amended 23 U.S.C. 327(b)(2) by requiring the Secretary to amend—within 270 days from the date of MAP–21's enactment (October 1, 2012)—the regulations concerning the information required in a State's application to participate in the Program. The Agencies are initiating this rulemaking to address that requirement.

General Discussion of the Proposals

This NPRM proposes to revise part 773 in title 23 to account for changes to the Program application process as a result of MAP–21. The NPRM also proposes to to create a new part 264 in title 49 to cross-reference the Program application procedures for the benefit of FRA applicants. Finally, the NPRM proposes to add a reference to 23 U.S.C. 327 and the Program application procedures in 49 CFR part 622, subpart A—Environmental Procedures for the benefit of FTA applicants. The NPRM is limited to the application process and the information the Agencies require from any eligible State interested in applying to the Program. Specifically, the proposal provides for applicant eligibility criteria, projects and responsibilities that are eligible or ineligible for assignment, pre-application procedures, content and submittal procedures for the application, review and approval procedures, and procedures for the renewal of participation in the Program. In addition, the proposal provides a provision on the authority for termination of Program participation. The application requirements would apply to eligible States interested in applying for the Secretary's responsibilities under NEPA and other Federal environmental laws with respect to certain highway, railroad, public transportation, and multimodal projects. As part of this NPRM, the Agencies are seeking input on options for implementing MAP–21's direction to provide for assignment and assumption of environmental review responsibilities with respect to multimodal projects.

Under the Program, an eligible State may apply for the assignment and assumption of the Secretary's responsibilities under NEPA for eligible surface transportation projects. The Secretary's responsibilities under NEPA

include making categorical exclusion determinations, developing and issuing environmental assessments (EA), issuing Findings of No Significant Impacts (FONSI), and engaging in the environmental impact statement (EIS) process, including, but not limited to, developing and issuing draft, final, and supplemental EISs, issuing Records of Decision, and engaging in re-evaluations. States also may request the assignment and assumption of the Secretary's responsibilities for environmental reviews, consultations, or other actions required by other Federal environmental requirements pertaining to the review of the eligible surface transportation projects. Examples of such other Federal environmental requirements include evaluations, determinations, and consultations under section 106 of the National Historic Preservation Act (NHPA), section 7 of the Endangered Species Act, and 23 U.S.C. 138 and 49 U.S.C. 303 (section 4(f)). The Secretary has delegated NEPA and other Federal environmental review responsibilities pertaining to the review and approval of highway, railroad, and public transportation projects, as well as the administration and implementation of this Program to the Agencies pursuant to 49 CFR 1.81.

Although a State may submit simultaneous applications, obtaining assignment for the Secretary's environmental review responsibilities for highway projects is a precondition for obtaining assignment of environmental review responsibilities for non-highway projects (i.e., railroad, public transportation, and multimodal projects). Termination of assignment and assumption for responsibilities with respect to highway projects also would terminate assignment and assumption for responsibilities with respect to non-highway projects.

It is important to note that this NPRM is focused on the application procedures for eligible States as required in 23 U.S.C. 327(b)(2). The Agencies have determined that, with the exception of the termination provision, regulations on the implementation of the Program are not needed at this time. As a result, this NPRM does not address other aspects of the Program, such as the auditing and monitoring requirements, content of Memoranda of Understanding (MOU), or responsibilities associated with litigation. The Agencies anticipate developing guidance on these issues in the future.

Section-by-Section Discussion of Changes

This section provides an overview of the proposed changes to 23 CFR part 773 and 49 CFR part 622, and proposed new part 264 in 49 CFR. The Agencies have relied heavily on FHWA's experience in the development and implementation of the current part 773 regulations.

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

The Agencies propose a title to this part that clearly describes the scope of the part. As discussed above, the NPRM does not address implementation procedures and requirements, other than a termination provision.

Section 773.101—Purpose

The Agencies propose a section to explain the purpose of the Program and to reflect the scope of the Secretary's responsibilities eligible for assignment and State assumption. A notable difference from the current 23 CFR 773.101 is that the proposed section recognizes the expanded responsibilities that can be assigned (i.e., railroad, public transportation, and multimodal projects).

Section 773.103—Definitions

The Agencies propose a section similar to current 23 CFR 773.103 to provide definitions for specific terms that have special significance to an application under this Program. In addition to terms that were originally defined in section 773.103, the Agencies' proposal would add definitions for MOU, multimodal project, NEPA, Operating Administration, public transportation project, and railroad project.

The Agencies propose to define the term ''classes of projects'' as ''either a defined group of projects or all projects to which Federal environmental laws apply.'' The proposal is different from the definition of ''classes of highway projects'' in the current 23 CFR 773.103 because it eliminates the ''highway'' modifier. Under the Program, a State may request assignment for particular projects and identify them in the application. However, a State also may describe a class of projects instead of or in addition to specific projects. For example, a State requesting and obtaining assignment of ''all highway projects located outside the Interstate System'' would be responsible for the environmental review of any future highway project fitting the class for the duration of the term of the agreement. The Agencies also may make assignment decisions based on classes of projects. For example, an Agency may decide to retain responsibility for a particular class of projects (e.g., multimodal projects where the State has not received assignment from the other Agencies, projects within or crossing Federal lands, projects within or crossing Tribal lands).

The proposed definition of ''Federal environmental law'' is similar to the current definition in 23 CFR 773.103. This definition includes Executive Orders, which were added to the final rule definition of ''Federal environmental law'' in 23 CFR 773.103 (72 FR at 6465). In adding Executive Orders to the current definition in § 773.103, FHWA noted that the purpose of Executive Orders was to improve the internal management and administration of the Executive Branch of the Federal Government and did not create any legally enforceable rights. In adopting this definition, the Agencies reiterate this point and note that nothing in this rulemaking process is intended to change the legal force and effect of any Federal statute, regulation, or Executive Order cited herein. Notable differences between the proposed definition and the current definition in § 773.103 are the explicit inclusion of the terms ''railroad,'' ''public transportation'' and ''multimodal projects''; deletion of specific references to non-assignability of Clean Air Act (CAA) conformity determinations and the Secretary's transportation planning responsibilities; and deletion of a provision explaining that only those laws that are inherently environmental are assignable. The Agencies propose to move the notification of restrictions (i.e., CAA conformity, transportation planning, and responsibilities that are not inherently environmental) to the eligibility section.

