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Friday  
August 28, 1987

Final Rule

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**Part II**

**Department of  
Transportation**

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**Federal Highway Administration  
Urban Mass Transportation Administration**

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**23 CFR Parts 635, 640, 650, 712, 771,  
and 790**

**49 CFR Part 622**

**Environmental Impact and Related  
Procedures; Final Rule**

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****Urban Mass Transportation Administration****23 CFR Parts 635, 640, 650, 712, 771, and 790****49 CFR Part 622****[FHWA Docket Nos. 85-12 and 83-20]****Environmental Impact and Related Procedures**

**AGENCIES:** Federal Highway Administration (FHWA) and Urban Mass Transportation Administration (UMTA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FHWA and the UMTA are issuing a joint final regulation governing the preparation of environmental impact statements (EISs) and related documents under grant programs administered by FHWA and UMTA. The amendments contained in this final rule will streamline the project-development process and provide increased decisionmaking authority to agency field offices. The amendments are consistent with the directives of the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and other Federal statutes and incorporate the requirements of DOT Order 5610.1C, "Procedures for Considering Environmental Impacts." The documents and actions to which this regulation applies are described more fully in § 771.109 of the regulation. By this final rule, the FHWA is also eliminating duplication in its public involvement regulations by rescinding 23 Code of Federal Regulations (CFR) Part 790 and amending a section of 23 CFR Part 771 to make it the agency's single public involvement regulation. This action will contribute to the establishment of a streamlined, one-stop environmental process in which public involvement is fully integrated with the other project development and environmental procedures.

**EFFECTIVE DATES:** The amendments to 23 CFR Parts 640, 712 (see the amendatory instruction number 4), and 771 are effective on November 27, 1987. The amendment to Subpart A of Part 622 of 49 CFR is effective on November 27, 1987. The amendments to 23 CFR Parts 635, 650, 712 (see the amendatory instruction number 8), and 790 are effective August 29, 1988, in order to allow States which conduct public

hearings under Part 790 to adopt public involvement/public hearing procedures that satisfy the requirements of Part 771.

**ADDRESSES:** Copies of comments received, together with the regulatory evaluation required by DOT policies and procedures, are available for public inspection in the public docket room of FHWA, Room 4205, HCC-10, 400 Seventh Street SW., Washington, DC 20590, between the hours of 8:30 a.m. and 3:30 p.m. EST, Monday through Friday. These materials are filed under FHWA Docket Nos. 83-20 and 85-12.

**FOR FURTHER INFORMATION CONTACT:**

(1) For FHWA: Mr. Frederick Skaer, Office of Environmental Policy (HEV-10), (202) 366-0106, or Mr. Edward Kussy, Office of the Chief Counsel (HCC-40), (202) 366-0791, FHWA, 400 Seventh Street SW., Washington, DC 20590, between the hours of 7:45 a.m. and 4:15 p.m., EST, Monday through Friday; (2) For UMTA: Mr. A. Joseph Ossi, Office of Planning Assistance (UGM-22), (202) 366-0096, or Mr. Scott A. Biehl, Office of the Chief Counsel (UCC-5), (202) 366-4063, UMTA, 400 Seventh Street SW., Washington, DC 20590, between the hours of 8:30 a.m. and 5:00 p.m., EST, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The regulation being issued today applies to both FHWA and UMTA actions. Thus, it will amend Part 771 of Title 23 of the CFR with a cross reference at Part 622 of Title 49 of the CFR.

**Introduction**

This final rule amends the regulations utilized by FHWA and UMTA to comply with the CEQ's regulations and other environmental requirements. The FHWA and the UMTA first published regulations implementing CEQ requirements in 1980. (See 45 FR 71968; October 30, 1980.) On August 1, 1983, FHWA and UMTA published changes to their joint environmental regulation (48 FR 34894) as a part of the departmental effort to streamline regulations and reduce red tape. In response to that Notice of Proposed Rulemaking (NPRM), Docket 83-20, 51 comments were received from various Federal, State, and local agencies. Twenty-six of these comments were from State highway agencies (SHAs) or State DOTs. Eleven comments were received from transit or planning agencies. Seven comments were received from interested cities or counties. Two comments were received from State Historic Preservation Officers (SHPOs). The National Trust for Historic Preservation provided comments as did the following Federal agencies: The Environmental Protection

Agency, the Department of the Interior, the Advisory Council on Historic Preservation, and the U.S. Coast Guard. On January 31, 1985, the FHWA published another NPRM to rescind 23 CFR 790 and to amend 23 CFR 771.111(h). (See 50 FR 4526, Docket No. 85-12). This final notice combines both rulemakings. Comments on Docket No. 85-12 are discussed below as the last item under the heading "Section-by-Section Analysis."

**General Comments**

The majority of comments received in Docket No. 83-20 were generally supportive of the streamlining proposals made in the NPRM. This is especially true of the greater flexibility built into the categorical exclusion (CE) process. Many of the comments requested more flexibility, but, as will be discussed below, we were unable to make major changes given current statutory constraints. Another major source of comments was a proposal in the NPRM to require written reevaluations before each major project step. Substantial changes to that proposal have been made here. These are addressed in greater detail below.

It should be noted that most sections of the regulation have been renumbered from the NPRM, although the section headings have been retained. Section 771.127 of the NPRM has been subdivided into two sections (771.129, Reevaluations, and 771.130, Supplemental Environmental Impact Statements).

As with the 1980 regulation, this regulation has been approved by the Office of the Secretary of Transportation as being consistent with DOT Order 5610.1C. Applicants and Administration field offices should not normally need to consult DOT Order 5610.1C.

There were a number of editorial changes made throughout the document to make it more readable. Only the major changes made to each section of the regulation are discussed in this preamble.

**Section-by-Section Analysis**

**Section 771.101. Purpose.** This section has been amended to include a reference to 23 U.S.C. 128. Section 128 contains the FHWA public hearing requirements and describes the environmental report needed as a part of the public hearing requirements.

**Section 771.105. Policy.** This section sets forth basic Administration policy regarding the consideration of environmental impacts of Administration actions. Sections 109 and 128 of Title 23 and sections 3, 5, and

14 of the Urban Mass Transportation Act (UMT Act), 49 U.S.C. 1602, 1604, and 1610 require both FHWA and UMTA to consider social, economic, and environmental impacts of proposed projects. The documentation developed pursuant to this regulation is intended to satisfy both NEPA and the above sections.

It is the policy of FHWA and UMTA to make the process set forth in the regulation the primary vehicle for all environmental approvals of Administration actions by all Federal agencies. This can only be accomplished if both applicants and Federal agencies are committed to the development of procedures and cooperative arrangements which take advantage of the opportunities presented here to create as complete an environmental record as possible.

Administration policy on the funding of efforts to mitigate the impacts of Administration actions remains the same. The intent is that Federal funds be available to assist in complying with Federal requirements, as well as State and local requirements which do not conflict with Federal requirements. However, in those situations where State or local requirements differ from Federal requirements, the decision to use Federal funds will be made on a case-by-case basis, after considering the reasonableness of the applicant's request and the costs and benefits of Federal participation in the request.

Several commenters questioned the "status" of FHWA's Technical Advisory T6640.8 and requested clarification. The Technical Advisory was developed by FHWA for the purpose of providing the best available guidance to its field offices and applicants regarding the types of information needed to comply with NEPA, section 4(f) of the DOT Act of 1966, and other environmental requirements, such as Executive Order 11990, "Protection of Wetlands." The Technical Advisory is available for inspection and copying as prescribed in 49 CFR Part 7, Appendix D. The FHWA expects the Technical Advisory to be used to the fullest extent possible. However, FHWA also recognizes that each project must be evaluated on its individual issues and merits. When circumstances dictate, there is sufficient flexibility to tailor the content of the environmental document to the needs of the individual situation. A revised Technical Advisory has been prepared and will be issued as T6640.8A on October 30, 1987.

The UMTA also has developed supplementary guidance on the NEPA process for applicants. UMTA Circular C5620.1, "Guidelines for the

Environmental Protection Process", provides information on the assessment of environmental impacts for major transit projects, and the preparation and processing of environmental documents. This circular is available from UMTA Headquarters and field offices.

*Section 771.107. Definitions.* In the 1980 regulation, the term "action" was defined as the Federal approval of construction of highway and transit projects. The CEQ regulations use the term "proposed action" in a broader context. There, actions include projects and programs that are proposed for Federal assistance as well as proposed plans, policies, and legislation. For consistency with the CEQ regulations, a new definition for "action" has been added. As used throughout the regulation, actions are highway or transit projects proposed for Federal funding or activities such as joint and multiple use permits which require Federal approvals. The actual Federal approval of the construction of a highway or transit project or of a permit is now covered in the new definition of "Administration action." The difference between an "action" and an "Administration action" as defined under the regulation is the difference between a proposed project and an actual Federal commitment to fund construction of the project.

The DOT Act of 1966 included specific provisions providing special protection to publicly owned parks, recreational areas, wildlife and waterfowl refuges, and all historic sites. This provision was set forth at section 4(f) of the DOT Act, and printed in the United States Code (U.S.C.) at 49 U.S.C. 1653(f). A similar provision is found at 23 U.S.C. 138. In 1983, as part of a general codification of the DOT Act, 49 U.S.C., 1653(f), was formally repealed and recodified with slightly different language in 49 U.S.C. 303. However, the substantive requirements remain unchanged. Given that over the years, the whole body of provisions, policies, case law, etc., has been collectively referenced as "section 4(f)" matters, we have continued this reference in this regulation, even though section 4(f) of the 1966 DOT Act has been technically amended. To change the popular reference to "section 4(f)" would confuse needlessly the public and the Federal, State, and local agencies that participate in "section 4(f)" matters on a recurring basis.

