estimate of 31,878 hours. BIS expects the burden hours associated with this collection to decrease slightly or have limited impact on the existing estimates. Any comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, should be sent within 30 days of publication of this notice to *http://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

List of Subjects in 15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 740 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 740—LICENSE EXCEPTIONS

■ 1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Section 740.4 is revised to read as follows:

§ 740.4 Shipments to Country Group B countries (GBS).

License Exception GBS authorizes exports and reexports to Country Group B (see Supplement No. 1 to part 740), except Ukraine, of those commodities where the Commerce Country Chart (Supplement No. 1 to part 738 of the EAR) indicates a license requirement to the ultimate destination for national security reasons only and identified by ''GBS—Yes'' on the CCL. See § 743.1 of the EAR for reporting requirements for exports of certain commodities under License Exception GBS.

■ 3. Section 740.6 is amended by revising paragraph (a) introductory text to read as follows:

§ 740.6 Technology and software under restriction (TSR).

(a) *Scope.* License Exception TSR permits exports and reexports of technology and software where the Commerce Country Chart (Supplement No. 1 to part 738 of the EAR) indicates a license requirement to the ultimate destination for national security reasons only and identified by ''TSR—Yes'' in entries on the CCL, provided the software or technology is destined to Country Group B, except Ukraine. (See Supplement No. 1 to part 740.) A written assurance is required from the consignee before exporting or reexporting under this License Exception.

* * * * *

Supplement No. 1 to Part 740 [Amended]

■ 4. Supplement No. 1 to part 740 is amended by

■ a. In the Country Group A table, adding ''Cyprus'' and ''Mexico'' in alphabetical order to Column A:6.

■ b. In the Country Group B table, adding ''Ukraine'' in alphabetical order;

■ c. In the Country Group D table, removing the entry for ''Ukraine'';

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020–26552 Filed 12–23–20; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 773 and 778

Federal Railroad Administration

49 CFR Part 264

Federal Transit Administration

49 CFR Part 662

[Docket No. FHWA–2016–0037]

FHWA RIN 2125–AF73; FRA RIN 2130–AC66; FTA RIN 2132–AB32

Program for Eliminating Duplication of Environmental Review

AGENCY: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FHWA, FRA, and FTA are issuing this final rule to establish the regulations governing the DOT Program for Eliminating Duplication of Environmental Reviews (Pilot Program). Section 1309 of the Fixing America's Surface Transportation (FAST) Act, as further amended, directed the Secretary of Transportation to establish a pilot program authorizing up to two States to conduct environmental reviews and make approvals for projects under State environmental laws and regulations, instead of the National Environmental Policy Act (NEPA), under certain circumstances. Section 1309(c) requires the Secretary, in consultation with the Chair of the Council on Environmental Quality (CEQ), to promulgate regulations to implement the requirements of the Pilot Program, including application requirements and criteria necessary to determine whether State laws and regulations are at least as stringent as the applicable Federal law.

This final rule also implements Section 1308 of the FAST Act, which amends the corrective action period of the Surface Transportation Project Delivery Program (Section 327 Program).

DATES: This final rule is effective January 27, 2021.

FOR FURTHER INFORMATION CONTACT: For FHWA, James Gavin, Office of Project Development and Environmental Review, (202) 366–1473, or Diane Mobley, Office of Chief Counsel, (202) 366–1366. For FRA, Michael Johnsen, Office of Railroad Policy and Development, (202) 493–1310, or Chris Van Nostrand, Office of Chief Counsel, (202) 493–6058. For FTA, Megan Blum, Office of Planning and Environment, (202) 366–0463, or Mark Montgomery, Office of Chief Counsel, 202–366–1017. The Agencies are located at 1200 New Jersey Ave. SE, Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Section 1309 of the FAST Act (Pub. L. 114–94, 129 Stat. 1312), codified at 23 U.S.C. 330, established a pilot program that allows the Secretary to approve up to five States (to include the District of Columbia and Puerto Rico) to use one or more State environmental laws instead of the NEPA process for a State's environmental review of surface transportation projects. Section 1309 required the Secretary, in consultation with the Chair of CEQ, to promulgate regulations governing the Pilot Program. FHWA, FRA, and FTA, herein referred to as the ''Agencies'' or, when singular, the ''Agency,'' are promulgating these regulations under a delegation from the Secretary.

This final rule establishes the Pilot Program, specifies application requirements, and defines the criteria the Agencies will use to determine whether a State law or regulation is as stringent as the Federal requirements under NEPA, the procedures implementing NEPA, and NEPA-related regulations and executive orders. As a prerequisite to a State's participation in the Pilot Program, it must have assumed the Secretary's responsibilities for

environmental reviews under 23 U.S.C. 327 (the Section 327 Program).

After publication of the NPRM, Section 578 of the FAA Reauthorization Act of 2018 (Pub. L. 115–254) amended 23 U.S.C. 330(a)(2), reducing the number of States eligible to participate in the pilot from five to two. In addition, it amended 23 U.S.C. 330 (e)(2)(A) and (e)(3)(B)(i), changing the statute of limitations from 2 years to 150 days as set forth in 23 U.S.C. 139(*l*). In addition, CEQ issued a final rule comprehensively updating the regulations implementing NEPA. 85 FR 43304 (July 16, 2020). These regulations became effective on September 14, 2020.

In addition to creating the Pilot Program authorized under Section 1309, the FAST Act also amended 23 U.S.C. 327, which authorizes DOT's Section 327 Program. Notably, section 1308(5) changed the termination procedures for the Section 327 Program by: (1) Lengthening the time the Agencies must provide to a State to take corrective action following a notice of non-compliance from 30 days to at least 120 calendar days, and (2) requiring the Agencies to provide a detailed description of each responsibility in need of corrective action, upon the request of the Governor of the State. 23 U.S.C. 327(j)(1).

Notice of Proposed Rulemaking (NPRM)

On September 28, 2017, the Agencies published their NPRM at 82 FR 45220. In the NPRM, the Agencies proposed regulations to implement the Pilot Program and its application and stringency requirements, and proposed amending the corrective action period that the Agencies must provide to a State participating in the Section 327 Program.

The public comment period closed on November 27, 2017. The Agencies considered all comments received when adopting this final rule.

Summary of Comments and Responses

The Agencies received 18 comment letters in response to the NRPM from the following groups or individuals: 1 private citizen, 4 surface transportation industry interest groups (the American Association of State Highway and Transportation Officials, the American Road and Transportation Builders Association, the Association of American Railroads, and the Associated General Contractors of America), 1 regional transportation agency (the Transportation Corridor Agencies), 2 States (California Department of Transportation and Maryland State Highway Administration (MD SHA)), 1 public transportation agency (the San Francisco Municipal Transportation Agency), 14 public interest groups (the Southern Environmental Law Center, the Natural Resources Defense Council, Earthjustice, WE ACT for Environmental Justice, Earthworks, Environmental Law & Policy Center, Waterkeeper Alliance, Western Watersheds Project Wilderness Workshop, Wyoming Outdoor Council, Center for Biological Diversity, Klamath Forest Alliance, Save EPA, Environmental Protection Information Center, and the Defenders of Wildlife), 2 resource/regulatory agencies (the Arizona Fish and Game Department and the Department of the Interior), 1 port authority (Port of Long Beach), 1 railroad company (Modesto and Empire Traction Company), 3 local governments (Orange County Public Works, Orange County Transportation Authority, and the Contra Costa Transportation Authority), and 1 anonymous commenter.

The majority of comments addressed several common issues. The following section-by-section discussion of changes identifies and addresses the significant comments received. The Agencies responded to all comments except those related to § 779.109. CEQ responded to the comments related to § 779.109 because that section addresses CEQ's mandate to develop the criteria necessary to determine whether State laws and regulations are at least as stringent as the applicable Federal law.

Discussion of Comments Received to the NPRM

Section-by-Section Discussion of Changes

Section 778.101—Purpose

An anonymous commenter noted there is no discussion on the purpose of the Pilot Program. The commenter recommended that additional information be added to 23 CFR 778.101 entitled ''Purpose.'' The Agencies decline to make the proposed change. The statute sets forth the purpose in section 1309(a) and requires the Secretary to establish the Pilot Program; therefore, the Agencies have determined a separate purpose section in the regulations is unnecessary. However, for clarity, the background section of the preamble for this final rule explains the Pilot Program's basic purpose and history.

Section 778.103—Eligibility and Certain Limitations

One public transportation agency expressed reservations about a State transportation agency having the lead role in the environmental review and approval process, including oversight. Specifically, the commenter noted that federally funded transit projects located outside State rights-of-way do not fall within the State departments of transportation (State DOT) jurisdiction, so the proposed rules could place responsibility for environmental compliance on an agency that would not otherwise have a role in developing or approving a proposed project. The commenter suggested that additional coordination and review periods would lengthen the overall time and cost to complete the Federal NEPA process for transit projects. The public transportation agency also noted that, in certain States, individual jurisdictions, not State DOTs, may implement the State's environmental laws. Under that process, the State's only involvement in the environmental review of local projects would take place when there is a pass-through of FHWA funds, or when there is an affected State-owned facility or right-of-way. The public transportation agency expressed concern that adding another reviewer to the process would add new coordination requirements, leading to a lengthened documentation schedule.

The Pilot Program, as authorized by Congress, allows a State—not local agencies or jurisdictions—to substitute an alternative environmental review and approval process for NEPA. However, in some situations a State may exercise authority under the Pilot Program on behalf of a local government pursuant to 23 U.S.C. 330(h). Consistent with § 778.107(h), a local government must request that the State exercise authority under the Pilot Program for the local government's locally administered projects. If a local government does not submit such a request, NEPA, not the State's alternative environmental review and approval process, would apply to such projects.

In addition, the Agencies anticipate learning whether implementation of the Pilot Program has resulted in more efficient review of projects and identifying any recommendations for modifications to the program.