The Agencies propose to define ''highway projects'' as ''any undertaking to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a highway, bridge, or tunnel, or any portion thereof, including environmental mitigation activities, which is authorized under title 23 U.S.C. A highway project may include an undertaking that involves a series of contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel. The term highway project does not include any project authorized under 23 U.S.C. 202, 203, or 204 unless the State will design or construct the project.'' This proposed definition is similar to the

highway definition in the current 23 CFR 773.103 with the notable difference that it eliminates limitations in the current definition for priority projects under Executive Order 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews* and projects receiving funds through chapter 53 of title 49, U.S.C. The Agencies proposed provision in § 773.105(d) would address situations where projects should be retained for various reasons, including designation of priority project status under Executive Order 13274. The exclusion of projects funded through chapter 53 of title 49, U.S.C., has been eliminated because the MAP–21 revisions now authorize the use of the Program for multimodal projects. The Agencies propose to retain the exclusion of Federal Lands Highways projects. Instead of making a reference to Federal Lands Highways, the Agencies propose to reference the provisions authorizing such projects (i.e., 23 U.S.C. 202, 203, and 204). In some limited cases, a State may design and construct a project authorized under these provisions. These would be considered highway projects under the definition, and their assignment would be subject to the conditions established in the agreement.

The proposed definition would not include the last sentence in the highway project term in the current version of 23 CFR part 773. This provision was added in the current part 773 rule to address concerns expressed by Federal agencies that the exclusion of multimodal projects in assignments under the Program would have encouraged participating States to limit the consideration of reasonable alternatives (72 FR 6465). This restriction is no longer needed since the MAP–21 revisions now authorize assignment of multimodal projects under the Program. States participating in the Program are expected to follow the same standards for environmental review as Federal agencies. This includes NEPA's requirement for lead agencies to consider, in some circumstances, reasonable alternatives that would be outside their jurisdiction (40 CFR 1502.14(c)). Participating States would be expected to consider alternatives, whenever appropriate and reasonable, that meet the purpose and need for the action, but would result in a project for which it does not have all assigned environmental review responsibilities (e.g., multimodal project).

The Agencies propose to define ''MOU'' as ''Memorandum of Understanding, a written agreement that complies with 23 U.S.C. 327(b)(4)(C) and (c), and this part.'' Section 327(b)(4)(C) of title 23, U.S.C., establishes that one of the conditions for selection is that the head of the State agency having primary jurisdiction over highway matters enters into a written agreement with the Secretary. Section 327(c) describes the requirements for the agreements.

The Agencies propose to define the term ''multimodal project'' for this part as a ''project that falls under the jurisdiction by law or special expertise of two or more DOT Operating Administrations.'' This term is broader than the statutory term of ''multimodal project'' in 23 U.S.C. 139, which limits ''multimodal projects'' to projects funded in whole or in part by either FHWA or FTA. For example, for purposes of the Program, a project funded in whole by FRA and that would receive no funding from FHWA or FTA but that would fall under the jurisdiction by law or special expertise of these Agencies would be considered a multimodal project under the proposed definition.

The Agencies propose to define ''NEPA'' as the ''National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).''

The Agencies propose to define ''Operating Administration'' as ''any agency established within the DOT, including the Federal Aviation Administration, Federal Highway Administration (FHWA), Federal Motor Carrier Safety Administration, Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration, National Highway Traffic Safety Administration, Office of the Secretary of Transportation, Pipeline and Hazardous Materials Safety Administration, Research and Innovative Technology Administration, and Saint Lawrence Seaway Development Corporation.''

The Agencies propose to define the ''Program'' as the '''Surface Transportation Project Delivery Program' established under 23 U.S.C. 327.''

The Agencies propose to define ''public transportation project'' as ''a capital project or operating assistance for 'public transportation,' as defined in chapter 53 of title 49, U.S.C.''

The Agencies propose to define ''railroad project'' as ''any undertaking eligible for financial assistance from FRA to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a railroad, as that term is defined in 49 U.S.C. 20102, including: environmental mitigation activities; an undertaking that involves a series of contracts or phases, such as a railroad corridor; and anything that may be constructed in connection with a railroad. The term railroad project does not include any undertaking in which FRA provides financial assistance to Amtrak.''

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

Section 773.105—Eligibility

The Agencies propose an eligibility section to describe eligible applicants, eligible and ineligible responsibilities for assignment, and ineligible projects. Paragraph (a) proposes to establish the requirements for an Applicant to be eligible and to retain eligibility for Program participation. The proposed use of the phrase ''retain eligibility'' is intended to provide notice that any change in the State's circumstances or laws that creates a conflict with these requirements could result in termination of the State's participation in the Program. The conditions for Applicants' eligibility for the Secretary's responsibilities with respect to highway projects would be described first because highway assignment is a prerequisite for the assignment of the Secretary's responsibilities with respect to non-highway projects (23 U.S.C. 327(a)(2)(B)).