The only other changes to this section were minor editorial changes to make it more readable.

*Section 771.109. Applicability and responsibilities.* This section deals with the documents and actions to which this regulation applies, the status of prior

approvals, and the responsibilities of both the Administration and grant applicants for the preparation of the documents required by this regulation.

Paragraph (b) deals with the responsibility for carrying out mitigation measures that have been described in the Administration's environmental documents. One commenter suggested that language be added to the regulation to specify that the Administration monitor projects during and after construction to ensure that mitigation measures that have been described in the Administration's environmental documents are implemented. The Administration meets its responsibility set forth in paragraph 1505.2(c) of the CEQ regulations (40 CFR Parts 1500-1508), and the regulation has been modified to make this clear. Paragraph (b) now states that mitigation measures will be incorporated by reference in the grant document and UMTA will follow up with reviews of designs and on-site inspections to ensure that mitigation measures are implemented as called for in environmental documents and grant agreements. It should be noted that the mitigation measures referenced in an executed grant agreement become contractual obligations on the part of the applicant and cannot be changed without the express written approval of UMTA. FHWA assures that mitigation measures are implemented by reviewing and approving the plans and specifications for the project and by conducting periodic construction inspections. On projects processed under an approved certification in accordance with 23 CFR 640, FHWA ensures the implementation of mitigation measures by conducting program management reviews and a final construction inspection.

In paragraph (c), different levels of responsibility for applicants preparing EISs are defined depending on whether section 102(2)(D) of NEPA or a State law comparable to NEPA applies. Several local transit agencies asked what role they would assume if a State requirement comparable to NEPA applies. In such cases, the transit agencies will have a joint lead responsibility with UMTA and will take a substantial role in preparing the environmental document. It is intended that a single document satisfy all Federal and State requirements.

*Section 771.111. Early coordination, public involvement and project development.* The FHWA and the UMTA regard early coordination and public involvement as critical to the successful completion of the processes required by this regulation. Scoping, a

major innovation of the CEQ regulations, is accomplished in this phase. Many potential difficulties confronting particular actions can be most conveniently identified and, in many instances, resolved at this stage.

Public involvement as discussed in this regulation, may mean not only public hearings, but a series of less formal informational meetings which begin after the planning phase and help affected persons and local governments learn about agency actions and identify potential difficulties at the earliest possible time. Very often, the persons most affected are those who must be relocated from their homes or businesses by the agency action.

Appropriate relocation planning and studies should be done as part of initial project planning, usually during the course of preparing documents required by this regulation, to ensure that the rights and concerns of potentially affected residents and businesses are fully addressed and considered in the development and timing of agency actions. Very often, project location, design, and right-of-way problems are particularly sensitive where certain ethnic, social, or economic groups are affected to unusual or disproportionate degrees. Where this might be the case, these issues should be considered very early in the process. Notification of any project related hearings, meetings, or opportunities for public involvement should be placed in newspapers or publications most likely to be read by affected groups. This would include minority or foreign language newspapers where appropriate.

One commenter asked that paragraph (b) be dropped. This paragraph identifies an early point in project development, the Transportation Improvement Program (TIP) review, where the Administration will consult with an applicant on environmental requirements. This was done in response to paragraph 1505.1(b) of the CEQ regulations which requires Federal agencies to designate major decision points in their programs and ensure that the NEPA process corresponds with them. The TIP is a local planning document identifying projects to be implemented over a 3-5 year time frame. Not all listed projects are subsequently constructed, but inclusion in the TIP is an early indication that Federal funding may be pursued. It is expected that applicants will initiate environmental impact work first on the high-priority projects in the TIP. When adequate site-specific information is available at the TIP review stage, FHWA and UMTA will determine whether an EIS, EA, or

CE is appropriate and whether other environmental requirements apply. The 3-5 year time frame of the TIP will allow ample lead time for document preparation, public involvement, and agency review. This provision has been retained because it supports early consultation in the environmental review process without placing unnecessary burden on prospective applicants. However, this paragraph was modified to indicate that FHWA would, where appropriate, indicate the possible class of action at the later, formal 105 program approval stage. This technical change was necessary since FHWA reviews, but does not approve, the TIP.

Paragraph (d) adopts the suggestion to change the word "should" to "must" in the second sentence.

Paragraph (g) describes the tiering of EISs as an optional approach which may have benefits when considering large, complex transportation projects. This paragraph stimulated a mix of comments. Several commenters expressed the concern that two sets of EISs do not lead to improved decisionmaking regarding major projects and are not justified considering the additional cost and time involved. Others supported the tiering concept and noted that it had been used successfully when incorporated with early planning at the local level. Tiering of EISs may be beneficial under certain limited circumstances, but a tiered approach can only be effective if the initial EIS is prepared very early in the planning process. The focus would be on a broad comparison of key environmental factors which may have a bearing on early decisions concerning, for example, the type of project, the general location, and major design features. This approach is consistent with the CEQ regulations which encourage agencies to consider environmental effects at an early stage before decisions on major alternatives are foreclosed. A second-tier EIS (or EA where no new significant impacts are expected) would be appropriate at the stage where a preferred alternative has been identified and project details have been developed.

Commenters asked for clarification as to how the Administration determines the need for tiered EISs. The decision to use tiering will be made in consultation with the applicant and will depend on the scope and complexity of the alternatives under consideration, the status of planning, and the need to address environmental considerations at an early stage in the local planning process. Generally, the Administration

would not direct an applicant to prepare tiered EISs but, instead, would employ tiering to accommodate an applicant's planning or environmental review requirements.

It should be noted that this progressively, more focused look at a project embodied in the concept of tiering may also be accomplished with a supplemental draft EIS. If project details are developed before a final EIS has been issued (e.g., during preliminary engineering), site-specific environmental effects can be addressed in a supplemental draft EIS. In this case, the process would be concluded with a final EIS responding to comments on both the general and the site-specific draft EISs. Thus, the process of tiering EISs is most appropriate where a project concept is still in the formative stages and the applicant is actively seeking information from agencies and the public in helping to reach early decisions. Tiering is accomplished with two complete EISs; however, alternatives and environmental concerns fully considered in the first-tier statement need not be restudied in the second-tier EIS.

Paragraph (h), which discusses the FHWA public hearing requirements, has been addressed in a separate NPRM (50 FR 4525, January 31, 1985). A discussion of final revisions as well as comments submitted to the public docket appears later in this document as the last item in the section-by-section discussion.

A new paragraph (i) has been added discussing public involvement for UMTA's projects. No new requirements have been established; however, coordination of any public hearings with NEPA process is emphasized with special reference to the preparation of EAs and environmental studies. It should be noted that although these hearings and the FHWA hearings are coordinated with the NEPA process, they are not required by NEPA itself; the requirement for public hearings is found in FHWA and UMTA legislation. Under these statutes, questions such as the need to hold hearings during the preparation of a NEPA document and the type and scope of those hearings are within the Federal agency's discretion.

This new paragraph also refers to the scoping process as a means of inviting public and agency comments on a project proposal. Providing this opportunity for input at an early stage frequently helps the applicant and UMTA to focus on important environmental effects and to determine whether reasonable alternatives exist to avoid or mitigate those effects. For example, in regard to sections 9 and 9A of the UMT Act, UMTA intends that the

new paragraph (i) will generally apply to the program of projects proposed for Federal funding. If practicable, EAs should be prepared, where required by this regulation, before the notice of an opportunity for a public hearing on the program of projects. At a minimum, the notice announcing the opportunity for a hearing should indicate those projects requiring EAs, the timetable for preparing those documents, and how copies may be obtained. If, after releasing the EA, UMTA or the applicant becomes aware of strong community concerns or controversy on environmental grounds, or if UMTA determines that an EIS is necessary, the applicant will hold a separate hearing on the project to receive public comment. The UMTA will continue to require early contacts with affected agencies and the public in defining the scope of environmental documents.

*Section 771.113. Timing of Administration Activities.* This section describes the timing of various project development activities in relation to the completion of the environmental process. It places limits on the actions which the Administration and the applicant may take to develop a project prior to the completion of the NEPA process.

The language in paragraph (a) supports, and should be read in conjunction with, section 1506.1 of the CEQ regulations, "Limitations on actions during NEPA Process." These provisions ensure that the Administration's decision whether to implement an alternative under consideration in the environmental document will not be influenced by a previous commitment to a particular course of action. As such, the strictures apply not only to the Administration and applicants, but also third parties acting under a contractual agreement. Furthermore, the Administration or the applicant cannot prematurely enter into a contract which irrevocably binds it to the future performance of this work. This limitation on actions supports one of the primary purposes of NEPA--that Federal agencies consider environmental effects fully, including alternative courses of action, before reaching a decision to proceed with major Federal actions.

The wording in this paragraph has been revised to make clear the kinds of activities that will be allowed prior to the completion of the NEPA process. This will include any impact studies and engineering work needed to complete the environmental document. Normally, preliminary design will provide all the project information needed to satisfy

environmental requirements. In certain cases, more detailed design work will be needed to satisfy a specific environmental requirement and this additional design work is allowed. This paragraph has also been changed to expand on the kinds of activities which may not occur prior to completion of the NEPA process.