A surface transportation industry interest group commented that in implementing the Pilot Program, the Agencies should be mindful that the Pilot Program's purpose is to reduce delay in the environmental review process. The commenter suggested that, in determining which States participate in the Pilot Program, the Agencies should consider whether a State's participation will improve the efficiency of the environmental review and approval process. In addition, the commenter suggested that, if applying a

State environmental review process would add time or complication to the review, NEPA should apply instead.

The Agencies decline to make the proposed change. The criteria for a State to receive approval to participate in the Pilot Program is established in 23 U.S.C. 330(d). The Agencies have determined that the statute does not permit the Agencies to consider a State's demonstrated ability to reduce delays in the environmental review process as part of the application approval. However, the Agencies expect a State would consider whether the Pilot Program would lead to more efficient environmental reviews when deciding whether to submit an application.

One surface transportation industry interest group proposed language that would exclude FRA or railroad projects from the Pilot Program. The surface transportation industry interest group argued that the Interstate Commerce Commission Termination Act of 1994 (ICCTA), 49 U.S.C. 10501(b), establishes a broad preemption standard preventing the application of State and local laws to rail operations.

The Agencies decline to make the proposed change. While in certain circumstances, ICCTA may preempt the application of State law under the Pilot Program, the Agencies do not believe it would do so in every case. Railroad projects are potentially eligible to participate in the Pilot Program and excluding them would be inconsistent with the statute. Prior to executing a written agreement under § 778.111(d), the applicable Agency will conduct a fact-specific review to determine the appropriateness of applying State law to a railroad project or class of railroad projects. The review will be based on the information the State submits with its application and the consideration of the law(s) a State identifies pursuant to § 778.105(b), as they may relate to ICCTA preemption. In making this determination, the applicable Agency may consult with the Surface Transportation Board. The Agencies will memorialize the types of projects to which State law will be applied in the written agreement.

A railroad company raised a similar concern and asked the Agencies to clarify that the Pilot Program would apply only to projects requiring both State and Federal environmental review, and that it would not apply to projects that are subject to Federal environmental review only. In such cases, the commenter suggests that a Federal lead Agency would be responsible for the environmental review, applying Federal law.

Similar to the Section 327 program, the Pilot Program would apply to those actions where the State's approval would normally require a Federal environmental review by one of the Agencies in the event the State was not participating in the Pilot Program. The statute does not limit the application to only those instances where both a State and Federal environmental review are required. Therefore, the Pilot Program would apply when an approval would require both a State and a Federal environmental review, as well as in cases only requiring Federal environmental review. The key question is whether the project or class of projects is within the scope of the application and the final written agreement.

A railroad company commented that the State of California would not be well-suited for the Pilot Program and further suggested that if California applies and is approved to participate in the Pilot Program, then freight rail infrastructure projects in California should be excluded.

The Agencies note that 23 U.S.C. 330 does not give the Agencies discretion to preemptively exclude a State from participation in the Pilot Program. The Agencies will make determinations on a State's participation in the Pilot Program only after receiving an application and following the process described in 23 U.S.C. 330 and 23 CFR 778.107.

Two commenters suggested that the Agencies create an ''opt-out'' provision. First, a railroad company suggested that a project proponent should be able to opt out of the Pilot Program at its discretion. Second, a public transportation agency suggested that local agencies should be allowed to opt out of the Pilot Program on a project-by-project basis in instances where participation in the Pilot Program would hinder, rather than streamline, the environmental review process.

Due to logistical and administrative complications for the approving Agency and the participating State (*e.g.,* managing, tracking, or auditing the Pilot Program, as appropriate), the Agencies decline to create an opt-out provision for project proponents or local agencies in the Pilot Program. Project sponsors concerned with how the Pilot Program would apply to their projects should coordinate with the State during the development of the application to ensure their concerns are addressed. With respect to the local agencies, the Agencies have modified § 778.107(h) by adding a new paragraph to require the State to provide the Agency with a copy of the local government's written request for the State to apply the approved alternative review and approval procedures to a locally administered project. This new prerequisite would eliminate the possibility that a State could apply the Pilot Program to a project or projects over the objections of the local agency.

In addition, the Agencies note that 23 U.S.C. 330(f) gives a State participating in the Pilot Program the discretion to apply NEPA instead of the State's alternative environmental review and approval procedures. How a State would communicate such a decision to the Agency and complete the environmental review would be further defined in the written agreement between the State and the approving Agency.

A State suggested the Agencies should use the term ''existing'' rather than ''alternative'' when describing the State's environmental review process. The commenter suggested that the Agencies assume that States applying for the Pilot Program have existing environmental review and approval procedures that will be used to substitute for the Federal NEPA process.

The Agencies decline to make the suggested change. The term ''alternative'' is consistent with the statutory language in 23 U.S.C. 330(a)(3). As described in statute, the term ''alternative environmental review and approval procedures'' means substitution of one or more State environmental laws and substitution of one or more State environmental regulations. The Agencies have modified § 778.103(a)(4) to use the term ''alternative'' rather than ''equivalent'' for consistency.

A State suggested clarifying the two limitations in § 778.103(b) to eliminate redundancy because the limitations in paragraphs (b)(1) and (b)(2) are the same. The Agencies disagree the limitations are the same and, therefore, decline to make the suggested changes. The two limitations in § 778.103(b) distinguish the conditions governing a State's participation in the Pilot Program. The limitation in paragraph (b)(1) identifies which Federal laws the State's alternative environmental review and approval procedures may substitute, whereas paragraph (b)(2) states that such procedures may not substitute for other Federal environmental laws. However, the Agencies have added a clause to (b)(2) to provide additional clarity.

One public transportation agency requested the Agencies clarify and expand the phrase ''related regulations and Executive orders'' used in § 778.103(b)(1)(iii). The Agencies

decline to provide an exhaustive list in the Pilot Program regulation since regulations and executive orders change over time. During the negotiation of the written agreement, the approving Agency will identify which executive orders are related and applicable at that time and will provide for changes in law, including by regulation or executive order.

One local government suggested that the regulation should address how the Agencies would treat (1) environmental documents started before a State participates in the Pilot Program and (2) environmental documents started during a State's participation in the Pilot Program but not completed prior to the termination of the written agreement. The Agencies intend to address those scenarios in the written agreements between the approving Agency and the State, similar to how these situations are treated under the existing Section 327 program. This approach allows for the desired flexibility.

Section 778.105—Application Requirements for Participation in the Program

A local government suggested that the regulation address whether each State that has already assumed the responsibilities under the existing Section 327 Program would have to go through an application process under this Pilot Program. The commenter further suggested that, if a separate application process is required, the regulation should clarify how this process would be undertaken and whether States would still be able to process documents under their existing Section 327 Program agreements while applying to participate in the Pilot Program.

Pursuant to 23 U.S.C. 330(a)(1) and § 778.103(a)(3), the State must already be a participant in the Section 327 Program to participate in the Pilot Program. To participate in the Pilot Program, a State must go through a separate application process, as described in §§ 778.105 and 778.107. Although the Pilot Program is intended to build on the established responsibility assumed by the State under the Section 327 Program, the programs are different and have separate application and participation requirements.

With respect to how a State should process documents during the Pilot Program application process, the Agencies expect the State will continue to follow the requirements of its executed Section 327 Program agreement. In addition, the Section 327 Program allows a State to take on broader environmental review responsibilities than can be substituted under the Pilot Program. Therefore, it is likely the State will retain some responsibilities to conduct Federal environmental reviews under the Section 327 Program, where such reviews cannot be substituted by the State's alternative environmental review and approval process under the Pilot Program.

Two surface transportation industry interest groups noted the proposed application requirements call for the applicant to provide a ''detailed explanation of how the State environmental law and regulation intended to substitute for a Federal environmental requirement is at least as stringent as the Federal requirement'' (§ 778.105(b)(4)). The commenters noted that wording in the NPRM implies that the State must separately demonstrate consistency with each Federal requirement. In addition, the commenters noted that it is more practical and consistent with the way the stringency criteria are defined to allow the application to address consistency with the Federal NEPA process and 23 U.S.C. 139 requirements together by addressing each of the stringency criteria listed in the regulations.

The commenters are correct that the application should address the criteria for determining stringency set forth in § 778.109 as part of the application requirements in § 778.105(b)(4). The States should include an explanation of how the State environmental law or regulation satisfies each of the stringency criteria in § 778.109. It is the Agencies' expectation that the application will identify how the State law or regulation meets the criteria; however, the Agencies do not expect that the State law or regulation will have to follow all of the CEQ regulations implementing the NEPA standards associated with the criteria. As an example, the explanation could be in the form of a side-by-side comparison or walk-through of the stringency requirements and the appropriate State laws and regulations that meet the requirements. However, a State could address the application requirement in § 778.105(b)(4) in a different manner if the application demonstrates how the requirement is met. The Agencies expect there will be differences on each specific detail of the various criteria, and the application process will facilitate a discussion with the respective States on the specific areas to ensure adequacy.

A State commented that the term ''classes'' in § 778.105(b)(5) needs to be better defined. The State recommended using the terms ''actions'' or ''class of actions.'' The Agencies decline to make the suggested changes because the term ''classes of projects'' is the statutory term. Further, the terms ''actions'' and ''class of actions'' have different meanings under 23 U.S.C. 139. With respect to how the Agencies will apply the term ''class of projects,'' the Agencies intend to be consistent with the Section 327 Program, which uses the same term. As defined in 23 CFR part 773, a class of projects ''means either a defined group of projects or all projects to which Federal environmental laws apply.'' For purposes of the Pilot Program, ''class of projects'' would be defined as ''either a defined group of projects or all projects to which NEPA, the procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109 and 139, and related regulations and Executive orders would apply.'' This definition has been added to § 778.105(b)(5) to provide clarity.

One public interest group noted that, in numerous places, the proposed rule requires that the participating State's Attorney General certify that the State has certain laws in place. The commenter recommended that, in each instance, the regulation should require identification of the State law(s) that form the basis for the certification. The Agencies decline the recommendation because the Agencies intend to be consistent with the requirements in the Section 327 Program, which does not require a similar identification (see 23 CFR 773.109(a)(7)). Furthermore, no issues have arisen with the State certification process under the Section 327 Program.