Under the proposed regulation, the State agency seeking and obtaining the assignment must be the State Department of Transportation (State DOT) for highway and railroad projects. The State must consent to accept the jurisdiction of the Federal courts for compliance, discharge, and enforcement of any responsibility of the Secretary that the State is seeking (23 U.S.C. 327(c)(3)(B)). State law would dictate how a State can achieve this waiver declaration of its sovereign immunity under the 11th Amendment of the U.S. Constitution. For example, in some States the authority to waive State sovereign immunity is reserved for the legislature. In other States, the authority may have been delegated to the State's Attorney General. In addition to these requirements, the State must have in place laws that authorize the State to take actions necessary to carry out the responsibilities it is assuming (23 U.S.C. 327(c)(3)(C)(i)); must have laws that are

comparable to the Federal Freedom of Information Act (5 U.S.C. 552) (FOIA), including providing that decisions regarding public availability of documents under the State law be reviewable by a court of competent jurisdiction (23 U.S.C. 327(c)(3)(C)(ii)); and must have the financial resources necessary to carry out the responsibilities being assumed (23 U.S.C. 327(c)(3)(D)).

The proposed regulation would require States to adhere to the same conditions for assumption of the Secretary's responsibilities with respect to non-highway projects with two exceptions: (1) For public transportation projects, the State agency applying for assignment would not have to be a State DOT and (2) as noted above, a State would be required to obtain and maintain assignment of responsibilities with respect to one or more highway projects. This latter exception would mean that termination of assignment of responsibilities with respect to highway projects for a State would be cause for termination of assignment of responsibilities with respect to that State's non-highway projects under the proposed regulation.

Paragraph (b) proposes to establish eligible and ineligible responsibilities. A State seeking participation in the Program must request and obtain assignment for all NEPA responsibilities for the project(s) or classes of projects being sought. This proposed regulation would not permit assignment of only select aspects of the NEPA responsibilities (e.g., developing and approving only EAs and FONSIs). However, in accordance with 23 U.S.C. 327(a)(2)(B)(i), a State does not have to seek all environmental review responsibilities. As an example, a State may decide to seek all environmental review responsibilities with the exception of those associated with section 106 of the NHPA.

As established by 23 U.S.C. 327(a)(2)(B)(iv), the list of ineligible responsibilities would include conformity determinations under section 176(c) of the CAA and the Secretary's responsibilities under transportation planning legal requirements (23 U.S.C. 134 and 135; 49 U.S.C. 5303 and 5304). The list also would include government-to-government consultation with Tribal governments (see Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*). Proposed paragraph (b) would clarify that the Secretary's responsibilities that are not related to the environmental review process are not eligible for assignment and assumption under this Program. For example, in the highway context, approvals of changes to Interstate access, issuance of Buy America waivers, and approval of Interstate and National Highway System design exceptions are not considered to be environmental review responsibilities that can be assigned through this Program.

In addition, proposed paragraph (b)(6) would exclude the assignment of the Secretary's environmental review responsibilities for actions of DOT Operating Administrations other than FHWA, FRA, and FTA, providing notice to potential applicant States that the Secretary's responsibilities for other portions of multimodal projects are not assignable under the Program. For example, in a situation where a highway, railroad, or public transportation project will either receive funding or require the approval of another DOT Operating Administration not covered by the Program (e.g., Maritime Administration (MARAD) or Federal Aviation Administration (FAA)), the State may request and receive assignment of the FHWA, FRA, or FTA environmental review responsibilities, but would not be able to request or receive assignment of the other Operating Administration's environmental review responsibilities. The Agencies have determined that this approach is consistent with section 1313 of MAP–21. The Agencies have denominated the proposal as option 1. The Agencies specifically request public comment on the feasibility of and interest in this proposal.

The Agencies evaluated other approaches for implementing the statute's direction to provide for assignment of environmental review responsibilities with respect to multimodal projects. Under option 2 the rule would have allowed assignment of environmental review responsibilities for elements of a multimodal project not explicitly listed in the statute (e.g., airports, motor carrier safety, port, and pipeline/hazardous materials safety). Option 2 would have allowed the assignment of environmental review responsibilities even when the largest element of the project is an element that was not specifically listed in the law. For example, under this reading a project that is in its majority an airport project, but that has a minor public transportation element, would be assignable under the Program as a multimodal project. The Agencies considered various factors in pursuing option 1 rather than option 2. The broader interpretation in option 2 could create administrative difficulties in its implementation. For example, Operating Administrations other than FHWA, FRA, and FTA would need to become familiar with, participate, and budget for the auditing and monitoring process. Furthermore, it is more common for MARAD and FAA projects to involve third-party sponsoring entities other than a State (e.g., port and airport authorities) that are ineligible for assignment and who may want DOT to retain its responsibilities. In addition, neither the MAP–21 nor its legislative history provide clear direction that the provision should be implemented in its broadest sense. Therefore, the Agencies did not believe that option 2 was reasonable or consistent with this provision. See *U.S. Telecom Ass'n* v. *F.C.C.,* 359 F. 3d 554, 566 (D.C. Cir. 2004) (holding that Federal agencies may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so).

Despite issues described in the previous paragraph, if the Agencies were to pursue option 2, the Agencies envision that the application process would proceed in the following manner: (1) A State would request the responsibilities for multimodal projects through the Office of the Secretary of Transportation (OST); (2) OST would send the request to all affected DOT Operating Administrations for their coordination, review, and approval; (3) if approved, the Operating Administrations would enter into agreements with the State and would share responsibility for the oversight (i.e., audit and monitoring requirements) with respect to the assigned environmental review responsibilities that would have otherwise been under their jurisdiction. Obtaining assignment for the Secretary's environmental review responsibilities with respect to highway projects would continue to be a precondition of obtaining assignment for the Secretary's environmental review responsibilities for non-highway projects. However, the Agencies do not consider option 2 reasonable or consistent with this provision, as outlined in the previous paragraph. The Agencies specifically request public comment on the feasibility of and interest in this option.