It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed. Segmentation of a project might involve the early acquisition of property or the purchasing of rolling stock, construction materials, or other equipment needed during the construction phase. Segmentation could also entail separate development by the applicant of an entire portion of a project, e.g., a segment of highway or transit guideway that should be considered as part of a larger project for which Federal assistance is being sought.

A number of commenters suggested revisions to this section to permit the applicant to proceed with final design activities after the receipt and evaluation of comments on the draft EIS and prior to approval of the final EIS. The commenters contended that the EIS approval process delayed the start of final design work and, therefore, induced delays in all subsequent phases of the project development process. They suggested that if no environmental concern were raised during the draft EIS circulation period, final design of the preferred alternative should be allowed to proceed. The Administration has carefully considered these comments and continues to believe the environmental process must be completed and the EIS approval made before it is in a position to permit the applicant to proceed with final design activities. We recognize the need to develop preliminary designs in order to more accurately assess impacts in the environmental document. However, granting approval to proceed with final design at this stage would be a premature commitment to one alternative at a time when other alternatives, including the alternative of taking no action, are still being actively considered by the Administration in the environmental process.

However, the Administration recognizes the need to proceed with detailed design activities where such work is necessary to permit the full evaluation of environmental impacts and to permit the consideration of appropriate mitigation measures, e.g., impacts to wetlands, section 4(f) areas and resources covered by section 106 of the National Historic Preservation Act (section 106). The regulation provides for those situations by allowing the applicant to complete all necessary design work needed to complete the EIS or to comply with other environmental laws during the NEPA process. This should not be construed as an authorization to proceed with final design for the entire project, but only for those aspects of the project necessary to consider specific environmental concerns.

The possibility of acquisition of land for a project before completion of the NEPA process was raised by several commenters. The UMTA received comments in favor of both expanding and restricting the scope of advance land acquisition allowed under the regulation. Several commenters suggested that UMTA expand the scope of advance land acquisition because the Surface Transportation Assistance Act of 1982 (STAA) amended section 3(a)(1)(A) of the UMT Act by adding a provision specifically addressing UMTA's discretion to make grants or loans for the acquisition of rights-of-way and relocation for fixed guideway corridor development for projects in advanced stages of alternatives analysis or preliminary engineering. On the other hand, one commenter expressed the opinion that "no acquisition should be allowed prior to completion of the NEPA process," arguing that hardship or protective buying cannot be accomplished without influencing or limiting the choice of reasonable alternatives.

In weighing the arguments, UMTA considered how to implement the STAA amendment consistently with the agency's responsibilities under NEPA and with the results of pertinent case law governing advance land acquisition, *National Wildlife Federation vs. Snow*, 561 F.2d 227 (D.C. Cir. 1976). The UMTA has concluded, in light of these considerations and a review of the pertinent legislative history, that this amendment was not intended to override the requirements of NEPA.

For UMTA's major fixed guideway projects, the draft and final EISs are developed during alternatives analysis and preliminary engineering. Any authorization for advance land

acquisition during alternatives analysis or preliminary engineering would create a conflict with NEPA if the acquisition could result in a substantial commitment to a particular course of action before the NEPA process was completed. In addition, since UMTA's major investment procedures are integrated with the NEPA process, this would also prejudice the major investment decisionmaking process.

After careful review, FHWA and UMTA still believe that some advance land acquisition may take place on a case-by-case basis without resulting in a substantial commitment to a particular course of action before completion of the NEPA process. Therefore, in this regulation, FHWA and UMTA are maintaining the current practice: that is, the only types of advance land acquisition that FHWA and UMTA will approve before the completion of the NEPA process are "hardship" and "protective" acquisitions. These terms are defined in § 771.117(d)(12) of this regulation.

As in the past, this type of land acquisition is reserved for extraordinary or emergency situations involving a particular parcel or a limited number of parcels within the proposed transportation corridor. It has been FHWA's and UMTA's recent experience that the number of hardship and protective acquisitions on a given project are so few as to not result in a substantial commitment to a particular course of action. The purpose of protective acquisition is to preserve the status quo. Since it serves to protect valuable property and can be easily undone, such acquisition generally will not tilt the balance toward a particular alternative.

Another question is whether acquiring an option to purchase land before completing the environmental process would be an acceptable alternative to assure the availability of land for project purposes. It would be less costly and arguably would constitute a smaller commitment than the actual purchase of land. Generally, UMTA and FHWA maintain that acquiring options to purchase land for a project would tend to bias fair consideration of other project alternatives and violate basic principles of Federal environmental law. Therefore, the same standards apply to options to purchase as to outright purchase of land: before completing the environmental process, only acquisitions for hardship and protective purposes are acceptable.

To obtain approval for hardship or protective acquisition, the applicant should apply for a CE under paragraph 771.117(d)(12). In addition, for FHWA

actions, hardship and protective acquisition activities must be processed in accordance with 23 CFR 712.204(d). It should be noted that a CE for advance land acquisition applies only to the purchase of property and does not permit further project development. The restrictions of paragraph 771.113(a) will apply until the Administration completes the NEPA process for the entire proposed action. The FHWA has issued guidelines and UMTA is preparing similar guidance describing the documentation needed to support requests for hardship and protective buying. Documentation supporting these claims will continue to be reviewed in the field offices of FHWA and UMTA.

One commenter suggested that any advance land acquisition be noted in the subsequent EIS or EA. The FHWA and the UMTA have no objection to noting this information in environmental documents, but do not believe it is appropriate to require it under the regulation.

Paragraph (a)(3) has been added to emphasize that in addition to environmental requirements, certain programming requirements must be satisfied prior to the initiation of FHWA funded final design, acquisition, and construction activities. This paragraph is a cross reference to 23 CFR Part 450 and 23 CFR Part 630 and does not create any additional requirements.

Paragraph (b) has been revised to indicate that FHWA approval of the final environmental document is considered acceptance of the general project location and project concepts such as type of facility, interchange locations, and other major features which may be indicated in the environmental document. This paragraph is an indication that FHWA normally will approve for Federal funding a project of the type noted in the final environmental document. However, it does not commit the Administration to fund any specific project or any features identified therein. Final approval of the EIS does not constitute a commitment to fund the project, as noted in this paragraph and in § 771.125(e) of this regulation.

*Section 771.115 Classes of actions.* Actions treated under this regulation fall in one of the classes outlined in this section. Class I actions are those which typically require an EIS. Class II actions are those which typically are classified as CEs. If it is uncertain whether a particular action requires an EIS, and it requires an EA to establish the significance of the impacts, the action is grouped under Class III. A change in this section was the shifting of the list of examples of CE activities to § 771.117.

This has been done in order to group all activities related to CEs in § 771.117.

One commenter suggested deleting the list of Class I actions that remains in § 771.115(a) and, instead, focusing on the definition of significance as applied to environmental impacts in the CEQ regulations. Examples of specific Class I actions are included in the regulation in accordance with § 1507.3(b)(2) of the CEQ regulations. We have referenced the section of the CEQ regulations that addresses the significance of impacts rather than repeating it.

One commenter suggested that the wording be changed in paragraph (a) to indicate that the projects listed under Class I may not in all cases require EISs. The CEQ regulations require that Federal agency procedures include specific criteria for and identification of those typical classes of action which normally require EISs. While there may be individual projects listed in Class I that because of unusual circumstances would not require an EIS, such projects are exceptions to the rule. The wording in paragraph (a) has been changed to parallel the CEQ regulations (40 CFR 1507.3(b)(2)). The intent of dividing projects by class is to provide guidance on the environmental review process that will be followed normally for projects in the class. The FHWA and the UMTA will continue to review individual cases whenever applicants describe circumstances which may have a bearing on the choice of environmental process. The final decision on class of action will be made by the Administration.

In the NPRM, UMTA proposed eliminating exclusive busways as Class I actions because of the potential to construct and operate a busway on or within an existing highway without significant environmental impacts. A number of commenters supported this change. Busways are frequently established by dedicating an existing highway lane for exclusive bus and high occupancy vehicle use and the regulation affords the flexibility to handle such projects with an EA instead of an EIS. The NPRM noted UMTA's intention to continue to require an EIS for construction of a new roadway for buses which is not integrated in an existing highway. This type of project is now listed in the regulation as a Class I action. Other types of busway projects will be reviewed individually to determine the appropriate environmental document, e.g., busways on existing lanes or medians which have off-line facilities such as stations, park-and-ride lots, transfer points, etc.

The UMTA also proposed eliminating "major transportation-related developments" as Class I actions. These were joint public/private urban development projects that were tied into transit terminals or stations. These types of projects normally required an EIS. They were dropped from the list of Class I actions because they are no longer a significant part of the UMTA program.

Several commenters who supported the proposal to remove busways constructed on existing highways from the Class I list suggested that rail lines built in highway medians should be accorded the same treatment. However, the environmental effects associated with the fixed facilities of a rail line—stations, parking lots or structures, storage and maintenance yards—and the changes in travel patterns and land use associated with such projects are normally significant and warrant evaluation in an EIS. Greater variability exists in constructing a busway on an existing highway. Thus, the regulation provides the flexibility to handle the simpler busway projects with a simpler environmental process, while mandating an EIS if the EA shows significant impacts.