One regional transportation agency noted that, according to proposed § 778.105(b)(9)(B), the State must consent to exclusive Federal court jurisdiction for the compliance, discharge, and enforcement of any responsibility under the Pilot Program. The commenter requested that the Agencies clarify that any such lawsuit would need to be brought in Federal court for Federal court jurisdiction to apply and that a lawsuit brought in State court against the State environmental document would remain in State court.

As described in the NPRM preamble, 23 U.S.C. 330(e)(1) provides Federal district courts with exclusive jurisdiction over a State's compliance, discharge, and enforcement of any responsibility under the Pilot Program.

Section 778.105(b)(9)(B) sets forth the application requirements for the Pilot Program with respect to waiver of sovereignty immunity.

One public interest group expressed support for the requirement that States must consent to the jurisdiction of the Federal courts to be eligible to participate in the Pilot Program. However, it recommended that the Agencies require that a State have laws with a standard of review at least as stringent as the Administrative Procedure Act (APA). In the alternative, if States do not have a State law as stringent as the APA, the commenter suggested that the Agencies require the State to expressly submit to the jurisdiction of the APA for judicial review. The public interest group also suggested that the Agencies clarify which laws and standards will govern the review of the State laws substituting for the NEPA process. Specifically, the commenter sought clarification on the standards for determining standing and the applicability of arbitration.

The Agencies agree that decisions under State law must be reviewable. To address the commenter's concerns, the Agencies add a new application requirement in § 778.105(b)(9)(D) requiring a State to identify the jurisdictional requirements and standard of review that will be applicable to judicial review of decisions under the environmental laws proposed for substitution under the Pilot Program. The Agencies expect the information a State provides in response to this requirement will address the commenter's concern about identifying the applicable standards and requirements under the State's laws.

One public interest group commented that the proposed language does not clearly require that a State waive its sovereign immunity before participating in the Pilot Program. The commenter recommended that the Agencies require a State to expressly waive immunity under each State law that would substitute for the Federal NEPA process. The commenter further suggested that, in some circumstances, the waiver of sovereign immunity should apply to the State's equivalent of the APA, which ''creates the basis for the cause of action.'' Similarly, 13 public interest groups commented that the rule should clarify that the right to judicial review remains when a State has assumed the responsibilities of the Secretary.

An interested State must waive its sovereign immunity under the U.S. Constitution's 11th Amendment to the extent needed to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of the environmental review responsibilities under the Pilot Program. A State's consent to accept the exclusive jurisdiction of the Federal courts for compliance, discharge, and enforcement of any responsibility, as required under the Pilot Program, is the functional equivalent of the State's waiver of the State's sovereign immunity. The Agencies revised § 778.103(a)(2) to clarify that a waiver of sovereign immunity is necessary to participate in this Pilot Program. The Agencies also revised § 778.105(b)(9)(B) to ensure the State includes documentation regarding the waiver of sovereign immunity as part of its application for the Pilot Program. This sovereign immunity waiver is a significant precondition for the State's participation that may require State legislative action (in some States gubernatorial action may be sufficient).

A public interest group stated that it is important the Agencies ensure a State has a law similar to the Equal Access to Justice Act. The Agencies lack the authority under Section 1309 to require a State to have a law similar to the Equal Access to Justice Act. The Pilot Program covers the substitution of the procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109 and 139, and NEPA-related regulations and executive orders. It also identifies other laws a State must have in place—for example, a law comparable to the Freedom of Information Act (FOIA). However, since the statute does not require the State to have a law similar to the Equal Access to Justice Act, the Agencies cannot impose this requirement in a rulemaking as a condition of a State's participation in the Pilot Program.

One State DOT asked whether a State must provide a separate consent to Federal court jurisdiction in order to participate in this Pilot Program where the State has already given such consent pursuant to the Section 327 Program. The Agencies clarify that the certification and explanation required under § 778.105(b)(9) must be met separately for participation in the Pilot Program, *i.e.,* the certification and explanation must be included in a State's application to participate in the Pilot Program. The Agencies acknowledge that several States have provided this certification and explanation with applications to assume responsibilities under the Section 327 Program; however, the Agencies require the inclusion of this certification and explanation in a State's application for this Pilot Program to facilitate the approving Agency's review of a complete application package.

One public interest group supports the requirement that an interested State must demonstrate that it has a State public records law comparable to FOIA. However, the commenter suggested that the word ''comparable'' is ambiguous and suggested that the Agencies instead consider using the phrase ''at least as stringent as the Freedom of Information Act (FOIA).'' The commenter also recommended that any decision made under the State public records law must be reviewable in court. Additionally, the commenter recommended that, when evaluating a State's public records law, the Agencies ensure that the law includes a fee waiver provision, a requirement that the State respond to a request for records within a specific time frame that is no less than the Federal 20-day obligation, and a requirement that each participating State certify that it has sufficient resources to comply with the provisions of its State public records law.

The Agencies disagree with the commenter's proposal to require States to have laws (and regulations) in effect that are at least as stringent as FOIA and decline to adopt the three suggested requirements. Under 23 U.S.C. 330(d)(1)(D)(iii)(III)(bb), the Secretary must approve a State's application to participate in the Pilot Program if the State executed an agreement with the Secretary in which the State, among other requirements, ''certifies that State laws (including regulations) are in effect that . . . are comparable to [FOIA]. . . .'' This certification is consistent with that required by the Section 327 program (23 CFR 773.106(b)(7)). The statutory language does not establish factors to assess comparability. However, the Agencies have added an additional stringency requirement in § 778.109 that applicable State law must provide for public access to the documentation necessary to review the potential impacts of projects.

One resource/regulatory agency commented that there is no mention of how the States will coordinate with other agencies during environmental reviews. The resource/regulatory agency recommended that State wildlife agencies be identified as cooperating agencies based on their regulatory authority and special expertise for wildlife and wildlife resources for high-level NEPA analyses. The Agencies considered the comment, but decline to make the recommended change because the identification of cooperating agencies is a project-specific determination and not appropriate in this rulemaking. However, the Agencies

note that the stringency criteria in § 778.109 address the need for coordination with other agencies, including those that have jurisdiction by law or special expertise.

The resource/regulatory agency also noted that full public disclosure of impacts is a key component of NEPA and recommended that States be required to analyze impacts to all resources required under NEPA. Public disclosure and analysis of impacts to affected resources is considered as part of the evaluation of whether a State law or regulation is as stringent as NEPA (*see* §§ 778.109(f)–(i)).

The same resource/regulatory agency recommends revising the requirements to direct that environmental review and analyses be documented in one all-encompassing report in accordance with NEPA standards. The CEQ regulations implementing NEPA (40 CFR parts 1500–1508) encourage the concurrent preparation and integration of the Federal NEPA process with other environmental impact analyses and surveys and studies required by other Federal laws. The CEQ regulations also encourage combining documents and processes to eliminate duplication and reduce paperwork (*see* 40 CFR 1506.2 and 1506.4). However, these are best practices allowed under the CEQ regulations and are appropriately addressed in State applications. The Agencies, therefore, decline to make the commenter's recommended change.

Section 778.107—Application Review and Approval

A regional transportation agency and a port authority suggest the Agencies consider streamlining the application and approval process by eliminating the separate requirements for a State to seek public comment on its application before submittal to the Agencies and for the Agencies to seek public comment before approving or disapproving an application. Instead, the commenters suggest requiring a State and the Agencies to seek one set of public comments. Similarly, one State questioned the need for two public comment periods, noting that § 778.105(b)(7) requires that the State seek public input on the application prior to submitting it to the approving Agency.

The Agencies decline to make the suggested change. Two public comment periods are required by 23 U.S.C. 330. As reflected in § 778.105(b)(7), 23 U.S.C. 330(b)(7) requires that the application include evidence that the State sought and addressed public comments on its application. Additionally, as reflected in § 778.107(a), 23 U.S.C. 330(c)(1) and (d)(1)(A)–(B) require the Secretary to accept and consider public comments on applications submitted. These requirements are separate; the pre-submission comment period provides the public an opportunity to inform the State's application, while the post-submission comment period provides the public an opportunity to inform the approving Agency's consideration of the application and the terms of the agreement with the State. Additionally, the second opportunity for public comment ensures transparency during the approval process.

A regional transportation agency and a port authority recommended that the regulations require an approving Agency to approve the application within 60 days instead of 120 days. The Agencies decline the suggested change because the timeframe in § 778.107(b) is prescribed in the statute. Under 23 U.S.C. 330(c)(2), the Secretary must approve or disapprove an application not later than 120 days after the date of receipt of an application that the Secretary determines is complete.

A State commented that the requirement that a written agreement be made between the Governor or Senior Transportation Official and the approving Agency prior to approval of the application appears to be out of sequence. The State commented that the Agency should approve the application before the written agreement between the State and the approving Agency is finalized. The State also expressed confusion with the assertion in § 778.107(f) that the approving Agency's execution of the agreement will constitute approval of the application and the assertion in § 778.111(b) that, after making a decision on an application, the approving Agency must transmit the decision in writing to the State with a statement explaining the decision.

The Agencies decline the commenter's recommendation to approve the application prior to finalizing the written agreement. Section 330(d) of Title 23, U.S.C., authorizes approval of an application only if the State has executed an agreement with the approving Agency that memorializes the State's responsibilities under the Pilot Program. The Agencies interpret this provision to require States to sign a written agreement prepared by the approving Agency during the approving Agency's application review process to demonstrate the State's ability to comply with all Pilot Program requirements. The approving Agency will sign and execute the agreement after the State, and only when it has determined approval of the State's application is appropriate. The Agencies clarify the approving Agency's signature on and execution of the agreement constitutes approval of a State's application. The approving Agency's transmittal of the agreement with the approving Agency's signature will serve as the notice of approval required under 23 U.S.C. 330(c). For clarity, the Agencies modify the text of § 778.107(f).