Under option 3, the Agencies considered a more limited approach than option 1, where the only multimodal projects considered for assignment are those made up of highway, railroad, and/or public transportation components and where the State successfully obtains assignment for all of the Secretary's environmental review responsibilities for the project. Under such scenario, a

State may obtain assignment of a highway-railroad, railroad-public transportation, highway-public transportation, or highway-railroad-public transportation project if the State successfully obtains assignment from the Operating Administrations involved. Projects that have components of other DOT Operating Administrations would not be eligible for assignment. Restricting the assignment to situations where the State successfully obtains assignment for all the environmental review responsibilities involved (i.e., highway, railroad, and/or public transportation) would address complexities that could result from having a State acting for the Secretary and a DOT Operating Administration working together in a multimodal project. Examples of such complexities include the process for handling conflict resolution when a State has assumed the Secretary's responsibilities and a DOT Operating Administration is the other party involved in the conflict; joint legal representation issues when a participating State and another DOT Operating Administration are involved; and the potential impacts on privileges, such as protections for deliberative materials. The Agencies believe that this approach may be overly restrictive. The Agencies specifically request public comment on the feasibility of and interest in this option.

Proposed paragraph (c) would describe classes of projects that are ineligible for assignment. Ineligible classes of projects would include those that cross State boundaries and those that cross or are at international boundaries. Federal interest in these types of projects would warrant the active participation and involvement of the Agencies in the environmental review. Section 1503 of MAP–21 amends 23 U.S.C. 106 by creating a category of projects—high risk category—for which FHWA may not assign its responsibilities under 23 U.S.C. 106 to a State (see 23 U.S.C. 106(c)(4)). Paragraph (c) proposes to apply this assignment limitation to assignments under the Program.

Finally, the Agencies are proposing paragraph (d) to reiterate that they have discretion to reject assignment of eligible responsibilities or projects under the Program. Under the pilot program, FHWA did not allow assignment to the State of the responsibility for environmental review of projects identified for oversight under Executive Order 13274. The Agencies have determined that Executive Order 13274 projects may not be the only projects that warrant high-level involvement from the Agencies. The proposed paragraph (d) would entitle the Agencies to reject the assignment for a project under the Program based on unique circumstances surrounding the project or group of projects. For example, responsibilities for which the Operating Administration could exercise this discretion include the Secretary's environmental review responsibilities for projects that raise unique issues or precedent-setting analyses, or for projects that are within or cross Federal or Tribal lands.

Section 773.107—Pre-application Requirements

The Agencies propose this section to discuss pre-application requirements. Paragraph (a) proposes a pre-application coordination meeting between the appropriate Division, Regional, or Headquarters office of the Operating Administration and the State requesting the assignment. The purpose of this meeting would be to understand the State's interests, to identify the responsibilities that would be the subject of the application, and to establish timelines for the application process. This coordination would be important for clarifying any issues and questions regarding the application process and Program implementation. For example, this meeting would be useful for addressing issues related to the handling of multimodal projects. The meeting could establish the State's interest in assuming responsibility for specific multimodal projects or a class of multimodal projects, procedures that may be needed for seeking assignment of multimodal projects not identified at the time of application, and discussion of classes of multimodal projects that may be best handled on a case-by-case basis. It may be useful for the State and the relevant Operating Administration(s) to discuss possible scenarios for the identification of multimodal projects, such as situations where a project can be identified as a multimodal project early in project planning or at a later stage (e.g., where a project that started out as a highway, public transportation, or railroad and changes into a multimodal project during alternatives analysis). The meeting could also be useful for discussing how the State proposes to address environmental review for special classes of projects such as those that affect Federal or Tribal lands.

Paragraph (b) proposes to establish public notification responsibilities for States applying for Program participation. The proposed language is similar to the statutory language in 23 U.S.C. 327(b)(2)(C) (requiring States to provide evidence of the notice and solicitation and copies of the comments received) and section 327(b)(3) (requiring States to provide notification 30 days before the application submission and authorizing States to provide notice and solicit comments in accordance with the State laws for public notification). The Agencies have also included a requirement for the State to seek comments from resource agencies—those Federal, State, and Tribal agencies that have oversight or interest over protected resources in their State. This information would be useful for the Agencies' compliance with section 327(b)(5) (requiring the Secretary to solicit the views of Federal agencies that would have consultation responsibilities for assigned projects).

The Agencies propose a requirement, under paragraph (b)(1), for applicant States seeking the Secretary's responsibilities with respect to public transportation, to identify and solicit comments from recipients of assistance under chapter 53 of title 49, U.S.C. This would assist FTA in identifying recipients of assistance under chapter 53 of title 49, U.S.C., who would want FTA to maintain the responsibilities for a public transportation project pursuant to section 327(a)(2)(B)(iii). The FTA would consider this information in its final assignment decision.

The Agencies propose paragraphs (c) and (d) to encourage States to identify their respective processes for consenting to Federal court jurisdiction and to cure any deficiency with respect to any State information disclosure law or regulation that would make it inconsistent with FOIA. The process for consenting to Federal court jurisdiction may vary from State to State. These paragraphs propose to clarify that States must start this process as soon as possible and must complete it before submitting the application.

Section 773.109—Application Requirements

Section 773.109 proposes to include the application requirements. The proposal includes application provisions similar to those in current regulation 23 CFR 773.106. Notable differences from current § 773.106 are the inclusion of application procedures for railroad, public transportation, and multimodal project environmental review responsibilities; a paragraph encouraging electronic submissions; a paragraph discussing the joint application process; and a paragraph authorizing the Agencies to seek additional information.

The proposal defines the application requirements for the FHWA's responsibilities with respect to highway

projects first because obtaining highway assignment is a precondition to obtaining responsibilities for non-highway projects. As specified in proposed § 773.105(a)(1)(i) the State entity seeking to participate in the Program must be the State DOT. Paragraph (a)(1) proposes to require the State to set forth in its application the highway projects or classes of highway projects for which it is seeking to obtain the Secretary's NEPA responsibilities. Proposed paragraph (a)(2) would require the State's application to identify which environmental review responsibilities, in addition to NEPA, it is seeking to obtain. As discussed in this preamble, a State must seek all NEPA responsibilities, but may seek either all, some, or none of the Secretary's responsibilities with respect to the other Federal environmental laws.