Another commenter, noting the change proposed for busway projects on existing highway facilities, argued that the initiation or increase of rail passenger service on rail lines already in use was analogous and should, therefore, not require an EIS. Reference was made to an exemption from State environmental requirements for such projects in California. The UMTA recognizes there may be some cases where a rail rapid transit project proposed on an existing railroad right-of-way can be built and operated with minimal environmental impact. In such cases, the fact that displacement of residences and businesses is avoided or minimized alleviates one potentially significant concern. However, these projects are exceptions which would not warrant a change in emphasis in the regulation. Sometimes rail projects are proposed on railroad rights-of-way that are abandoned or lightly used for freight. In these situations, the rapid transit project may intensify some effects associated with existing railroad operations, e.g., wayside noise, and could introduce new impacts at proposed station locations, such as traffic congestion and parking demand. It should be noted that listing as a Class I action does not preclude the handling of specific cases with EAs. The FHWA and the UMTA will continue to review individual project proposals to establish the appropriate environmental

document and level of environmental analysis.

*Section 771.117. Categorical Exclusions.* CEs are types of actions which in the Administration's experience have normally been found not to have significant environmental effects. Designation as a CE speeds the Administration's approval process by eliminating the need for an EIS or EA on an activity proposed for Federal funding. The FHWA and the UMTA proposed several important changes to the process of classifying and approving CEs in the NPRM and many comments were made on the changes. It is important to note that these changes have been made in response to the CEQ's latest guidance to Federal agencies on this subject (48 FR 34263, July 28, 1983). Agencies were encouraged to add the flexibility to their implementing procedures to allow new types of actions to be classified as CEs with minimal documentation required. They were to do this by developing more broadly defined criteria as well as providing examples of typical CEs, rather than a comprehensive list, so that specific actions not previously listed by an agency could be considered for CE status on a case-by-case basis. This regulation generally adopts this approach.

We have amended §§ 771.115 and 771.117 to classify FHWA's and UMTA's role in reviewing CE designations for proposed projects. These amendments are designed to speed the approval of many smaller projects while focusing attention on projects with particular environmental concerns. This change in procedures is one of the several steps taken by FHWA to comply with the requirements of section 129 of the STAA of 1982.

The FHWA and the UMTA have examined the existing list of categorically excluded actions and separated it into two groups. The first group includes actions which experience has shown almost never involve significant impacts. The second group contains examples of projects which usually have been found appropriate for CE classification but may, depending upon the circumstances, have significant adverse effects (e.g., increased noise, wetlands encroachment, historic site impacts) which would preclude the use of the CE classification. Site location and the surrounding land use are often key factors. Thus, the Administration will require all appropriate information on the area immediately surrounding the proposed project site and any specific impact studies which may be needed to

determine whether CE status is appropriate

It should be noted that projects approved on an individual basis will not be added to the list or examples in the regulation. Reviews of individual projects for CE status on a case-by-case basis will be at the field office level, although there will be coordination with Headquarters. Where a pattern emerges of granting CE status for a new type of project, rulemaking will be initiated to determine whether to add such projects to the list of CE examples in the regulation. Section 771.117(e) has been added to the regulation to describe these procedures.

Some commenters objected to the intent of splitting the original CE list into two groups and suggested that the Administration give a one-time designation to all CEs with no further review. This view contrasts sharply with the comments of others who felt the one-time designation for certain CEs would allow some projects with adverse consequences to escape scrutiny. The FHWA and the UMTA believe that this regulation strikes the proper balance. Only those actions which normally have no effect or minimal effect on the environment are included in the first group of CEs. Furthermore, in unusual circumstances, even these actions must undergo an environmental review if an EIS could be required, as provided in § 771.117(b).

Several commenters expressed the concern that specific environmental laws and administrative requirements might be overlooked if a project qualified as a CE in the NEPA compliance process, particularly in the first group of CE projects, which do not require individual Administration approval. One commenter noted that many of the actions listed in the second group of CEs could have significant effects depending on the location of the activity, thus, they should be subject to the more thorough analysis of an EA.

The final regulation is an effort to strike a reasonable balance between environmental concerns and the reduction of excessive procedures and paperwork. In adopting this approach, it is not the intention to exempt the first group of actions from any appropriate Administration review. Experience has shown that the actions placed in the first group almost never cause significant impacts to the environment and, from the standpoint of NEPA, are properly classified as CEs.

This prior approval with respect to NEPA compliance in no way implies that a project is exempt from the requirements of other laws. All other

laws and procedures still apply. For example, minor modifications to a historic building may require a review pursuant to section 106 or the proposed use of a minimal amount of land protected by section 4(f) may require review under that statute. We believe that these cases will be identified from information in the grant application and in other pertinent planning and programming documents available to the Administration. If there is any doubt over the applicability of a related environmental law or regulation, the Administration will request additional information to help determine whether such requirements apply. These determinations can usually be made with only a brief description of the area immediately surrounding the proposed project site.

The second group of CEs is composed of projects which normally do not involve significant environmental effects when carried out under the conditions or criteria set forth. They generally involve more construction than projects in the first CE group, and their designation as CEs is more dependent on proper siting. Projects in the second group will require documentation from the applicant to clearly establish that there are no significant impacts.

Several commenters expressed concern that the documentation required for the second group of categorically excluded projects defeats the purpose of the CE concept. We believe that this documentation, focused on particular areas of concern, is the only way to proceed while ensuring that federally assisted projects do not cause environmental harm. We expect that the documentation will be briefer than an EA since it will be focused on a limited number of environmental concerns and usually will not include an evaluation of alternatives as is often contained in an EA. Under this approach, projects which appear to meet the general criteria for CEs in paragraph (a) but are not specifically mentioned in the regulation may be approved on a case-by-case basis as provided in § 771.117(d).

Also with respect to CEs, there were numerous suggestions to: (1) Delete certain actions from the CE lists altogether, thus requiring preparation of EAs at a minimum, and (2) move certain CEs from the first group to the second group, requiring some level of supporting documentation, and move some from the second group to the first group. As a result, FHWA and UMTA reassessed all the CEs to determine if their present status was appropriate. Certain

refinements are reflected in this final regulation.

One commenter requested that CE status be given to all projects funded under sections 16 and 18 of the UMT Act which deal with elderly and handicapped access to transportation facilities and assistance for non-urban areas, respectively. A new CE has been added to cover modifications to facilities or vehicles for the express purpose of elderly and handicapped accessibility. Many of the projects funded with grants under section 18 are covered by existing CEs, e.g., new bus maintenance facilities, reconstruction of existing buildings, and vehicle purchases. However, a blanket CE for any project that might be proposed under section 18 is inappropriate.

A number of commenters asked for changes to clarify the description of certain CEs. One suggestion dealt with the CE for rehabilitation of rail or bus buildings in which "only minor amounts of additional land are required." We agree with the commenter that the ultimate concern is not the amount of additional land but whether significant environmental effects are involved. However, limiting this CE to situations where only minor amounts of additional land are needed draws a distinction between a rehabilitation or renovation-type project and a major expansion of an existing facility generally requiring more land. We have retained the existing language because there is greater confidence that the project as described would qualify as a CE.

A number of commenters suggested that weigh-station and rest-area construction should be in the first group of CEs. After considering these comments, it was decided to divide weigh-station and rest-area activities into two groups. The reconstruction and/or rehabilitation of existing facilities were added to the first group of CEs. However, because of the issues likely to be involved in the case of new rest areas or weigh stations, it was decided to leave these types of activities in the second group of CEs which requires approval on a case-by-case basis.

A number of commenters also suggested that traffic control devices be moved to the first group of CEs. Because of the wide range of activities that may take place under the broad category of "traffic control devices," the Administration has decided to divide those activities into two groups: (1) Traffic signals in the first group of CEs and (2) ramp metering controls in the second group (which requires Administration approval).

On commenter questioned whether the proposal to categorically exclude the promulgation of rules, regulations and directives which require a regulatory impact analysis was properly conceived, since the need for regulatory impact analysis seems to have little bearing on the possible environmental effects of the rule, regulation, or directive. The Administration agrees and has removed the phrase that refers to a regulatory impact analysis. Furthermore, because the vast majority of Administrative rules, regulations, and directives have not had significant environmental impacts, this action was moved from the second group to the first group of CEs. However, in unusual cases an environmental review will be conducted as required by § 771.117(b).

One commenter objected to removing the prohibition, that is in the 1980 regulation, against categorically excluding bridges on or eligible for the National Register of Historic Places and bridges providing access to barrier islands. This prohibition was removed because it is too general. Projects involving historic bridges or bridges to barrier islands may be properly categorically excluded or may require the preparation of an environmental assessment or an environmental impact statement depending on the severity of the anticipated impacts. The criteria for categorical exclusions presented in § 771.117(b) and the procedure for evaluating "unusual circumstances" in § 771.117(b) provide a suitable mechanism for determining whether, based on specific information regarding project impacts, a categorical exclusion is proper. In addition, since bridges are in the second CE category, historic bridges would always require some documentation that should reveal whether further environmental review is needed. The commenter's concern that historic bridges be adequately protected is addressed by § 771.117(b)(3), that relates to properties protected by section 4(f) or section 106. The barrier island issue is addressed by § 771.117(b)(4), that focuses on inconsistencies with environmental laws and requirements, such as the statutes that protect barrier islands.

In the proposed rule, § 771.117(b) limited the need for further environmental review to "extraordinary" cases. The historic bridge example illustrates that actions on the CE list may sometimes require a full environmental review, depending upon the circumstances. Such cases are unusual, but are not necessarily extraordinary. The indicate the need for environmental review in these and other

similar cases, § 771.117(b) has been revised to describe them as "unusual," rather than extraordinary.

Several comments concerned advance land acquisitions. We believe advance land acquisitions require more documentation than a project description. Therefore, this CE has been included under the second group of CEs in paragraph (d).