In a joint letter, 13 public interest groups recommended changes to clarify the role of the Agencies in the review and approval of a State's application to the Pilot Program. The commenters noted concerns about the lack of a requirement for the Agencies to respond to comments received during the public comment period following the State's submission of an application. In addition, they noted concerns about the public's ability to participate in the project-specific review and comment process once State environmental laws and regulations are substituted for the NEPA process under the Pilot Program.

The Agencies read the statute to require the Agency receiving an application to accept and consider public comments on a State's application, but the statute does not require the Agencies to respond to these public comments. The Agencies will seek and consider public comments before taking action on a State's application, consistent with how the Agencies seek and consider public comments under the Section 327 Program, and the written agreement approving a State's participation in the Pilot Program will address, as appropriate, these comments. In addition, the Agencies confirm that the public will retain the same ability to review and comment on projects as currently provided under the NEPA process per § 778.109(i). Under the Section 327 Program, a State that assumes responsibility must meet the same procedural and substantive requirements as if the responsibility was carried out by the Secretary. Any environmental documentation developed under State environmental laws and regulations under this Pilot Program would still be required to comply with the notification, publication, and comment procedures as would be required under NEPA.

The public interest groups also suggested that the final rule should require the Agencies to publish approval of the State's application and a copy of the executed agreement in the **Federal Register** and clarify that such approval is a final Agency action subject to judicial review under the APA. The Agencies intend to approve applications

for participation in the Pilot Program in a manner consistent with that used by the Section 327 Program (*see* 23 U.S.C. 327(b)(3)), which includes providing public notice as required by 23 U.S.C. 330(c)(1).

Section 778.109—Criteria for Determining Stringency

A State commented that the § 778.109 requirements ''are overly detailed and may prohibit States from participating'' in the Pilot Program. Rather than detailing an exhaustive list of separate requirements, the State suggested that the State law be evaluated for equivalency to the NEPA process as a whole, with provisions included in the NPRM to address shortcomings or deficiencies, should any be identified. The State indicated that most of such issues could be easily addressed through the written agreement. Similarly, two surface transportation industry interest groups expressed concern that the requirement to satisfy 14 distinct criteria as a ''minimum'' requirement could end up disqualifying States from participating in the Pilot Program even when the State law is ''equally as stringent or more stringent than NEPA overall.'' They commented that even a State law with extremely stringent requirements, such as the California Environmental Quality Act (CEQA), may require a lower level of detail than NEPA in some specific areas. These commenters cited CEQ's handbook on NEPA–CEQA integration where it points out that the alternative analysis and cumulative impact analysis under NEPA may need more detail than in the CEQA process. The surface transportation industry interest groups recommended that the final rule include language stating that the Agencies will base the stringency determination on an assessment of the State law as a whole, so that minor differences in the level of detail required on specific issues do not prevent the stringency requirement from being met.

Section 1309(c)(2)(A) of the FAST Act requires CEQ to develop the criteria the Secretary will use to determine whether the State law or regulation is at least as stringent as the Federal requirements. At a minimum, the criteria for determining stringency must provide for protection of the environment, provide opportunity for public participation and comment, allow access to the documentation necessary to review the potential impacts of projects, and ensure consistency of review of projects. A broad criterion based on an assessment of the State law as a whole would fail to establish an objective way to compare the State and Federal requirements. For example, the State commenters point to CEQA as an example of a statute that is more stringent than NEPA, but did not explain how they arrived at this conclusion. In the absence of specific criteria to make a comparison, a similar conclusory statement could be said for many, if not all, of the other State laws or regulations that are comparable to NEPA.

The Agencies clarify the expectations with regards to policies and guidance developed for NEPA for each of these criteria. The CEQ analyzed NEPA, the Regulations for Implementing the Procedural Provisions of NEPA, and 23 U.S.C. 139 to determine the core elements that would ensure protection of the environment and consistency of review. The CEQ also took into account the existing State laws and regulations that are comparable to the NEPA process. A State law or regulation that meets each of the listed general criterion would meet the stringency required by the statute. The State law or regulation would meet the test if the statutory text, implementing regulations, policies, or guidance address each general criterion in § 778.109. The State law or regulation does not have to adopt or follow the Federal guidance, policy, and interpretation used for implementing the standard under NEPA. For example, the alternatives analysis criterion (§ 778.109(e)) would be met if the State law or regulation requires alternatives evaluation consistent with the criterion, but would not need to follow the CEQ guidance and interpretation on alternatives for NEPA such as those available in the 40 Most Asked Questions (46 FR 18026 (March 23, 1981)) or based on NEPA case law. The same approach would follow for cumulative effects consideration. The Agencies do not require the State to follow CEQ guidance on cumulative effects analyses that is applicable to NEPA reviews, nor do they expect the cumulative effects case law under NEPA to apply to the State law or regulation implementation of its cumulative effects analysis expectations.

Proposed Rule § 778.109(a)

A public interest group expressed concerns that subsection (a) of the stringency criteria requires States to ''define the types of actions that normally require an environmental impact statement.'' By using the term ''environmental impact statement,'' a term of art under NEPA, the commenter asserts it is unclear whether the rule is requiring States to define what types of projects would be subject to NEPA review overall, or which projects would rise to the level of impact necessitating an environmental impact statement (EIS) rather than an environmental assessment (EA) or categorical exclusion (CE). The commenter recommended the rule make clear that States must first define the types of actions that are subject to NEPA review and then specify the level of documentation that will be required for different categories of projects.

The Agencies, revised the language for additional clarity. Section 778.109(a) does not address the various levels of environmental impact evaluations or documentation that may be acceptable for particular types of projects. Proposed section 778.109(a) did not use the NEPA-specific term ''environmental impact statement'' to refer to the various types of environmental evaluations and documents required and produced under different State laws and regulations. The Agencies expect the State laws or regulations to be substituted for NEPA to establish which actions trigger environmental review. Actions requiring environmental review should include government-sponsored actions, including those receiving Federal financial assistance or permits. The classification of the appropriate environmental impact evaluations or documentation required for particular types of projects is addressed as part of § 778.109(b).

Proposed Rule § 778.109(b)

A public interest group recommended amending the last sentence in § 778.109(b) by changing the word ''should'' to ''must'' to ensure that scoping for actions that may result in significant impacts on the human environment is guaranteed to be an ''open and public process.'' The commenter also suggested the rule require participating States to provide public notification and public involvement, to the extent practicable, during the scoping process for State environmental reviews equivalent to EAs.

The Agencies agree to change ''should'' to ''must'' in the last sentence of § 778.109(b) to mirror the CEQ regulations scoping requirements for actions with potential significant impacts. The Agencies decline to require the State to provide public notification and public involvement during the scoping process for State environmental reviews equivalent to EAs. The CEQ regulations do not include similar requirements for EAs.

Proposed Rule § 778.109(d)

A public interest group commended the effort in § 778.109(d) to ensure a participating State's objective analysis

by preventing conflicts of interest from affecting environmental reviews and by requiring States to certify all environmental reviews performed and compiled for a project analysis. The commenter recommended the Agencies further safeguard against State reliance on substandard work from outside contractors by requiring States to ensure the ''professional integrity,'' including ''scientific integrity,'' of the discussions and analyses in environmental evaluations and documents and to document the methodologies used, as required under 40 CFR 1502.24 (these requirements are now set forth in 40 CFR 1502.23). The Agencies agree States participating in the Pilot Program should be required to comply with the intent of 40 CFR 1502.23 to protect the scientific integrity of environmental analyses and methodologies. Accordingly, the Agencies are adding language to paragraph (f) to address this comment.

Proposed Rule § 778.109(e)

A public interest group commented that, although § 778.109(e) properly tailors the evaluation of reasonable alternatives to a proposed action's purpose and need, it does not ensure that the purpose and need for a project will be defined reasonably—a key first step in the NEPA process. To ensure that environmental reviews under State programs are not rendered meaningless by purpose and need statements drawn so narrowly that the proposed project is a foregone conclusion, or so broadly to be meaningless, the public interest group recommended the Agencies revise the rule to clarify that the same rule of reason applies to the definition of purpose and need and selection of a range of alternatives under State programs. The commenter also asserted it is essential that any State program include a requirement similar to CEQ's regulations that mandate a brief discussion of the reasons for eliminating any alternatives not explored in detail in an environmental review document. The commenter stressed that only through this procedure will the public be able to determine if a ''reasonable range'' of alternatives has been considered.

The Agencies decline to make changes because the Agencies believe the existing language adequately addresses the commenter's concern.

Proposed Rule § 778.109(f)

A public interest group commented that § 778.109(f) suggests that an assessment of reasonably foreseeable direct, indirect, and cumulative impacts of a proposed action (and any reasonable alternatives) should be compared with ''existing environmental conditions.'' The commenter noted that courts have been clear that the environmental effects of the proposed action and alternative solutions should not be compared with existing environmental conditions, but rather with the ''baseline'' or ''no action'' condition described in 40 CFR 1502.14(d) (now set out at 40 CFR 1502.14(c)). The public interest group added that the proposed rule, therefore, requires further clarification, noting that where § 778.109(e) does describe the baseline ''no action'' alternative as essential to NEPA compliance, the introduction in § 778.109(f) of a comparison with ''existing environmental conditions'' could result in considerable confusion and departure from the legal requirements of NEPA. While initially a ''no action'' alternative may be the same as ''existing conditions,'' the future analysis that NEPA requires will likely require the projection of a future ''no action'' baseline that is distinct from ''existing conditions.'' The public interest group suggested that the rule be rewritten to clarify that the necessary comparison is to the ''no action'' alternative.

The Agencies agree with the public interest group comments that including in the criteria the need for comparison between the environmental impacts and existing environmental conditions was confusing. The Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508) do not have this requirement; rather they require comparison among alternatives. Therefore, the Agencies revise § 778.109(f) to make this clarification.

Proposed Rule § 778.109(h)

A public interest group commended the mandate in § 778.109(h), which properly requires States to coordinate and consult with interested parties. However, the public interest group noted the words ''adequate'' and ''appropriate'' leave the proposed rule vague as to the degree of coordination and consultation required. The commenter recommended deleting both words. The Agencies believe that retaining ''adequate'' is warranted in this context. The need for and level of participation will depend on the type of analysis involved and the specific circumstances of the proposed project. Similarly, the Agencies believe that retaining ''appropriate'' is warranted because the review would not always require coordination with all the parties mentioned in the paragraph.