Proposed paragraph (a)(3) would require a State to discuss how it intends to carry out the responsibilities. Under the proposal, a State would need to provide a summary of that State's procedures currently in place to guide the process. A State would need to provide these procedures to FHWA either electronically or by submitting a hard copy. The proposal also would require a State to discuss any management changes it has made or will make to ensure good quality analyses. The proposal also would require a State to identify the process it will use for identifying projects that deserve higher scrutiny within that State. This requirement stems from the FHWA and FTA joint NEPA procedures at 23 CFR 771.125(c), which identifies situations where a Final EIS must be submitted from the Division or Region to Headquarters for approval. Under § 771.125(c), FHWA's Headquarters office would need to approve the Final EIS for projects where: (1) Additional coordination with other Federal, State, or local government agencies is needed; (2) the social, economic, or environmental impacts of the action may need to be explored more fully; (3) the impacts of the action are unusually great; (4) major issues remain unresolved; or (5) the action involves national policy issues. The proposed provision would require States to develop an analogous process to ensure that the State's Headquarters office approves the Final EIS for particular types of projects before they can proceed.

Proposed paragraph (a)(4) would require a State to describe its staff resources and any organizational changes it has made or will make to carry out the responsibilities sought. Proposed paragraph (a)(5) would require a State to summarize the financial resources available to carry out the responsibilities, the resource and staffing needs, and to provide a commitment that financial resources will be made available to meet these needs. These requirements stem from 23 U.S.C. 327(b)(4)(B) and (c)(3)(D).

Proposed paragraphs (a)(6) through (8) would require a State to provide evidence that it has waived its sovereign immunity with respect to the Secretary's responsibilities it is seeking to acquire, that it has laws comparable to FOIA, and that it has met the notice and solicitation of public comment requirements. The evidence sought for the sovereign immunity waiver and the FOIA requirement would take the form of a certification from the State's Attorney General or other State official legally empowered by State law to make such certification. This certification requirement stems from 23 U.S.C. 327(c)(3)(C).

Under proposed paragraph (a)(9), the Agencies would require a State to provide a point of contact for questions regarding the application and a point of contact for questions regarding the implementation of the Program in that State. These two points of contacts may be the same individual.

The Agencies propose paragraph (a)(10) to require a Governor, or the Mayor in the District of Columbia, to sign the application as acknowledgment of the commitment to provide resources for the implementation of the Program and the consent to exclusive Federal court jurisdiction for cases arising from the implementation of the Program in the State.

Proposed paragraph (b) would establish that the same information requirements apply for requests of the Secretary's environmental review responsibilities with respect to public transportation projects, but the discussion focuses on public transportation projects. In addition, the paragraph would require evidence that a State has either obtained assignment for the Secretary's environmental review responsibilities with respect to highway projects or has requested the assignment concurrently with the public transportation request. The Agencies propose a requirement for a State to provide evidence that it has notified recipients of assistance under chapter 53 of title 49, U.S.C., of the application (see 23 U.S.C. 327(a)(2)(B)(iii)).

Proposed paragraph (c) would establish that the same information requirements applicable to the request for the Secretary's environmental review responsibilities for highway projects would apply to the request for the Secretary's environmental review responsibilities for railroad projects. In addition, the paragraph would require evidence that a State has either obtained assignment for the Secretary's environmental review responsibilities with respect to highway projects or has requested the assignment concurrently with the railroad project request.

Proposed paragraph (d) would cover the application requirements for the Secretary's environmental review responsibilities with respect to multimodal projects. A State may seek assignment of the Secretary's environmental review responsibilities for the highway, railroad, and/or public transportation components of the multimodal project. As discussed above in this preamble, the Secretary's environmental review responsibilities with respect to actions of other Operating Administrations are not eligible for assignment. Under this proposal, a State would obtain the assignment for the component of the multimodal project that is eligible for assignment (i.e., highway, railroad, or public transportation) and would need to work with the Operating Administration(s) with jurisdiction by law or special expertise on the project to ensure a coordinated environmental review. This could involve the establishment of a special relationship with the DOT entity such as a joint lead agency relationship or a lead and cooperating agency relationship under NEPA.

Ideally, the identification of a multimodal project would occur early enough to allow for a joint application of the Secretary's responsibilities before the environmental review starts. However, in some situations the identification of a multimodal project may not occur until a later stage in the environmental review stage (e.g., identification of alternatives). States are encouraged to submit an application as early as possible once the project is determined to be a multimodal project. A State must submit an application to each Agency for which that State is seeking assignment of environmental review responsibilities.

Proposed paragraph (e) would authorize the electronic submittal of applications. Proposed paragraph (f) would authorize the joint submittal of applications. The Agencies believe that this provision would be particularly useful when a State is interested in seeking assignment for groups or classes of projects and multiple modal responsibilities (e.g., highway and public transportation NEPA responsibilities). Proposed paragraph (g) reminds States and the public that the

Agencies are authorized to seek more information to cure any deficiencies in a submitted Program application.

Section 773.111—Application Review and Approval

Proposed § 773.111 would establish the review and approval process. Proposed paragraph (a) would require the Operating Administration to solicit public comments and consider these comments in its evaluation of the State's application. Information made available to the public for its review may include materials such as the State's original application and any amendments to the application, and any additional supporting material that is not included in the State's application. The materials for public review also may include a list of responsibilities sought by the State that the Operating Administration proposes to retain. This information would be useful for the public and commenting agencies to understand the limits of the proposed assignment. The paragraph would allow the use of joint notices for those situations where the State seeks the environmental review responsibilities of more than one of the Agencies for a project or a class of projects.

Proposed paragraph (b) would establish that upon approving the application, the Operating Administration will invite the State to enter into an agreement in accordance with 23 U.S.C. 327(b)(4)(C) and (c). Proposed paragraph (c) would establish that the assignment would not be effective until an MOU is executed. Proposed paragraph (d) would establish that the MOUs may be renewed for a term not longer than 5 years in accordance with 23 U.S.C. 327(c)(5). Proposed paragraph (e) indicates that an MOU would be made available for public inspection.