Clarification was requested as to whether construction could occur after the land was acquired. This CE is intended to cover the very limited cases where advance land acquisition as set forth in § 771.113(a) is appropriate. The CE does not cover the entire project. Thus, in these cases, even though the land is acquired early, project development cannot occur until the NEPA process is completed and the Administration reaches a decision on whether to implement the proposed project. The CE for advance land acquisition has been modified to clarify this point.

In the 1980 regulation, the CE for advance land acquisition covered hardship and protective acquisitions, as defined in 23 CFR 712.204(d), and acquisitions under section 3(b) of the UMT Act. However, because hardship and protective acquisitions were not specifically referenced in the CE, some applicants have interpreted it as establishing a category of advance land acquisition in addition to hardship and protective acquisitions. The CE has been modified to clarify this point. Thus, the CE for advance land acquisition in the final regulation continues the Administration's existing practice for advance land acquisition. A definition of these terms has been added to the regulation.

It should be noted that the number of acquisitions under section 3(b) of the Urban Mass Transportation Act to date has been very limited and is expected to remain so. The purpose of section 3(b) is to allow the acquisition of land that may or may not be used for mass transit in order to preserve that land before land speculation caused by transit development inflates the price of the land. The UMTA will approve loans under section 3(b) only for unique circumstances, such as acquisition of abandoned rail right-of-way and only where there are no immediate plans for a project. UMTA will review each case separately to determine whether the action requires and environmental review. Where the grantee has definitely planned a mass transit project, section 3(a) is the appropriate section of the UMT Act under which to proceed. Under section 3(a), any major land

acquisition requires full compliance with NEPA.

Another commenter asked UMTA to distinguish more clearly the difference between small passenger shelters and bus transfer facilities. The CE for bus shelters covers the separate small shelters typically found throughout a transit system. The bus transfer facility CE refers to focal points of bus activity where several bus routes connect. It includes construction of passenger shelters, loading bays, layover areas, and related street improvements. The primary environmental concerns are the noise, traffic, and safety consequences of frequent bus movements in a new area. However, this CE does not apply to the construction of new bus terminal buildings.

In the NPRM, comments were invited on the specific conditions or criteria which should apply to a CE for rail car storage and maintenance facilities. One commenter recommended against establishing specific criteria for new rail yards since they are typically constructed in areas with compatible land uses and zoning. It was suggested that a project-by-project review would be satisfactory to identify those infrequent cases where a CE may not be appropriate. We agree that rail yards are usually located in areas characterized by industrial or transportation use. However, land-use compatibility, increased traffic, and noise have been issues where non-conforming residential land use is close by. These concerns have arisen with new facilities as well as the expansion of established rail yards. The existing wording has, therefore, been retained to describe the conditions under which approval as a CE is most likely.

There were other suggestions for new types of projects that should be categorically excluded. If, in the Administration's view, the proposal would have insignificant effects on the environment in the great majority of cases, the proposal was adopted. For this reason, as noted earlier, a CE has been added for alterations to make buildings and vehicles accessible to elderly and handicapped patrons. Other suggestions for CEs were not added as examples in the regulation because it was difficult to describe specific conditions or criteria which would provide assurance of no significant environmental effects. However, applicants may still submit new projects that they believe meet the criteria of § 771.117(a) accompanied by documentation supporting the CE designation. If the applicant's proposal for a CE involves new technology or

presents environmental impacts with which the Administration has little or no experience, it is likely that an EA will be required to examine the full range of environmental effects from such an action. In introducing flexibility in the CE process, the goal has been to speed the process for projects where there is the greatest confidence as to the insignificance of the impacts. However, this approach also requires a careful look, in the form of an EA, where greater uncertainty exists concerning environmental effects. Under paragraph (d), the Administration has the discretion to review all proposals for categorical exclusions on a case-by-case basis.

A number of comments were also received on paragraph (b) which sets forth the instances when unusual circumstances make it appropriate to require further studies to determine if the CE classification is appropriate. The level of additional study required by this paragraph will vary. In the occasional or rare case where significant impacts are caused by a normally excluded action, an EIS is required. In some cases, only a minor environmental review would be necessary and, in other cases, a full EA may be needed.

One commenter objected to the statement that "substantial controversy on environmental grounds" should trigger the requirement for an environmental study. Both the CEQ regulations and DOT Order 5610.1c list "substantial controversy" as a circumstance when a CE may not be appropriate for a normally excluded action. Substantial environmental controversy over a minor project may indeed indicate the presence of problems requiring further study.

Another commenter objected to the inclusion of significant impacts on properties protected by section 4(f) and section 106 as an example of "unusual circumstances." The point was made that some projects do not involve significant environmental impacts but may still cause effects which must be considered under section 4(f) and section 106. The commenter felt that the applicability of those laws should not automatically trigger a requirement for further NEPA documentation. The proposed language has been retained. Significant impacts on these statutorily protected sites are a clear indication of impacts not appropriately considered as a CE. This mandates a review of impacts better accomplished in an EIS or an EA rather than a separate section 4(f) evaluation. The requirement for an environmental document also underscores the importance the DOT

places on the protection of section 4(f) lands. A provision similar to paragraph (b) is contained in the DOT Order 5610.1c.

*Section 771.119. Environmental Assessments.* An EA must be prepared for all actions which do not qualify as a CE and do not clearly require an EIS. Studies undertaken solely to determine whether a project qualifies as a CE are not EAs. The purpose of an EA is two-fold. First, an EA should resolve any uncertainty as to whether an EIS is needed. Should the need become evident at any time in the course of the EA process, an EIS should be started. If no EIS is required, the EA process is completed with a finding of no significant impact (FONSI) (§ 771.121). Secondly, to the extent practicable, the EA should contain sufficient information to serve as the record for all environmental approvals and consultations required by law for the action and should include approvals by and consultations with other agencies, as well as those of the Administration. The EA must be made available to the public, although circulation requirements are considerably simpler than those required for an EIS.

One commenter suggested that the notification/distribution requirements for EAs be modified so that interested Federal agencies can be notified directly of the availability of EAs. Our aim is to streamline the environmental review process, particularly for those highway and transit projects that typically do not involve significant environmental impacts and are processed with EAs or as CEs. The EA is a public document, available on request from the applicant or Administration field offices. The applicant must publish a notice of its availability to ensure proper notification to the public. Notice of availability of the EA shall also be sent by the applicant to affected units of Federal, State and local government. The State agency responsible for intergovernmental coordination pursuant to Executive Order 12372 will also be notified. Beyond such notification, we do not intend to require a formal distribution process for EAs. Those agencies and interested parties participating in the early coordination/scoping process should be notified of the availability of an EA and a subsequent FONSI, should either be approved. Projects normally requiring EISs which are processed with EAs will be subject to the full, early coordination and public involvement requirements described in § 771.119.

On commenter raised a question about § 771.117(e) of the NPRM under

which the Administration encouraged applicants to prepare the EA and make it available prior to any public hearing that was required to be held on a proposed project. The concern was that the applicant must shoulder the cost of preparing an EA to satisfy a Federal requirement and would not be reimbursed for the cost of preparing the document if the grant application was subsequently disapproved. Environmental analysis is frequently funded in grants for planning or preliminary engineering which precede any Federal decision on construction funding. Thus, the possibility exists that an applicant may receive Federal funding for environmental analysis on a proposed project which, for a variety of reasons, does not advance to construction. Acceptance or approval of an EA by the Administration should not be construed as a conditional approval of the project. Lacking an earlier grant for planning or design, the applicant may have to bear the cost of preparing an EA. In most cases, however, preparation of an EA, in contrast to an EIS, does not entail a major investment of staff time and money.

When a public hearing is to be held, the EA should be prepared and made available for a reasonable period of time prior to the hearing. We will continue to encourage applicants to coordinate the EA and public hearing requirements in order to meet our responsibilities under section 1506.6 of the CEQ regulations. The preamble discussion for paragraph 771.111(i) treats the coordination of public hearings and EA preparation for transit projects funded under Sections 9 and 9A of the UMT Act.

One commenter suggested that the regulation be amended to give the Administration the option to hold a public hearing upon request. This comment has not been adopted because making this decision optional would fall short of the requirements of FHWA and UMTA statutes which mandate that an opportunity for a public hearing be afforded (see paragraphs 771.111 (h) and (i) of this regulation).

In paragraph (f), the former reference to a "shorter" time period than 30 days for comments has been changed to a "different" time period. This change was made to cover the situations where the State or local applicant or the Administration may feel a longer time period is appropriate.

The NPRM required that after any public review period for an EA, the applicant provide the Administration with a summary of any comments received. The final rule provides, instead, that the actual comments be

transmitted. This change eliminates the need to prepare a summary and avoids any possibility of misinterpreting comments.

Paragraph (g) also states that an EA, like an EIS, should be the vehicle for compliance with all applicable environmental laws and regulations. This addition merely restates in the EA section the long-standing DOT policy of a "one-stop" environmental process.

*Section 771.121. Findings of no significant impact.* This section remains unchanged from the NPRM except for some minor editing to improve the readability of the section.

*Section 771.123. Draft environmental impact statements.*

Paragraph (a) of this section and § 771.119(i) have been clarified to underscore the fact that an environmental impact statement need only be prepared when significant impacts on the environment will be or are likely to be caused by the proposed action. The environmental studies defined in § 771.107(a) or the EA discussed in § 771.119 would provide the basis for an informed judgment if there is any doubt about the magnitude of the environmental impact.