A public interest group expressed particular concern that Federal agencies should continue to fulfill the independent obligation to determine whether there is a Tribal interest in an undertaking and consult with Tribal authorities. The public interest group suggested that the regulation should make clear that participating States' obligations to consult with Tribal authorities are additional to the Federal obligation to do so and that the efforts should be coordinated. Similarly, in a joint letter, 13 public interest groups recommended that the proposed rule should explicitly acknowledge the Federal obligation to consult with Tribes regardless of any delegation of other responsibilities to States.

The Agencies agree with the comments related to coordination and consultation with Tribes. The Federal Government's responsibility to engage in government-to-government consultation with Tribes is a requirement independent of NEPA and, therefore, it is not subject to assignment under the Pilot Program. It is also excluded from the Section 327 Program. States must coordinate with Tribes as part of their responsibilities to assess environmental impacts, but this should not be interpreted as assigning the Federal Government's unique responsibility to consult with Tribes when needed.

One resource/regulatory agency recommended that the term ''appropriate coordination and consultation'' in § 778.109(h) be strengthened to ensure that Federal agencies with jurisdiction by law or special expertise be invited as cooperating agencies to ensure that interagency consultation occurs early and throughout the environmental review process. The Agencies decline to make the recommended change. Requiring the establishment of cooperating agency relationships would be overly prescriptive. A State law or regulation may provide for establishing coordination relationships that are as equally effective as the concept of cooperating agency under the NEPA process.

In their joint letter, 13 public interest groups noted that Congress did not authorize delegation of the review responsibility of the Environmental Protection Agency (EPA). The public interest groups recommended that the final rule explicitly address the requirement that, if a State does not incorporate EPA's review into its NEPA process, the applicable Agency will have to do so before it can finalize project approval. The statue does not address the delegation of EPA's review responsibility and it would be inappropriate for the Agencies to

determine the limitations of another Federal Agency's authority. Therefore, the Agencies decline the commenters' proposed edit on this point.

Proposed Rule § 778.109(i)

A public interest group commented that § 778.109(i) requires that States ''provide an opportunity for public participation and comment that is commensurate with the significance of the proposal's impacts on the human environment.'' The public interest group commented that this statement is overly vague and suggested that the rule must establish the bare minimum required for public participation, namely: (1) The right to notice and comment on draft EISs; (2) the right to notice and comment on draft EAs where the proposed project is controversial or where mitigation is relied upon to avoid potential significant impacts; and (3) the right to view all environmental review documents prior to a decision being made, including those supporting the application of CEs. The commenter also suggested that the rule make clear that, beyond simply providing an opportunity for the public to comment, States will ''affirmatively solicit comments from persons or organizations who may be interested or affected.'' The commenter recommended that the proposed rule refer States to the 2016 report of the Federal Interagency Working Group on Environmental Justice and its NEPA Committee titled, ''Promising Practices for Environmental Justice Methodologies in NEPA Reviews,'' and subsequent guidance from these bodies. The public interest group further noted that the rule should stress that a State's duty is not limited to allowing for public comment, but that it also encompasses a duty to carefully consider public comment and respond to all comments—including opposing viewpoints—in subsequent NEPA documents.

The Agencies decline to make the recommended changes. State law or regulations may create different categories of analysis that would not be the same as an EIS, EA, or CE. The criteria should be flexible enough to allow differences in the categorization of environmental analyses. The Agencies also do not find it necessary to require the same public comment standard as NEPA since the State law or regulations must have adequate public involvement procedures that are as equally effective and are consistent with State law.

In their joint letter, 13 public interest groups commented that the proposed rule should identify specific requirements for notice and comment that a State must provide to meet the guarantees of public participation currently provided by NEPA, including the right to notice and comment on draft EAs and draft EISs, and the right to all environmental review documents in time for non-expert members of the public to understand, assess, and provide informed comment on the decision being made.

The Agencies agree with the commenters that public participation procedures under NEPA are worth emulating. However, requiring that a State law or regulation adopt the same public requirements applicable to NEPA ignores the fact that States have their own public involvement procedures and applicable laws. The State law or regulation may have adequate public involvement procedures that are equally effective.

The public interest groups also requested that a State's use of CEs be limited to those established by Federal transportation agencies after public notice and comment. The Agencies decline this request. If the States in the Pilot Program choose to propose and develop additional categories of projects to exclude from detailed environmental analysis under the applicable State law, that process would be handled consistent with the State's legal authority that was determined to be as stringent as NEPA. Once a State is in the Pilot Program, it would no longer apply Agencies' CEs.

Proposed Rule § 778.109(j)

In their joint letter, 13 public interest groups noted that, under existing law, other Federal agencies can refer environmental reviews to CEQ (see 40 CFR 1504.3). The public interest groups commented that the final rule should also address the requirement that, if a Federal agency refers concerns about a proposed project to CEQ, CEQ must resolve those concerns before the project is approved. The Agencies agree that a referral process should be part of the stringency criteria and revise the regulation in § 778.109(j) to add a referral process. However, the Agencies believe that requiring the same referral process as required for the Federal NEPA process would be overly prescriptive. A State law or regulation may provide for a referral process that is as equally effective as the referral process under 40 CFR part 1504.

Proposed Rule § 778.109(l)

A public interest group noted the rule should make clear that supplemental environmental documents must be ''prepared and circulated in a similar fashion'' to the original environmental documents. The Agencies believe that this proposed change would be overly restrictive. Requiring that a State law or regulation adopt the same circulation requirement applicable to NEPA ignores the fact that States have their own public involvement procedures and applicable laws. The State law or regulation may have adequate public involvement procedures that are equally effective. Although the Agencies are not making changes in response to the commenter, the Agencies intend to consider each State application's treatment of this issue by evaluating the alternative environmental review and approval procedures that States propose in their applications to the Pilot Program and through the review process established in § 778.111.

Proposed Rule § 778.109(m)

A public interest group noted that § 778.109(m) risks seriously undermining the effectiveness of the proposed rule because it requires procedures to ''facilitate process efficiency'' without requiring that any such abbreviated procedures be at least as protective as their Federal equivalents. The public interest group commented that this subsection has the potential to become a large loophole for a State inclined to avoid environmental reviews by, for example, designating excessively large categories of actions exempt, conducting overly broad programmatic reviews, or similar actions. The commenter suggested that § 778.109(m) should be removed entirely, or at least any requirement to adopt abbreviated procedures should be separated from the stringency analysis. Beyond that, the commenter recommended the rule should make clear that any procedures set in place to ''facilitate process efficiency'' must be at least as stringent as their Federal equivalents.

The Agencies decline to make the proposed changes. The Agencies and CEQ have pursued measures to make the process more efficient, starting with Executive Order 11514 onward to the latest efforts captured in Executive Order 13807, as well as regulations implementing the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the FAST Act. The public comment process on State guidance and procedures, along with judicial review, provide the appropriate check on attempts to avoid compliance with applicable environmental reviews. Furthermore, as part of ongoing monitoring, the Agencies maintain the opportunity to provide oversight of any updated State environmental review procedures.

Additional Requirements

In their joint letter, 13 public interest groups recommended that 2 additional elements that are part of the current NEPA process be added to what is required in a State submission: (1) A requirement that the State review address disproportionate impacts on low-income and minority populations, and (2) an enforceable requirement that, when avoiding potentially significant impacts, any mitigation measures identified in the State review be incorporated as conditions of approval in the Federal decision that the State review supports. Similarly, a public interest group commented that the rule should make clear that States have a responsibility to address disproportionate impacts on minority and low-income communities.

The Agencies decline to make the proposed changes. First, the Agencies acknowledge the commenter's concern regarding the consideration of disproportionate impacts on minority and low-income communities and note they must be evaluated as part of the environmental review process per Executive Order 12898. While this is a process typically integrated into the NEPA process, it is not one that may be substituted under this Pilot Program. However, State agencies continue to have this responsibility and must comply with the Federal standard. Second, allowing a project with potential significant impacts to proceed with an EA and a Finding of No Significant Impact instead of an EIS, if there are mitigation commitments that reduce the impacts below the threshold of significance, is a NEPA-specific concept. There may be some State laws or regulations that allow a similar process, but this would be subject to State law. The Agencies are not requiring the adoption of the same concepts of EIS, EA, and CE as in the NEPA process and, therefore, do not believe that there is a need to require this NEPA-specific concept from State law or regulations.

The public interest groups also requested clarification on the role of Federal agencies in project approval. The commenters noted that Congress provided States the opportunity to stand in the shoes of the Secretary for compliance with other Federal environmental laws as well as NEPA (23 U.S.C. 327(a)(2)(B)(i)). This could include, for example, the obligation to consult with U.S. Fish & Wildlife Service under the Endangered Species Act. It could also possibly include compliance with the National Historic Preservation Act. The project approval, however, remains with the Secretary. The commenters recommended that the proposed rule should explicitly state so to avoid any confusion.

The Agencies agree with the commenters regarding project approval, but do not find that any additional clarification is needed. The procedures for the Section 327 Program make clear that the only assignable responsibilities under the Section 327 Program are the environmental review responsibilities; project approvals are not authorized to be assigned under the Section 327 Program (see 23 CFR 773.105(b)(5)). With regard to the Pilot Program, §§ 778.101 and 778.103(b) make clear that the only requirements being substituted are those related to NEPA.

One local government recommended that the Pilot Program regulations include an allowance for granting environmental review exemptions for categories of projects that have been determined not to have a significant effect on the environment. The Agencies find that this suggestion is addressed in § 778.109(b) (classification of the appropriate assessment of environmental impacts) and § 778.109(m) (categories of action). However, the Agencies want to highlight that, as with a CE under NEPA, these are not exemptions from the applicability of the State law or regulation, but rather are situations where the analysis is more limited and where consideration of extraordinary circumstances evaluation is warranted.