Section 773.113—Application Amendments

Proposed § 773.113 is similar to the current regulation at 23 CFR 773.108. Proposed paragraph (a) would establish that the State may amend its application after submission of the application but prior to the execution of a MOU. These amendments may request additions to or eliminate requests for responsibilities. An amendment request is subject to the same notification and solicitation of comments procedures as an application. This includes a requirement for the State to submit the comments received and to note changes made to the request based on the comments received. It also includes the applicable Operating Administration's solicitation of comments on any amendments prior to the decision on an application. This is meant to be consistent with the requirement in § 773.111(a) for an original application.

Proposed paragraph (b) would establish that a State may amend its original application after 1 year of the executed MOU. The amendment request is subject to the same notification and solicitation of comments procedures as the application. This includes a requirement for the State to submit the comments received and to note changes made to the request based on the comments received. It also includes the Operating Administration's solicitation of comments on the proposed changes prior to the decision on the application.

Section 773.115—Renewals

Proposed § 773.115 would describe the conditions of renewal for Program participation. The proposed section would include requirements for notification to DOT, solicitation of public comments, and information needed for the Agencies' consideration.

Proposed paragraph (a) would require the participating State to notify the appropriate Operating Administration of its intent to renew no later than 1 year before the expiration of the MOU. The intent of this provision is to have a venue similar to the pre-application meeting to identify any issues and to go through the process requirements.

The Agencies propose a process similar to the original application review and approval process for the renewal. The proposal would require the submission of renewal application no later than 6 months before a MOU's expiration date. An application would need to capture any relevant changed circumstances that have taken place since the original application. The proposal would require a public participation process for any renewal that would inform the State and the Operating Administration of any modifications that may be needed in a State's implementation of the assigned responsibilities. The proposal would require the Operating Administration(s) to solicit comments on the request and make documents under its consideration available for public review. This may include an original application, a renewal application, audit and monitoring reports, and a list of responsibilities the relevant Operating Administration proposes to retain. The relevant Operating Administration must consider comments it receives, in addition to the record before it, in making a determination to renew.

Paragraph (g) proposes to permit a continuance of a State's participation in the Program after the expiration of its MOU in exceptional situations. Specifically, such a continuance would be intended to address situations where administrative delays or emergencies would not allow the timely execution of a renewal MOU. This provision would be an extraordinary measure that would be used when the only remaining step for Program continuation is the execution of signature or completion of administrative protocols. The Operating Administration would have the discretion of exercising this extraordinary measure.

Section 773.117—Termination

The Agencies are proposing to include § 773.117 to address termination of the assignment of portions or all Federal environmental review responsibilities. The Agencies believe that it is difficult to predict all circumstances where it might be necessary to terminate the assignment for portions or all of the environmental review responsibilities. Therefore, the proposed regulation does not specify criteria for termination.

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

The Agencies propose Appendix A as a list of example Federal environmental review responsibilities that may be assigned under the Program. A similar list exists in the current Appendix A of part 773. Additional responsibilities have been added related to FRA responsibilities to recognize the broadened scope of the Program.

49 CFR Part 264—Surface Transportation Project Delivery Program Application Requirements and Termination

The Agencies propose to create a new part 264 in 49 CFR to include a reference to 23 U.S.C. 327 and the Program application procedures in 23 CFR part 773. A cross reference would assist those potential FRA applicants, State and Federal agencies, and the public.

49 CFR part 622—Environmental Impact and Related Procedures

The Agencies proposed to revise the authorities in subpart A—Environmental Procedures, to include a reference to 23 U.S.C. 327 and the application procedures in 23 CFR part 773. A cross reference would assist those potential FTA applicants, State and Federal agencies, and the public.

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 Secretary 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. The Agencies may publish a final rule 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 Agencies have determined preliminarily that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of DOT's regulatory policies and procedures (44 FR 11032).

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

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. §§ 601-612), the Agencies have evaluated the effects of this proposed rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities.

The proposed rule addresses application requirements for States wishing to participate in the Program. As such, it affects only States, and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and the Agencies certify that this action would not have significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $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 would evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and Tribal governments and the private sector. Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government.

Executive Order 13132 (Federalism Assessment)

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

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

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175 and believe that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Tribal governments; and would not preempt Tribal law. The proposed rulemaking addresses application requirements for the Program and would not impose any direct compliance requirements on Tribal governments. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

The DOT's regulations implementing Executive Order 12372 (49 CFR part 17) apply to this proposed rulemaking. Accordingly, the Agencies solicit comments on this issue.

Paperwork Reduction Act

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

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

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12898 (Environmental Justice)

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534 (May 10, 2012) (available online at *www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with Executive Order 12898 and the DOT Order in all rulemaking activities. In addition, FHWA and FTA have issued additional documents relating to administration of Executive Order 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (the FHWA Order) (available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*). FTA also issued an update to its EJ policy, *FTA Policy Guidance for Federal Transit Recipients,* (the FTA Circular) 77 FR 42077 (July 17, 2012) (*available online at www.fta.dot.gov/legislation_law/12349_14740.html*).

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

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This proposed action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not lead directly to construction) for FHWA, and 23 CFR 771.118(c)(4) (planning and administrative activities which do not involve or lead directly to construction) for FTA. In addition, FRA has determined that this proposed action is not a major FRA action requiring the preparation of an environmental impact statement or environmental assessment under FRA's Procedures for Considering Environmental Impacts (64 FR 28545, May 26, 1999 as amended by 78 FR 2713, Jan. 14, 2013). The Agencies have evaluated whether the proposed action would involve unusual circumstances or extraordinary circumstances and have determined that this proposed action would not involve such circumstances.