Paragraph (d) has been revised to clarify the requirements when a consultant is involved in the EIS process. This paragraph is now consistent with the definitions contained in paragraph 771.109(c) of this regulation. The FHWA deals only with SHAs and State Departments of Transportation. Accordingly, all FHWA applicants qualify as "Statewide agencies." The FHWA approval of consultants is needed only when Federal funds will be used to reimburse the consultant. In those situations, other FHWA regulations govern the consultant selection process. In the case of UMTA-funded activities, UMTA should be apprised of the possible use of consultants before work is undertaken. Although UMTA will not normally participate in the consultant selection, staff will advise applicants if there is a need for interdisciplinary capability in preparing an environmental document and will, when necessary, jointly evaluate consultants' qualifications. The UMTA will apprise applicants of paragraph 1506.5(c) of the CEQ regulations, governing work by consultants and possible conflict of interest.

Paragraph (h) has been amended to indicate that the draft EIS shall be available at the public hearing as well as a minimum of 15 days in advance of the public hearing. As expected, there were comments favoring the shortening

of the minimum period to 15 days and comments objecting that this is unreasonably short. The statutes governing FHWA and UMTA programs require only that adequate notice of any public hearings be given. The change was made to be consistent with the CEQ regulations (section 1506.6(c)). We recognize, however, that the typical EIS with a 45-day circulation period would allow a 30-day notice for a public hearing with no delay in the environmental review process. We will encourage applicants to give greater than 15-day notice whenever possible in order to foster public involvement in the NEPA process.

One commenter asked that FHWA and UMTA specify in the regulation their time for reviewing EISs. Setting time limits for the major steps in the EIS process is a task accomplished in the scoping process. The time periods will vary from project-to-project depending on the size and complexity of the project and other factors set forth in section 1501.8 of the CEQ regulations dealing with time limits.

*Section 771.125. Final environmental impact statements.* As with the section dealing with draft EISs, few changes were proposed to our final EIS procedures. There was support for the proposed change in paragraph (a) eliminating the requirement to describe in the final EIS the procedures to be followed to assure that all environmental mitigation measures are implemented. The FHWA and the UMTA's general approach to ensure that mitigation is carried out has been outlined in paragraph 771.109(b). Any further details would be developed on an individual project basis by the applicant and Administration. This does not represent a change in the Administration's commitment to take all practicable steps to mitigate any adverse environmental consequences caused by transportation projects.

There also was support for the proposed change to identify, rather than describe, mitigation measures. However, UMTA and FHWA have decided that the requirement of describing mitigation measures should be retained. Accordingly, the final regulation continues the existing practice of a full description of mitigation measures in the final environmental document, to the extent permitted by the level of design. When details on mitigation measures have not been developed at the time the final EIS is being prepared, the final EIS should describe the measures in as much detail as possible and give an assessment of the effectiveness of such measures in reducing environmental

harm. When there is uncertainty over the choice of mitigation measures, the range of measures under consideration should be fully described, and the final EIS should address mitigation in terms of the results that will be achieved, e.g., conforming to governmental standards or plans or meeting criteria developed for specific projects. These measures will be summarized in the Record of Decision (ROD) for projects requiring EISs.

Many commenters supported the change eliminating the need for prior concurrence by the Administration Headquarters on certain EISs. There was a dissenting view that Headquarters oversight was needed to ensure that DOT environmental protection responsibilities were being fully met. The delegation of greater EIS responsibility to field offices is an important change from the standpoint of streamlining the environmental review process. This provision allows routine EISs to be completed more quickly. Internal procedures in the FHWA and the UMTA will ensure that EISs for projects with major unresolved issues are reviewed by Headquarters. The regulation specifies those circumstances in which Headquarters' concurrence will normally be required.

The provision for legal review of final EISs has been retained. Experience has shown this to be an important requirement.

Paragraph 771.123(d)(2) of the NPRM which deals with FHWA actions on programmatic documents has been dropped from the final rule. The FHWA has issued internal operating instructions that all programmatic environmental documents will be sent to the Administration Headquarters for action. Since this is an internal Administration practice, not a requirement imposed by the Administration on its applicants, it was decided to eliminate that provision from the regulation.

Paragraph (e) concerning the significance of the Administration's approval of the final EIS has also been modified to better emphasize that approval does not constitute a present or future commitment of funds to the preferred alternative.

*Section 771.127. Record of decision.* The basic mechanism for the ROD remains unchanged. The ROD lays out the basis for the decision as specified in 40 CFR 1505.2 and summarizes the mitigation measures that will be incorporated in the project. The last sentence of paragraph (a) of the NPRM has been eliminated. That sentence indicated a ROD was not required for

projects where the draft EIS was filed with EPA prior to July 30, 1979. We believe that this "grandfather" clause is no longer appropriate and have eliminated it in response to comments.

The ROD is a public document and will be made available to the public on request. However, FHWA and UMTA will not routinely distribute RODs to all those who received the final EIS, nor will we distribute RODs on all projects to an individual agency. One commenter asked that we seek outside consultation and review whenever the Administration changes the proposed action and a revised ROD has to be prepared. If the proposed action changes to an alternative fully evaluated in the final EIS, but not identified as the preferred alternative in that document, the Administration will issue a new ROD and distribute it to everyone who received the final EIS. The regulation states that this distribution will be made to the extent practicable, meaning that documents will be sent to the addressees of record, but the Administration cannot ensure that people who have changed addresses will be reached.

*Section 771.129. Reevaluations.* This section directs the applicant to consult with the Administration prior to proceeding with major project activities, such as land acquisition and construction, to assess any changes that have occurred and their effect on the validity of the environmental document.

After the environmental process has been completed, the Administration is free to make a funding decision and proceed with construction of a project. The decision to implement a project may occur soon after the final environmental document is approved and circulated or it may be deferred for various reasons. Where a substantial period of time has elapsed since the initial environmental review process, the Administration needs to determine whether existing environmental documents and findings remain valid before moving ahead with construction. The Administration must also ensure that mitigation measures stated as commitments in environmental documents have been incorporated in appropriate contract documents, plans, specifications, and estimates.

Many commenters objected to the proposal in the NPRM for a written evaluation, required in all cases, to assess whether the final EIS was still current. Based on these comments, the Administration has agreed that a written evaluation of the final EIS should not be required before every major project approval or filing for a Federal permit. Instead, the Administration has substituted two

paragraphs. One of these requires a written evaluation of the final EIS if major steps to advance a project have not been taken within 3 years of final EIS approval or the last major Administration approval or grant. The purpose of this paragraph is to require a careful look at proposed projects which have not gone to construction and have been inactive for a relatively long time since the final EIS or last major step in project development. A similar paragraph appeared in the 1980 regulation but was deleted in the NPRM.

The second paragraph, paragraph (c) in the final regulation, requires consultation in all cases not covered by paragraphs (a) and (b), but leaves discretion to determine on a case-by-case basis whether a written report is required. The Administration will determine whether the changes are significant enough to warrant a supplemental EIS (as outlined in § 771.130). The Administration believes the fixed time period of paragraph (b) and the flexibility of paragraph (c) would accomplish the purpose of the NPRM, without imposing the burdens objected to by the commenters.

Normally, the reevaluation requirements apply at the right-of-way authorization stage and at the construction stage. However, on the more complex projects, the Administration may identify additional points at which it would be appropriate to reevaluate the status of the previously approved environmental document. The regulation is structured to ensure that the Administration has a current and valid environmental document on file prior to permitting the applicant to proceed with any subsequent phase of the pending project.

*Section 771.130. Supplemental environmental impact statements.* Paragraph (a) retains the provisions in the 1980 regulation that a draft or final EIS may be supplemented at any time. This provision had been included in § 771.127(a) of the NPRM. In addition, it makes clear that a supplemental EIS may be supplemented at any time.

Paragraph (a) also identifies those situations in which a supplemental EIS must be prepared. A supplemental EIS is required where changes in the proposed action or new information or circumstances relevant to environmental concerns and bearing on the proposed action would result in significant environmental impacts not already evaluated in the EIS. The language in paragraph (a) was changed to more closely parallel the CEO regulations. It replaces § 771.129(b) of the 1980 regulation which required a supplemental EIS when there had been

"significant changes in the proposed action, the affected environment, the anticipated impacts, or the proposed mitigation measures." The word "change" in the regulation is no longer limited to the four categories set forth in the 1980 regulation. Instead, this paragraph focuses the determination of whether a change or new information is "significant" to the anticipated impacts of the proposed action. The regulation is intended to distinguish, for example, between new information that may be very important or interesting, and thus, significant in one context, such as to the scientific community, and yet should not be considered "significant" so as to trigger preparation of a supplemental EIS because the information does not result in a significant change in the anticipated environmental impacts of the proposed action.

Paragraph (b) identifies two circumstances in which a supplemental EIS is not required. Paragraph (b)(1) provides that no supplemental EIS is required where changes or new information would mitigate or lessen adverse impacts that have already been evaluated in the EIS and do not cause any other environmental impacts that are significant and which were not evaluated in the EIS. This provision is intended to cover primarily the situation where a proposed action is down scaled or additional mitigation measures are incorporated in a project. Changes or new information that only reduce impacts and are of the same character as those discussed in the EIS could include, for example, less right-of-way taken, fewer relocations, or reduced noise levels as a result of additional noise walls. This section only applies where the change or new information does not cause any other impacts that are significant. If the change or new information results in impacts that were not evaluated, a supplemental EIS would be required if the new impacts are significant. Thus, in response to comments on the NPRM, the regulation recognizes that even beneficial changes may be significant and require a supplement if they result in a type of impact that was not evaluated in the original EIS. Further, if previously evaluated impacts become significantly worse, so that the environmental impacts of the action are greater than thought initially, a supplemental EIS would also be required. For example, a supplemental EIS would continue to be required where mitigation measures, presented as commitments in the final EIS, are changed or withdrawn, thereby creating new and significant environmental effects.