Section 778.111—Review and Terminations

One local government suggested that the proposed rule should provide what the compliance and reporting measures would be for States participating in the Pilot Program. The Agencies acknowledge the comment and agree States participating in the Pilot Program should be informed about required compliance and reporting measures. The Agencies believe that the appropriate place to do this is the written agreement consistent with the Section 327 Program. In addition, the Agencies want to further clarify that the frequency of review of the State's performance in implementing the requirements of the Pilot Program will be determined as necessary by the approving Agency and included in the written agreement.

One public interest group noted concerns about the mechanisms for ensuring State compliance with the proposed review and the termination requirements, including the public's opportunity to provide input, and recommended many changes. The Agencies agree that monitoring and auditing each approved State's performance implementing the Pilot Program is critical to its success, and the Agencies possess the right and responsibility to terminate a State's participation in the Pilot Program early (see § 778.111(c)). The Agencies will provide the necessary compliance and reporting measures as part of the written agreement required between the approving Agency and the State.

In their joint letter, 13 public interest groups noted that the proposed rule fails to provide the public an opportunity to petition the Secretary to rescind approval for a State to participate in the Pilot Program, stating that such opportunity is a fundamental aspect of delegation of other authority to States to implement and enforce environmental laws. The Agencies determine that a public or formal petition process is not necessary or supported by statute. However, the public can submit concerns regarding a State's implementation of the Pilot Program to the Secretary at any time. In addition, the Agencies note that, under § 778.111(b), the Agencies must review each participating State's performance in implementing the requirements of the Pilot Program at least once every 5 years and must provide notice and an opportunity for public comment during that review.

Section 778.111—Review and Terminations

One State noted concerns with termination of the Pilot Program after 12 years of enactment of the FAST Act. Specifically, the commenter indicated participation in the Pilot Program would likely require it to revise its processes and procedures for completing applicable environmental review under existing regulations and, therefore, the definable and finite termination of the Pilot Program after 12 years under § 778.111 would place a burden on the State to revise its regulations again to account for Pilot Program termination. The commenter also noted termination of the Pilot Program after 12 years could confuse staff and resource agencies required to switch between legal standards. The Agencies acknowledge the concern; however, the termination provision is prescribed by the statute. Congress mandated in 23 U.S.C. 330(k) that the Pilot Program terminate 12 years after the date the FAST Act was signed into law. The Agencies have added a new section to address the termination of the Pilot Program and a sunset of the regulations absent Congressional action to extend the program.

Locally Administered Projects

A public transportation agency and a port authority requested that the Agencies clarify that States can change the local governments that participate in the Pilot Program, as needed, provided the total number of local governments participating at one time does not exceed 25. The Agencies decline to provide additional clarification in the regulation. Under § 778.107(h), a State is responsible for ensuring that the requirements of the approved alternative State procedures are met when applying the alternative procedures to locally administered projects. Procedures for identifying the local governments participating in the Pilot Program will be defined in the written agreement between the State and the approving Agency.

One State requested that the provision that limits the application to only 25 local government agencies be eliminated, noting that other State-administered Federal programs, such as the Recreational Trails Program, do not include this limitation. Section 778.107(h) is consistent with the statute. Accordingly, the Agencies decline the suggested change. The number of local governments participating in the Pilot Program is limited by 23 U.S.C. 330(h)(1), which specifies that a State with an approved Pilot Program, at the request of a local government, may exercise authority under that program for *up to* 25 local governments for locally administered programs.

One public interest group noted that the proposed rule provides little detail beyond the text of 23 U.S.C. 330(h) about how States and local governments might apply the alternative environmental review and approval procedures to locally administrated projects. The commenter noted the proposed rule does not describe or limit which projects or local governments may qualify for or be eligible to implement the State's alternative environmental review and approval procedures, nor does the proposed rule define ''locally administered project'' or ''local government.''

The Agencies decline to provide additional clarification of the terms ''locally administered project'' and ''local government'' in the regulation due to differing program definitions and requirements among the Agencies, but may define expectations regarding locally administered projects and local governments in the written agreement. Under the Pilot Program, the State is the responsible party that must meet the Pilot Program requirements. Any local governments participating in the Pilot Program may conduct the environmental analyses or reviews, but the State is responsible for ensuring that the requirements of the approved alternative State procedures are met for those projects (see § 778.107(h)).

A local government suggested that the Agencies consider requiring States to participate in the Pilot Program so that local agencies, which are responsible for delivering local transportation projects, can benefit from the Pilot Program. The commenter also noted that, if State participation in the Pilot Program is optional, local agencies should be given the opportunity to demonstrate their ability to participate in the Pilot Program. Similarly, another local government commented that the Pilot Program should provide administrative delegation of the proposed regulations to a local agency to further streamline the process and review of environmental documents.

The Agencies acknowledge the commenters' interest in the Pilot Program and concerns with the proposed rule. However, 23 U.S.C. 330(a) only allows, and does not require, States to participate in the Pilot Program. The scope of the Pilot Program in relation to locally administered projects is established by 23 U.S.C. 330(h). It provides that a State with an approved program, at the request of a local government, may exercise authority under that program on behalf of up to 25 local governments for locally administered projects and, for up to 25 local governments selected by a State participating in the Pilot Program, the State shall be responsible for ensuring compliance with Federal and State law and the Pilot Program.

Statutes of Limitations

Several commenters raised concerns with the statute of limitations in the proposed rule. A public transportation agency commented that the 2-year statute of limitations established under Section 1309 of the FAST Act is a deterrent to participation in the Pilot Program. A surface transportation industry interest group noted the statute of limitations for any claims challenging actions taken by a State under the Pilot Program is different from the 150-day period that otherwise would apply to claims challenging actions taken by State agencies approving a highway or transit project under the Section 327 Program. The surface transportation industry interest group commented that the disparity between these two statutes of limitations means that a lawsuit challenging a single State decision approving a highway or transit project could be subject to two different limitations periods; a 2-year period relative to a State's action under the State law substituted for NEPA, and a 150-day period relative to State's action under other Federal laws not covered by the Pilot Program (*e.g.,* 49 U.S.C. 303, commonly known as ''Section 4(f)''). To provide clarity for applicants and for States participating in the Pilot Program, the commenter recommended that the Agencies include a section in the regulations specifically addressing the issuance of statute of limitations notices under the Pilot Program. The surface transportation industry interest group commented that the regulations should confirm that the State can still issue a 150-day statute of limitations notice for all actions taken by the State or other Federal agencies under other Federal laws.

Similarly, a State seeks clarification on whether the statute of limitations is two years following the publication in the **Federal Register** of the Notice of Final Federal Agency Action. The commenter also noted that, if the statute of limitations under the Pilot Program is set at two years, this is significantly longer than the 150-day period currently afforded to other surface transportation projects by MAP–21. The State DOT commented that, in order to streamline project delivery, the statute of limitations under the Pilot Program should be the same period established by the State law that will be used to substitute for NEPA, or the 150-day period established by MAP–21, whichever period is shorter. A local government also suggested the Pilot Program consider adopting the 150-day statute of limitations for NEPA actions and decisions, provided a Notice of Final Agency Action is placed in the **Federal Register**. A local government, a regional transportation agency, and a port authority all commented that, since the Pilot Program would allow States to substitute their environmental review procedures for Federal procedures, the State's statute of limitations should apply to legal challenges related to the environmental review. Finally, a public interest group sought clarification on the applicable statute of limitations.

After publication of the NPRM, Section 578 of the FAA Reauthorization Act of 2018 (Pub. L. 115–254) amended 23 U.S.C. 330(a)(2), reducing the number of States eligible to participate in the pilot from five to two. In addition, it amended 23 U.S.C. 330 (e)(2)(A) and (e)(3)(B)(i), changing the statute of limitations from two years to 150 days as set forth in 23 U.S.C. 139(*l*). This statutory change regarding the applicable statute of limitations is reflected in the rulemaking and

otherwise responds to and clarifies the comments received regarding the applicable statute of limitations.

Environmental Permits

A regional transportation agency and a port authority commented that there were benefits to be realized from State and local governments using State environmental review procedures to satisfy the NEPA process. However, these two commenters expressed concerns that the State and local governments may not be able to obtain required permits from Federal resource agencies if the State reviews are not given the required deference. The two commenters stated that approved State and local governments in the Pilot Program should be treated the same as a Federal participating agency. Under the Pilot Program, the Agencies intend for the approved State agency to have the same standing as would a lead Federal agency under the NEPA process. This intent also applies to those local governments or locally administered projects that are subject to the approved Pilot Program application and written agreement, though the State will retain the responsibility for ensuring the requirements of the approved alternative State procedures are met.

One local government noted that Federal environmental resource agency review and approvals to obtain environmental permits continue to be a challenge and suggested the Pilot Program consider streamlining Federal environmental resource agency approvals and potentially assign environmental permitting to the State. Similarly, a public transportation agency recommended that States look for ways to maximize and utilize a project's environmental document for not only NEPA, but also for other Federal agency reviews and permitting requirements, in order to minimize duplicative efforts and streamline the environmental review process. While these comments are outside the scope of this rule, the Agencies direct the commenters to Executive Order 13807 and its corresponding One Federal Decision memorandum of understanding, which aim to condense Federal environmental review and authorization (*e.g.,* permitting) decisions to the maximum extent practicable.

Performance Measurement

A surface transportation industry interest group and a local government suggested that the Agencies establish a system for tracking and benchmarking the performance of the Pilot Program. The two commenters noted this system would allow DOT and Congress to compare the Pilot Program's timelines with those of States and the Federal Government applying NEPA requirements. Similarly, a private citizen noted the Pilot Program can provide key data regarding the possibility of saving money, whether State laws can substitute Federal environmental laws, and whether this program impacts project delivery. The private citizen recommended that DOT be sure to maintain careful records about the successes and failures of the Pilot Program to help determine whether the Pilot Program should be extended to more States.

Per 23 U.S.C. 330(j), the Agencies must submit a report to Congress that describes the administration of the Pilot Program. As such, the Agencies will collect the necessary data and information needed to comply with these requirements. However, the Agencies do not believe it is necessary to address data collection for the Pilot Program in regulation.