Under the Program, a selected State may voluntarily assume the responsibilities of the Secretary for implementation of NEPA for one or more highway projects, and one or more railroad, public transportation, or multimodal projects. Upon a State's voluntary assumption of NEPA responsibilities, that State also may choose to be assigned all or part of the Secretary's responsibilities for environmental review, consultation or other action required under any Federal environmental law pertaining to the review or approval of highway, public transportation, railroad, or multimodal projects. A State must follow the DOT's and the appropriate Agency's regulations, policies, and guidance with respect to NEPA and the assumed environmental law responsibilities. As a result, the Agencies find that this

proposed rulemaking would not result in significant impacts on the human environment.

Regulation Identification Number

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

List of Subjects

23 CFR Part 773

Environmental protection, Highways and roads.

49 CFR Part 264

Environmental protection, Railroads.

49 CFR Part 622

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

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

Title 23

■ 1. Revise part 773 to read as follows:

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

Sec.

773.101 Purpose.
773.103 Definitions.
773.105 Eligibility.
773.107 Pre-application requirements.
773.109 Application requirements.
773.111 Application review and approval.
773.113 Application amendments.
773.115 Renewals.
773.117 Termination
Appendix A to Part 773—Example List of the Secretary's Environmental Review Responsibilities That May Be Assigned Under 23 U.S.C. 327.

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

§ 773.101 Purpose.

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

§ 773.103 Definitions.

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

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

Federal environmental law means any Federal law or Executive Order (E.O.) under which the Secretary of the U.S. Department of Transportation (DOT) has responsibilities for environmental review, consultation, or other action with respect to the review or approval of a highway, railroad, public transportation, or multimodal project. A list of the Federal environmental laws for which a State may assume the responsibilities of the Secretary under this Program include, but are not limited to, the list of laws contained in Appendix A to this part.

Highway project means any undertaking to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a highway, bridge, or tunnel, or any portion thereof, including environmental mitigation activities, which is authorized under title 23 U.S.C. A highway project may include an undertaking that involves a series of contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel. The term highway project does not include any project authorized under 23 U.S.C. 202, 203, or 204 unless the State will design and construct the project.

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

Multimodal project means a project that falls under the jurisdiction by law or special expertise of two or more DOT Operating Administrations.

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

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

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

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

Railroad project means any undertaking eligible for financial assistance from FRA to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a railroad, as that term is defined in 49 U.S.C. 20102, including: Environmental mitigation activities; an undertaking that involves a series of contracts or phases, such as a railroad corridor; and anything that may be constructed in connection with a railroad. The term railroad project does not include any undertaking in which FRA provides financial assistance to Amtrak.

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

§ 773.105 Eligibility.

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

(1) For highway projects:

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

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

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

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

State laws is reviewable by a court of competent jurisdiction; and

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

(2) For railroad, public transportation, or multimodal projects:

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

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

(3) For railroad projects, the State must also be the State DOT.

(b) *Responsibilities.* Responsibilities eligible for Program assignment and State assumption include all NEPA responsibilities and all or part of the reviews, consultations, and other actions required under other environmental laws, regulations, and E.O.s. Appendix A contains an example list of other environmental laws, regulations, and E.O.s that may be assigned to and assumed by the State. The following responsibilities are ineligible for Program assignment and State assumption:

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

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

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

(4) The Secretary's responsibilities for government-to-government consultation with Tribes; and

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

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

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

(1) Projects that cross State boundaries;

(2) Projects that are at or cross international boundaries; and

(3) Projects classified as high risk under 23 U.S.C. 106(c)(4).

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

§ 773.107 Pre-application requirements.

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

(b) *Public comments.* The State must give notice of its intention to participate in the Program and must solicit public comment by publishing the complete application in accordance with the appropriate State public notice laws not later than 30 days prior to submitting its application to the appropriate Operating Administration(s). If allowed under State law, publishing a notice of availability of the application rather than the application itself may satisfy the requirements of this provision so long as the complete application is made available on the internet and reasonably available to the public for inspection. Solicitation of public comments must include solicitation of the views of other State agencies, Tribal agencies, and Federal agencies that may have consultation or approval responsibilities associated with the project(s) within State boundaries.

(1) The State requesting the FTA's responsibilities with respect to public transportation projects must identify and solicit public comments from potential recipients of assistance under chapter 53 of title 49 U.S.C.

(2) The State must submit copies of all comments received with the publication of the respective application(s). The State must summarize the comments received and note any actions taken in response to the public comments.

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

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

§ 773.109 Application requirements.

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

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

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

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

(i) A summary of State procedures currently in place to guide the development of documents, analyses, and consultations required to fulfill the environmental review responsibilities requested. The State must submit a copy of the procedures with the application unless these are available electronically. The State may submit the procedures electronically, either through email or by providing a hyperlink;

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

(iii) A discussion of how the State will verify legal sufficiency for the environmental document it produces; and

(iv) A discussion of how the State will identify and address those projects that would normally require Headquarters prior concurrence of the final environmental impact statement under 23 CFR 771.125(c).

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

(i) A description of the staff positions, including management, that will be dedicated to fulfilling the additional

functions needed to accept the assigned responsibilities;

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

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

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

(6) Certification and explanation by the State's Attorney General, or other State official legally empowered by State law that the State can and will assume the responsibilities of the Secretary for the Federal environmental laws and projects requested and that the State consents to exclusive Federal court jurisdiction with respect to the responsibilities being requested and to be assumed. Such consent must be broad enough to include future changes in relevant Federal policies and procedures to which FHWA would be subject or such consent would be amended to include such future changes;

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

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

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

(10) The State Governor's signature approving the application.