Paragraph (b)(2) indicates that a supplemental EIS will not be necessary if a decision is made to fund an alternative fully evaluated in a previous EIS but not identified therein as the preferred alternative. In those situations, a revised ROD must be prepared and provided to all parties that received a copy of the final EIS. A supplemental EIS would be required if the impacts from the alternative now designed as the preferred alternative were not fully evaluated and appropriate mitigation measures included in the original EIS. After a revised ROD is prepared, public and agency notification of the change in the recommended alternative is essential. The specific methods used to notify the public of the change will be determined by the Administration on a case-by-case basis.

Paragraph (c) is new paragraph that expresses in slightly different terms a provision contained both in the 1980 rule and the NPRM. If the Administration is uncertain whether the proposed changes to the project would result in significant environmental impacts, it may require the applicant to prepare an EA or environmental studies to aid in determining the significance of the effects. An EA would be appropriate where a number of different environmental effects need to be assessed and, in the Administration's view, there is uncertainty as to the significance of these effects. Also, an EA is warranted if the Administration feels that an examination of alternative routes, sites, or designs (beyond the normal consideration of design options as the project is being refined) might identify ways to avoid or mitigate probable adverse effects. If these effective are found to be not significant, the Administration will document its decision with a notation to the files for projects where environmental studies were prepared and with a FONSI for projects where an EA was prepared.

Several commenters objected to the paragraph in the NPRM which described circumstances under which supplemental EISs may be needed for UMTA's major investment projects. The concern was that this would add to an already lengthy EIS process. This provision has been modified and retained as paragraph (e). It does not require that supplements be prepared in all cases; it gives UMTA the discretion to prepare such a document in those cases where a substantial body of new information relevant to environmental concerns has been developed.

Although it is similar to tiering in that the environmental focus is sharpened as project details are developed, a

supplement eliminates the need to prepare two separate draft and final EISs as in tiering. The UMTA will continue to require a draft EIS at an early stage of project planning for major investments (i.e., alternative analyses); thus, we want to preserve the option of preparing a supplemental draft EIS when circumstances dictate.

Section 771.129(b) of the 1980 regulation stated that a decision to prepare a supplemental EIS does not require withdrawal of the previous approvals for those aspects of the proposed action not directly affected by the changed condition or new information. While the 1980 regulation was silent on whether activities already in progress under the prior approval should be suspended, it has generally been held that such activities need not be suspended. In addition, it has been held that new approvals of activities outside the scope of the supplemental EIS may be granted while a supplemental EIS is being processed.

Provisions have been added to paragraph (f) specifically to permit these practices. These provisions apply only to supplemental EISs of limited scope. Where the supplemental EIS requires a comprehensive reexamination of the entire project or more than a limited portion of the project, then the Administration would suspend any activities that may have an adverse environmental impact or prejudice the selection of reasonable alternatives.

*Section 771.131. Emergency action procedures.* This section is unchanged from the NPRM.

*Section 771.133. Compliance with other requirements.* This section is unchanged from the NPRM.

*Section 771.135. Section 4(f) (49 U.S.C. 303).* This section sets forth the procedures for applying section 4(f). There have been few substantive changes made from the 1980 regulation. Those that have been made are designed to give the Administration more flexibility in dealing with particular actions or to clarify existing requirements. We do not believe that any of the changes diminish the substantive protection provided section 4(f) sites.

Numerous comments were received on this section. To a large extent, these comments urged the Administration to narrow the situations in which section 4(f) would apply. For example, some commenters expressed frustration with the application for section 4(f) requirements to acquisition of minor amounts of land resulting in little or no impact on the site. The legislative history of section 4(f) makes clear that the "nibbling away" of section 4(f) lands

by repeated minor acquisition was of primary concern to Congress. As a result, the DOT and the courts have always taken the position that even minor takings require the preparation of a section 4(f) document.

Paragraph (c) has been revised to emphasize that the "entire resource" must be found to be not significant before the Administration can determine that section 4(f) requirements are not applicable. Furthermore, determination that an entire area is not significant is subject to review by the Administration prior to a determination that section 4(f) requirements are not applicable. This has been a longstanding Administration practice and the change in the regulation states existing practice.

Paragraph (d) addresses the application of section 4(f) to publicly owned lands managed for multiple use. Typically, multiple use management is applied to the natural resources on large tracts of land where such resources can serve a variety of needs. Section 4(f) will apply only to those parts designated or being used for park, recreation, or wildlife refuge purposes. It should be noted that the multiple-use concept does not apply within areas which have been designated as parks, recreation areas, or wildlife and waterfowl refuges. Section 4(f) applies throughout such areas. Historic sites were included in this paragraph in the NPRM but have been eliminated in the final regulation because it was felt that this was inconsistent with the approach for identifying historic sites in paragraph (e). In addition, paragraph (d) has been revised from the NPRM to state more clearly the procedures for applying section 4(f) to multiple use lands.

Paragraph (f) clarifies existing FHWA and UMTA practices on the application of section 4(f) to existing transportation facilities. Examples include highway bridges, railroad stations, and terminal buildings which are on or eligible for the National Register Historic Places and proposed for improvement with Federal funds. Most of the commenters on this paragraph favored the proposed provision. The NPRM indicated that section 4(f) requirements did not apply to "work" on transportation facilities under certain circumstances. The final regulation clarifies those circumstances and substitutes for "work" the term "restoration, rehabilitation or maintenance" of transportation facilities. The intention of this change is to better define the key concept "use."

The overriding purpose of section 4(f) was to protect certain publicly owned lands and historic sites from road building and other projects, except in extraordinary circumstances. Toward

that end, section 4(f) restricts the approval of projects which require the "use" of certain publicly owned parks and recreation areas and any historic sites. The applicability of section 4(f) in the first instance, therefore, turns on whether a project requires "use" of the land in question. Courts construing the term "use" under section 4(f) have focused on whether the proposed project actually takes or significantly adversely affects the site in question. Accordingly, UMTA and FHWA believe that if a project involves a facility that is already dedicated to transportation purposes (so there is no taking), and does not adversely affect the historic qualities of that facility, then the project does not "use" the facility within the meaning of section 4(f). If there is no use under section 4(f), its requirements do not apply. This construction is consistent with the purpose of section 4(f) and with case law on this issue. Accordingly, the Administration will evaluate any proposed restoration, rehabilitation or maintenance activities of transportation facilities that are on or eligible for the National Register to determine if the criteria of paragraph (f) are met. If those criteria are met, then the work may proceed without a section 4(f) evaluation.

One commenter described paragraph (f) as having alternative criteria. This is incorrect. Both criteria must be met in order for the paragraph to apply.

Some commenters thought paragraph (f) confused the responsibilities of UMTA and FHWA under section 4(f) with our responsibilities under section 106 of the National Historic Preservation Act. The UMTA and FHWA are well aware that section 4(f) and section 106 have distinct requirements. However, in our experience, there is overlap between the analyses necessary to meet the requirements of sections 4(f) and 106. The UMTA and the FHWA's objective is to use a coordinated approach while retaining the distinct requirements of sections 4(f) and 106. If a project will adversely affect the historic qualities of the transportation facility, then the project will require the use of the facility under section 4(f), and the requirements of that provision will apply, i.e. the Administration will evaluate avoidance alternatives and measures to minimize harm to the degree necessary to make the determinations required by paragraph (a). At the same time the Administration will also comply with the separate, consultation requirements of Section 106.

One commenter suggested that paragraph (f) should apply to all section 4(f) properties, not just transportation

facilities. However, the rationale for paragraph (f) only applies to transportation facilities. Therefore, the application of paragraph (f) remains limited to transportation facilities.

Paragraph (g) deals with the application of section 4(f) to archeological resources. Whether or not section 4(f) applies to such resources will depend primarily on whether the value of the resource can best be realized through a data recovery program. The degree to which the value of the resource is tied to a particular site must also be considered. These determinations are always made in consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP).

If it is decided, after consulting the SHPO and the ACHP, that data recovery is appropriate and there is no need to preserve the resource in place, section 4(f) will not apply. However, section 4(f) will apply in case where data recovery is deemed appropriate, and, in addition, there is an overriding concern to preserve a major portion of the resource in place, e.g., for the purpose of public interpretation.

If data recovery is determined to be inappropriate, the application of section 4(f) will depend on the reason underlying this determination. If preservation in place is the paramount concern or if it is determined that there are not adequate techniques to properly recover the resource, section 4(f) will apply. However, if a data recovery program is deemed inappropriate because the site has minimal value in terms of scientific research, section 4(f) would not apply. This latter situation often arises when a proposed transportation project would affect a number of sites all of which will reveal the same information. Where an adequate data recovery program focuses on a representative site or sites, it may be determined that the remaining sites would yield no further values. Thus section 4(f) would not apply.