Miscellaneous

A private citizen expressed support for the proposed rulemaking and its attempt to aid in the reduction of duplicative environmental reviews at the State and Federal levels. The citizen also noted that the reduction in environmental reviews and subsequent potential cost savings could lead to a reallocation of increased transportation funding for infrastructure. The individual requested that the Agencies seek to expand the Pilot Program beyond five States to gain a better understanding of the efficacy of the Pilot Program across the country since limiting it to only five States could create a limited data set to analyze. The Agencies note that the limit of State participation is based upon a statutory mandate in 23 U.S.C. 330(a)(2), which the FAA Reauthorization Act of 2018 reduced to two States. This rulemaking is consistent with that statute.

49 CFR Part 264

The Agencies are modifying the heading and list of authorities to align with the Final Rule published on October 29, 2018 (83 FR 54480). These changes are administrative in nature.

Rulemaking Analyses and Notices

Statutory/Legal Authority for This Rulemaking

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

Rulemaking Analyses and Notices

The Agencies considered all comments received before the close of business on the comment closing date indicated above. The comments are available for examination in the docket (FHWA–2017–20561) at *www.regulations.gov.* The Agencies also considered comments received after the comment closing date to the extent practicable.

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies have determined that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of U.S. Department of Transportation Regulatory Policies and Procedures. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action complies with Executive Orders 12866 and 13563.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This final rule is considered an E.O. 13771 deregulatory action. The Agencies expect minor cost savings from this rulemaking that cannot be quantified.

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 rule on small entities and anticipate that this action would not have a significant economic impact on a substantial number of small entities. ''Small entities'' include small

businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The proposed rule addresses application requirements for States wishing to participate in the Pilot 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 a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $155 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government.

Executive Order 13132 (Federalism Assessment)

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

Executive Order 13175 (Tribal Consultation)

The Agencies have analyzed this action under Executive Order 13175, and determined that it would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal law. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

DOT's regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities (49 CFR part 17) apply to this program. The Agencies solicited comments on this issue with the proposed rulemakings but did not receive any comments pertaining to Executive Order 12372.

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.(e)(2)).

This action qualifies for CEs under 23 CFR 771.116(c)(15) (promulgation of rules), 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), 23 CFR 771.118(c)(4) (planning and administrative activities which do not involve or lead directly to construction). The Agencies have evaluated whether this action would involve unusual or extraordinary circumstances and have determined that this action would not involve such circumstances.

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

Regulation Identifier Number

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

List of Subjects

23 CFR Part 773

Environmental protection, Surface Transportation Project Delivery Program application requirements and termination, Highways and roads

23 CFR Part 778

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

49 CFR Part 264

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

49 CFR Part 622

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

Issued in Washington, DC, under authority delegated in 49 CFR 1.81(a)(5), 1.85, and 1.91:

Nicole R. Nason,

Administrator, Federal Highway Administration.

Quintin C. Kendall,

Deputy Administrator, Federal Railroad Administration.

K. Jane Williams,

Deputy Administrator, Federal Transit Administration.

For the reasons set out in the preamble the Federal Highway Administration mends title 23, chapter I of the Code of Federal Regulations as follows:

TITLE 23—HIGHWAYS

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

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

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

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

(a) * * *

(2) The Operating Administration(s) may not terminate a State's participation without providing the State with notification of the noncompliance issue that could give rise to the termination, and without affording the State an opportunity to take corrective action to address the noncompliance issue. The Operating Administration(s) must provide the State a period of no less than 120 days to take corrective actions. The Operating Administration(s) is responsible for making the final decision on whether the corrective action is satisfactory.

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

* * * * *

■ 3. Add part 778 to read as follows:

PART 778—PILOT PROGRAM FOR ELIMINATING DUPLICATION OF ENVIRONMENTAL REVIEWS

Sec.

778.101 Purpose.
778.103 Eligibility and Certain Limitations.
778.105 Application requirements for participation in the Pilot Program.
778.107 Application review and approval.
778.109 Criteria for Determining Stringency.
778.111 Review and Termination.
778.113 Program Termination and Regulations Sunset

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

§ 778.101 Purpose.

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

§ 778.103 Eligibility and Certain Limitations.

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

(1) Act by and through the Governor or top-ranking State transportation official who is charged with responsibility for highway construction;

(2) Consent to a waiver of its sovereign immunity for the compliance, discharge, and enforcement of any responsibility under this Pilot Program;

(3) Have previously assumed the responsibilities of the Secretary under 23 U.S.C. 327 related to environmental review, consultation, or other actions required under certain Federal environmental laws; and

(4) Identify laws authorizing the State to take the actions necessary to carry out the alternative environmental review and approval procedures under State laws and regulations.

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

(i) NEPA;

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

(iii) Related regulations and executive orders.

(2) Compliance with State environmental laws and regulations may not substitute for the Secretary's responsibilities regarding compliance with any other Federal environmental laws other than those set forth in (b)(1).

§ 778.105 Application requirements for participation in the Pilot Program.

(a) To apply to participate in the Pilot Program, a State must submit an application to the applicable Operating Administration(s) (*i.e.,* FHWA, FRA, or FTA).

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

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

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

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

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

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

(4) A detailed explanation (with supporting documentation, incorporated by reference where appropriate and reasonably available) of the basis for concluding the State environmental law or regulation intended to substitute for a Federal environmental requirement is at least as stringent as that requirement;

(5) A description of the projects or classes of projects (defined as either a defined group of projects or all projects to which NEPA, the procedures governing the implementation of NEPA and related procedural laws under the authority of the Secretary, including 23 U.S.C. 109 and 139, and related regulations and Executive orders would apply) for which the State would exercise the authority that may be granted under the Pilot Program;

(6) Verification that the State has the financial and personnel resources necessary to fulfill its obligations under the Pilot Program;

(7) Evidence that the State has sought public comments on its application prior to the submittal and the State's response to any comments it received;

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

(9) Certification and explanation by the State's Attorney General or other State official empowered by State law to issue legal opinions that bind the State:

(i) That the State has legal authority to enter into the Pilot Program;

(ii) That the State waives its sovereign immunity to the extent necessary to consent to exclusive Federal court jurisdiction for the compliance, discharge, and enforcement of any responsibility under this Pilot Program;

(iii) That the State has laws that are comparable to the Freedom of Information Act, 5 U.S.C. 552 (FOIA), including laws that allow for any decision regarding the public availability of a document under those laws to be reviewed by a court of competent jurisdiction;

(iv) Identifying within the State's laws the jurisdictional requirements and standards of review applicable to judicial review of decisions under the environmental laws proposed for substitution under the Pilot Program; and

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

§ 778.107 Application review and approval.

(a) The Operating Administration must solicit public comments on the application and must consider comments received before making a decision to approve or disapprove the application. Materials made available for this public review must include the State's application and supporting materials.

(b) After receiving an application the Operating Administration deems complete, the Operating Administration must make a decision on whether to approve or disapprove the application within 120 calendar days. The Operating Administration must transmit the decision in writing to the State with a statement explaining the decision.

(c) The Operating Administration will approve an application only if it determines the following conditions are satisfied:

(1) The State is party to an agreement with the Operating Administration under 23 U.S.C. 327;

(2) The Operating Administration has determined, after considering any public comments received, the State has the capacity, including financial and personnel, to undertake the alternative environmental review and approval procedures; and

(3) The Operating Administration, in consultation with the Office of the Secretary, with the concurrence of the Chair of CEQ, and after considering public comments received, has determined that the State environmental laws and regulations described in the State's application are at least as stringent as the Federal requirements for which they substitute.

(d) The State must enter into a written agreement with the Operating Administration.

(e) The written agreement must:

(1) Be executed by the Governor (or in the case of the District of Columbia, the Mayor) or top-ranking transportation official in the State charged with responsibility for highway construction;

(2) Provide that the State agrees to assume the responsibilities of the Pilot Program, as identified by the Operating Administration;

(3) Provide that the State, in accordance with the sovereign immunity waiver process required by State law, expressly consents to and accepts Federal court jurisdiction with respect to compliance, discharge, and enforcement of any responsibility undertaken as part of the Pilot Program;

(4) Certify that State laws and regulations exist that authorize the State to carry out the responsibilities of the Pilot Program;

(5) Certify that State laws and regulations exist that are comparable to FOIA (5 U.S.C. 552), including a provision that any decision regarding the public availability of a document under the State laws and regulations is reviewable by a court of competent jurisdiction;

(6) Contain a commitment that the State will maintain the personnel and financial resources necessary to carry out its responsibilities under the Pilot Program;

(7) Have a term of not more than 5 years, the term of a State's agreement with the Operating Administration in accordance with 23 U.S.C. 327, or a term ending on December 4, 2027, whichever is sooner; and

(8) Be renewable.

(f) The State must execute the agreement before the Operating Administration executes the agreement. The Operating Administration's execution of the agreement and transmittal to the State will constitute approval of the application.

(g) The agreement may be renewed at the end of its term, but may not extend beyond December 4, 2027.

(h) A State approved to participate in the Pilot Program may apply the approved alternative environmental review and approval procedures to locally administered projects, for up to 25 local governments at the request of those local governments. For such locally administered projects, the State shall be responsible for ensuring that the requirements of the approved alternative State procedures are met.

§ 778.109 Criteria for determining stringency.

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

(a) Define the types of actions that normally require an assessment of environmental impacts, including government-sponsored projects such as those receiving Federal financial assistance or permit approvals. (42 U.S.C. 4332(2)(C); 40 CFR 1501.1(a)(4), 1501.3, 1507.3(e)(2)(i), 1508.1(q);

(b) Ensure an early process for determining the scope of the action and issues that need to be addressed, identifying the significant issues, and for the classification of the appropriate assessment of environmental impacts in accordance with the significance of the likely impacts. For actions that may result in significant impacts on the environment, the scoping process must be an open and public process. (23 U.S.C. 139(e); 40 CFR 1501.5, 1501.9, 1506.6, 1507.3(c), 1507.3(e), 1508.1(y), and 1508.1(cc));

(c) Prohibit agencies and nongovernmental proponents from taking action concerning the proposal until the environmental impact evaluation is complete when such action would:

(1) Have adverse environmental impacts or

(2) Limit the choice of reasonable alternatives. (40 CFR 1506.1 and 1506.11(b)).