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

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

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

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

(d) *Multimodal project responsibilities.* An eligible State may submit an application for assignment of the Secretary's Federal environmental review responsibilities for a multimodal project, group of projects, or classes of projects. A State may seek only the Secretary's Federal environmental review responsibilities with respect to the highway, railroad, or public transportation components of the multimodal project, group of projects, or classes of projects. A State should submit the application as early as possible once the project is identified as a multimodal project and must provide the information required by paragraphs (a)(1) through (10) of this section, but with respect to the highway, railroad, or public transportation components of the multimodal project(s) at issue. In addition, the application must include evidence that FHWA has assigned, or has been requested to assign, to the State the responsibilities of FHWA with respect to one or more highway projects within the State under NEPA. A State must submit the application to each of the applicable Operating Administrations from which the State is seeking assignment.

(e) *Electronic submissions.* All applications may be submitted electronically.

(f) *Joint application.* A State may submit joint applications for multiple modal responsibilities. A joint application must avoid redundancies and duplication of information to the maximum extent practicable. The application must distinguish the modal projects or classes of projects of interest a State is seeking for assignment. A joint application must provide all of the information required by each Operating Administration for which a State is seeking assignment. A State must submit joint applications to each applicable Operating Administration.

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

§ 773.111 Application review and approval.

(a) The Operating Administration must solicit public comments on the pending request and must consider comments received before rendering a decision on the State's application. Materials made available for this public review may include the State's application, any additional supporting materials, and a list of responsibilities sought by the State that the Operating Administration proposes to retain. The notification may be a joint notification if two or more Operating Administrations are involved in the assignment for a project or a class of projects.

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

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

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

(e) The MOU and approved application must be published on a DOT Web site and made reasonably available to the public for inspection and copying.

§ 773.113 Application amendments.

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

(1) Prior to requesting any such amendment, the State must provide notice and solicit public comments with respect to the intended amendments in compliance with § 773.107(b) of this part.

(2) In submitting the amendment to the appropriate Operating Administration(s), the State must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

(3) Consistent with § 773.111(a) of this part, the appropriate Operating Administration(s) must solicit public comments on the change prior to approving the application.

(b) Upon execution of the MOU(s), a State may amend its application to the appropriate Operating Administration(s) no earlier than 1 year after the MOU has been executed to request additional projects, classes of projects, or more environmental review responsibilities consistent with the requirements of this part.

(1) Prior to requesting any such amendment, the State must provide notice and solicit public comments with respect to the intended amendments in compliance with § 773.107(b) of this part.

(2) In submitting the amendment to the appropriate Operating Administration(s), the State must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

(3) Consistent with § 773.111(a) of this part, the appropriate Operating Administration(s) must solicit public comments on the change prior to approving the application.

§ 773.115 Renewals.

(a) A State planning to renew a MOU and to maintain the assumption of the Operating Administration's responsibilities under NEPA and other environmental laws must notify the appropriate Operating Administration(s) of its intent to do so at least 12 months before the expiration of the MOU.

(b) A State must submit an application to renew the MOU no later than 180 days prior to the expiration of the MOU.

(c) An application to renew a MOU must:

(1) Describe any changes to the information submitted to meet § 773.109(a)(1) through (5) and (a)(9) of this part for the applicable Operating Administration(s);

(2) Provide up-to-date certifications required in § 773.109(a)(6) through (7) of this part for the applicable Operating Administration(s);

(3) Provide evidence of the public notification requirements in paragraph (d) of this section; and

(4) Provide the State Governor's, or the Mayor's in the District of Columbia, signature approving the application to renew the MOU.

(d) The State must give notice of its intent to renew its participation in the Program and must solicit public comment in compliance with § 773.107(b) of this part.

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

(f) The appropriate Operating Administration(s) must solicit public comments on the renewal request and must consider comments received before approving the State's renewal application. Materials made available for this public review may include the State's original application, the renewal application, any additional supporting materials, a list of responsibilities sought by the State that the Operating Administration proposes to retain, and auditing and monitoring reports developed as part of the Program. The notification may be a joint notification if two or more Operating Administrations are involved in the assignment for a project or a class of projects.

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

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

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

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

§ 773.117 Termination.

Pursuant to 23 U.S.C. 327 and any applicable conditions of the Secretary's assignment of responsibilities to the State, either the Secretary or the State may terminate the participation of the State in the Program.

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

Federal Procedures

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

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

The FHWA/FTA Environmental Regulations at 23 CFR parts 771, 772 and 777.

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

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

Noise

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

Airport Noise and Capacity Act of 1990, 49 U.S.C. 4751–47533.

Compliance with the noise regulations at 23 CFR part 772.

Wildlife

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

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

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

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

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

Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801–1884.

Historic and Cultural Resources

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

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

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

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

Social and Economic Impacts

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

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

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. 1251–1387.

Section 404, 33 U.S.C. 1344
Section 401, 33 U.S.C. 1341
Section 319, 33 U.S.C. 1329

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

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

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

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

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

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

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

Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

Parklands

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

Land and Water Conservation Fund, 16 U.S.C. 460*l*–4–460*l*–11.

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675.

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

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

Executive Orders Relating to Eligible Projects and DOT Implementing These Executive Orders

E.O. 11990 *Protection of Wetlands*
E.O. 11988 *Floodplain Management*
E.O. 12898 *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*
E.O. 13112 *Invasive Species*

Title 49

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

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

Sec.

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

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

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

The procedures for complying with the surface transportation project delivery program application requirements and termination are set forth in part 773 of title 23 of the Code of Federal Regulations.

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139, 326, and 327; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81, 1.85; and Pub. L. 112–141, 126 Stat. 405, sections 1313 and 1315.

■ 4. Revise § 622.101 to read as follows:

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and related statutes, regulations, and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as ''Section 4(f),'' are set forth in part 774 of title 23 of the Code of Federal Regulations. The procedures for complying with the surface transportation project delivery program application requirements and termination are set forth in part 773 of title 23 of the Code of Federal Regulations.

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

Issued on: August 12, 2013.

Victor M. Mendez,

Administrator, Federal Highway Administration.

Peter Rogoff,

Administrator, Federal Transit Administration.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

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