(d) Protect the integrity and objectivity of the analysis by requiring the agency to take responsibility for the scope and content of the analysis, and by preventing conflicts of interest among the parties developing the analysis and the parties with financial or other interest in the outcome of the project. (42 U.S.C. 4332(2)(D); 40 CFR 1506.5);

(e) Based on a proposed action's purpose and need, require objective evaluation of reasonable alternatives to the proposed action (including the alternative of not taking the action) if it may result in significant impacts to the environment or, for those actions that may not result in significant impacts, consideration of alternatives if they will involve unresolved conflicts concerning alternative uses of available resources (42 U.S.C. 4332(2)(C)(iii); 42U.S.C. 4332(2)(E); 23 U.S.C. 330(b)(1)(A); 40 CFR 1502.13, and 1502.14);

(f) Using procedures that ensure professional and scientific integrity of the discussions and analysis, require an assessment of the changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(B); 40 CFR 1501.5(c)(2), 1502.16, 1502.23, and 1508.1(g);

(g) Require the consideration of appropriate mitigation for the impacts associated with a proposal and reasonable alternatives (including avoiding, minimizing, rectifying, reducing or eliminating the impact over time, and compensating for the impact) (40 CFR 1502.14(e), 1502.16(a)(9), and 1508.1(s));

(h) Provide for adequate interagency participation, including appropriate coordination and consultation with State, Federal, Tribal, and local agencies with jurisdiction by law, special expertise, or an interest with respect to any environmental impact associated with the proposal, and for collaboration that would eliminate duplication of reviews. For actions that may result in significant impacts to the environment, the process should allow for the development of plans for interagency coordination and public involvement, and the setting of timetables for the review process (42 U.S.C. 4332(2)(C); 23 U.S.C. 139(d) and 139(g); 40 CFR 1500.5(g), 1501.8, 1501.9(b), 1502.174, and part 1503);

(i) Provide an opportunity for public participation and comment that is commensurate with the significance of the proposal's impacts on the environment, and require public access to the documentation developed during the environmental review and a process to respond to public comments (42 U.S.C. 4332(2)(C); 23 U.S.C. 330(b)(1)(A); FAST Act, Sec. 1309(c)(2)(B)(ii); 40 CFR 1502.20, part 1503, and 1506.6; and Executive Order 11514, Sec.1(b));

(j) Provide for public access to the documentation necessary to review the potential impacts of projects;

(k) Include procedures for the elevation, resolution, and referral of interagency disputes prior to a final decision on the proposed project (23 U.S.C. 139(h); 40 CFR part 1504);

(l) For the conclusion of the environmental review process, require a concise documentation of findings (for actions that would not likely result in significant impacts to the environment) or, for actions that may result in significant impacts, a concise record that states the agency decision that:

(1) Identifies all alternatives considered (specifying which were environmentally preferable),

(2) Identifies and discusses all factors that were balanced by the agency in making its decision and states how those considerations entered into the decision,

(3) States whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not; and

(4) Describes the monitoring and enforcement program that is adopted, where applicable, for any mitigation (40 CFR 1501.6(c), 1505.2, and 1505.3).

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

(n) Allow for the use of procedures to facilitate process efficiency, such as tiering, programmatic approaches, adoption, incorporation by reference, approaches to eliminate duplication with other Federal requirements, and special procedures to address emergency situations. Where the procedures allow for the identification and establishment of categories of actions that normally do not have a significant impact on the environment and are therefore excluded from further review, ensure that the procedures require the consideration of extraordinary circumstances that would warrant a higher level of analysis in which a normally excluded action may have a significant environmental effect. (23 U.S.C. 139(b)(3); 40 CFR 1500.4, 1500.5, 1501.4, 1501.11, 1501.12, 1502.24, 1506.2, 1506.3, and 1506.4).

§ 778.111 Review and termination.

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

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

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

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

(2) After notifying the State of its determination under paragraph (c)(1), the Operating Administration must provide the State a maximum of 90 days to take the appropriate corrective action. If the State fails to take such corrective action, the Operating Administration may terminate the State's participation in the Pilot Program.

§ 778.113 Program termination and regulations sunset.

(a) *In General.* The Pilot Program shall terminate December 4, 2027, unless Congress extends the authority under 23 U.S.C. 330.

(b) *Sunset.* Unless Congress extends the authority for the Pilot Program that sunsets 12 years after the date of enactment, this rule shall expire on December 4, 2027.

For the reasons set out in the preamble the Federal Railroad Administration amends 49 CFR part 264 as follows:

TITLE 49—TRANSPORTATION

PART 264—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303; 23 U.S.C. 139, 327, 330; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat. 405, Section 1319; and Pub. L. 114–94, 129 Stat. 1312, Sections 1309, 1432, 11502, and 11503.

■ 5. Revise § 264.101 to read as follows:

§ 264.101 Cross reference to environmental impact and related procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as ''Section 4(f),'' are set forth in part 774 of title 23 of the Code of Federal Regulations. The procedures for complying with the Surface Transportation Project Delivery Program application requirements and termination are set forth in part 773 of title 23 of the CFR. The procedures for participating in and complying with the program for eliminating duplication of environmental reviews are set forth in part 778 of title 23 of the CFR.

For the reasons set forth in the preamble, the Federal Transit Administration amends 49 CR part 622 as follows:

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

■ 7. The authority citation for subpart A of part 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.;* 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139, 326, 327, and 330; Pub. L. 109–59, 119 Stat. 1144, Sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; Pub. L. 112–141, 126 Stat.405, Sections 1315, 1316, 1317, and 1318; and Pub. L. 114–94, Section 1309.

■ 8. Revise § 622.101 to read as follows:

§ 622.101 Cross-reference to procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and Executive Orders are set forth in part 771 of title 23 of the CFR. 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 CFR. 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 CFR. The procedures for participating and complying with the program for eliminating duplication of environmental reviews are set forth in part 778 of title 23 of the CFR.

[FR Doc. 2020–26395 Filed 12–23–20; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[Docket No. OAG 162; AG Order No. 4926–2020]

Approval of Civil Consent Decrees With State and Local Governmental Entities

AGENCY: Office of the Attorney General, Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the Department of Justice (''Department'') setting forth the approval procedures to be used when a civil action against a State or local governmental entity is resolved by consent decree, prior to the finalization of that agreement.

DATES: This rule is effective December 28, 2020.

FOR FURTHER INFORMATION CONTACT: J. Taylor McConkie, Deputy Associate Attorney General, Department of Justice, Washington, DC 20530; telephone: (202) 514–9500 (not a toll-free number).

SUPPLEMENTARY INFORMATION: In enforcing Federal law, the Department may bring lawsuits against State and local governmental entities. State governments are sovereigns with special and protected roles under our constitutional order. Accordingly, the Department must ensure that its practices in such cases are in the interests of justice, transparent, and consistent with the impartial rule of law and fundamental constitutional principles, including federalism and democratic control and accountability.

On November 7, 2018, Attorney General Jeff Sessions issued a memorandum (''November 7 memorandum'' or ''memorandum'') to the heads of the Department's civil litigating components and the United States Attorneys addressing many of the particular considerations arising when a civil action against a State or local government is resolved by consent decree or settlement agreement. Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018) (available at *https://www.justice.gov/opa/press-release/file/1109681/download*).

As that memorandum explained, while consent decrees may be necessary and appropriate to secure compliance with Federal law, Federal court decrees that impose wide-ranging and long-term obligations on, or require ongoing judicial supervision of, State or local governments are extraordinary remedies that ''raise sensitive federalism concerns.'' *Id.* at 2 (*citing Horne* v. *Flores,* 557 U.S. 433, 448 (2009)). It is appropriate that the Department should exercise special caution before entering into a consent decree with a State or local governmental entity. While such consent decrees can be appropriate settlement vehicles in limited circumstances, they should be employed carefully and only after review and approval of senior leadership of the Department. *Id.* at 3–4.

To that end, the November 7 memorandum set forth important principles to guide the development of consent decrees with State or local governmental entities, including limitations on the circumstances in which a consent decree with a State or local governmental entity may be appropriate, the substantive requirements for such consent decrees, internal notification requirements regarding the initiation of negotiation for consent decrees, and a requirement of review and approval of senior leadership of the Department before a consent decree is agreed to by the United States or submitted to the court for entry.

The principles of the November 7 memorandum are applicable, by its terms, to all civil litigation conducted by the Department that involves any civil consent decrees or settlement agreements with State or local governmental entities. However, it is appropriate to amend the Department's settlement regulations to effectuate one aspect addressed by the memorandum, *i.e.,* the requirement for leadership approval of consent decrees prior to the agreement or submission to a court for entry. As noted in the memorandum (pages 2 n.3 and 3 n.4), the Department's existing regulations on the delegation of settlement authority govern the requirements for certain settlements to be approved by the Department's senior leadership. This final rule amends the existing settlement regulations to add a new paragraph codifying the requirement for the relevant Assistant Attorney General of the civil litigating division (or the United States Attorney to whom settlement authority has been redelegated under 28 CFR 0.168) to approve and submit consent decrees involving State or local government entities for approval by the Deputy Attorney General or the Associate Attorney General if the consent decree would (1) place a court in a long-term position of monitoring compliance by a State or local governmental entity; (2) create long-term structural or programmatic obligations, or long-term, indeterminate financial obligations, for a State or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. However, consistent with the November 7 memorandum at page 3 n.5, this new approval requirement does not apply where use of a consent decree is required by statute or regulation or the consent decree is limited to the payment of a sum certain of money or performance of a specific environmental removal action.

Accordingly, to achieve the foregoing objectives, before a consent decree that comes within one of the categories set forth above is agreed to by the United States or submitted to a court for entry, it must be approved by the United States Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter of the consent decree and by the Deputy Attorney General or the