In reaching judgments on the value of the archeological resource, the desirability and feasibility of a data recovery plan, and the need for preservation in place, the views of the SHPO and the ACHP will be given substantial deference. The intent of this provision is not to unnecessarily narrow the application of section 4(f) when dealing with archeological sites, but, rather, to apply the protections of section 4(f) to the situations for which they were originally intended. Frequently, the greatest value of the resource can be realized through data recovery. In those cases the primary

mandate of section 4(f)—to investigate every feasible and prudent alternative to avoid the site—would serve no useful purpose.

Paragraph (g) on archeological properties also retains a provision in the 1980 regulation concerning the discovery of archeological resources during project construction. Where section 4(f) applies, the section 4(f) process will be expedited. Noting that late designation of historically significant properties has posed problems in the past by invoking section 4(f) protection late in project development, several commenters proposed cut-off points after which a property newly designated for the National Register of Historic Places would not be afforded section 4(f) protection. Paragraph (h) deals with late designations of parks, recreational areas, and historic sites. With respect to historic and cultural properties, the regulation establishes an affirmative responsibility of the Administration and the applicant to identify historic properties on or eligible for the National Register of Historic Places. This is to be done early in the NEPA compliance process; thus, it is not expected that there will be late identification of historic buildings or structures. However, unidentified archeological resources do pose problems and paragraph (g) sets forth an expedited approach for these cases.

Another commenter found the regulation unclear as to how properties "on or eligible for the National Register" would be identified, and questioned whether only those properties known to the SHPO would be considered. Particularly where large projects are concerned, FHWA and UMTA, in cooperation with the applicant, will undertake a survey to identify properties which are potentially eligible for the National Register. The Administration or the applicant will seek assistance from the SHPO in this identification effort but a State register or list of historic properties provided by State and local officials does not relieve FHWA or UMTA from the need to undertake a comprehensive inventory. If the SHPO indicates that an adequate inventory of the area has already been completed, this will normally satisfy Federal requirements.

A sentence has been added to paragraph (i) in recognition of FHWA's use of programmatic section 4(f) evaluations. In such cases, coordination and documentation are usually accomplished in two phases. The first phase, the development of the programmatic section 4(f) evaluation, entails coordination with interested agencies and organizations, and

culminates in the issuance of a document (the programmatic section 4(f) evaluation) which defines the criteria and procedures for its use and contains requisite legal findings. The second phase, the use of the programmatic evaluation on a specific project, involves coordination with the officials with jurisdiction over the section 4(f) resource in question and documentation sufficient to demonstrate that the procedures set up by the programmatic evaluation has been followed. The UMTA currently has no plans to issue any programmatic section 4(f) evaluations.

Paragraph (n) adopts a provision set forth at § 771.133(m) of the NPRM. It emphasizes that the decision to prepare a supplemental environmental document must be made pursuant to § 771.130 of this regulation, independent of any decision to prepare new or separate section 4(f) documentation. The mere change in legal status of an area to which section 4(f) applies does not require such a supplemental document if the environmental impacts of the action on the area or the site have already been evaluated. Similarly, changes in the action which may generate additional section 4(f) requirements would not also require supplemental environmental documentation if the changes were not environmentally significant.

Paragraph (n) has also been modified to clarify that project activities need not be suspended and that new project approvals may be granted during the preparation of a separate section 4(f) evaluation when it is prepared late in project development. The Administration will hold in abeyance those aspects of the project that may prejudice the consideration of avoidance alternatives or measures to minimize harm, but may proceed with other elements of the project.

*Section 771.137. International actions.* This portion of the regulation has been taken from DOT Order 5610.1C. The Administration did not receive any comments on this section. However, certain editorial changes were made to clarify the application of this section to FHWA and UMTA programs.

*Section 771.111(h) Public Involvement.* On January 31, 1985, the FHWA published at 50 FR 4526, Docket No. 85-12, a NPRM; amendment and rescission of public involvement regulations. The purpose of this proposal was to eliminate confusing regulatory duplication as part of FHWA's overall efforts to institute a streamlined environmental process in which public involvement is fully integrated with

other project development and environmental procedures.

The FHWA has had two major regulations which pertain to public involvement. Detailed requirements for public hearings and location and design approval appear in 23 CFR Part 790. Beginning in 1974, the FHWA provided an alternative process for public involvement/public hearings and project location approval. This alternative process has given the States more flexibility in developing public involvement programs which are better integrated into the States' project development processes.

In order to avoid the confusion and inefficiency of two separate, but duplicative public involvement regulations, this final rule rescinds 23 CFR Part 790 and consolidates in 23 CFR 771.111(h) all regulatory requirements for public involvement in the development of Federal-aid highway projects. To allow the fewer than 10 States still conducting public hearings under 23 CFR Part 790 time to adopt new public involvement/public hearing procedures which satisfy the requirements of 23 CFR 771.111(h), the effective date of the rescission of Part 790 has been delayed 1 year after the publication of this notice in the *Federal Register*.

In addition, individual public involvement requirements appear at 23 CFR 650.109. The FHWA is consolidating all public involvement requirements in 23 CFR 771.111(h). Thus, § 650.109 is rescinded as a technical amendment in this final notice. This will remove the specific requirement by FHWA that significant floodplain encroachments be identified in public hearing notices. Section 771.111(h)(2)(iv) has been modified to require that public hearing notices provide information required to comply with public involvement requirements of other laws, Executive Orders and regulations. This would cover the requirement for a public notice of encroachments as required by Executive Order 11988, "Floodplain Management." In addition, FHWA plans to issue technical guidance to ensure that notice of encroachment is provided as part of the public notice.

The FHWA believes that 23 CFR 771.111(h), as amended in this final rule, will result in better public involvement. It more clearly encourages early identification of issues, early consultation and continuing coordination with concerned members of the public, and early resolution of issues.

No major changes are being made in existing programs, policies, and procedures with respect to public

involvement or design approval. The rescission of 23 CFR Part 790 does not in any manner eliminate the requirements for design approvals under 23 U.S.C. 106, 109, and 112. Design submissions and approvals to meet these requirements are carried out according to procedures developed by the FHWA and the State highway agencies. These procedures have been tailored to fit the specific project-development processes of each State highway agency.

Eight comments, all from State highway agencies, were received on the NPRM. The FHWA has given the following consideration to these comments.

Three commenters supported the rescission of 23 CFR Part 790 and the simplification of FHWA's regulations concerning public involvement.

In the NPRM, the FHWA proposed linking the conditions triggering a required public hearing to the classification of projects according to their environmental documentation. However, two commenters correctly pointed out that one of the proposed public hearing criteria (Class II and III projects with significant environmental effects) in 23 CFR 771.111(h)(2) was inconsistent with the definitions of Class II and Class III projects found in 23 CFR 771.115. The FHWA had decided to return the wording of the criteria triggering a required public hearing to the four criteria previously found in 23 CFR 771.111(h). This will assure that there is no change in the opportunities for a public hearing as a result of the present rulemaking.

Two SHAs observed that the criteria for public hearings on Class III projects are less stringent than their current procedures which require a public hearing for all Class III projects. This final rule states minimum Federal criteria for public involvement on Federal-aid highway projects. If, in its public involvement/public hearing procedures, a State chooses to exceed these Federal requirements, that is the State's prerogative. Thus, in their public involvement/public hearing procedures States may require public hearings for all Class III projects.

One western State highway agency expressed concern that public hearings for Class II and III projects requiring substantial amounts of right-of-way resulted in some hearings of little or no public interest, since the projects involved only one or two landowners. The commenter asked that "substantial" right-of-way acquisition be replaced by "sensitive" right-of-way acquisition. The FHWA believes the regulation provides for this situation through the public hearing opportunity. The State highway

agency may advertise an opportunity for a public hearing. Except to the extent required by 23 U.S.C. 128, if a project does not arouse public interest, a public hearing need not be held.

It was suggested by two commenters that requiring submission to the FHWA of a written, verbatim transcript is unnecessary for some public hearings. The revised regulation simply retains and repeats the statutory requirements of 23 U.S.C. 128 for transcripts.

One commenter expressed concern that the reevaluation of a project's public involvement activities not become a separate procedural reevaluation in addition to the substantive reevaluation of the project's environmental document under 23 CFR 771.129. The NPRM may not have been clear that the reevaluation of public involvement is intended to be based on the project reevaluation. The wording of the regulation has been changed to make this relationship clearer.

In addition, the FHWA has clarified wording at several points and deleted reference to the inclusion of other agencies and governmental jurisdictions in public involvement/public hearing procedures and to other agencies receiving notices of public hearings (23 CFR 771.111(h)(2) (ii) and (iv)). Coordination with other agencies and governmental jurisdictions is addressed in 23 CFR 771.111(a), 771.119, and 771.123 (c) and (g). Written statements from the public to accompany the public hearing transcript have been more clearly defined in 23 CFR 771.111(h)(2)(vi). Publication in the *Federal Register* of notices of availability of new public involvement/public hearing procedures has been eliminated as not being an effective way to reach residents of specific States. The FHWA encourages States to use appropriate ways of communicating the provisions of their public involvement/public hearing procedures to residents. Separate reference to mitigation measures as an element of the public hearing presentation has also been deleted (23 CFR 771.111(h)(2)(v)(D)) because the beneficial impacts of mitigation measures are included in the required discussion of impacts.

As a result of the rescission of 23 CFR Part 790 and amendments to 23 CFR 771.111(h), those few States currently under 23 CFR 790 must submit procedures for approval under Section 771.111(h); however, these States will at the same time have the opportunity to gain flexibility to conduct public hearings in a way which is compatible with the State's own project development process. The remaining

States for which alternate public involvement/public hearing procedures already have been approved pursuant to 23 CFR 771 are not required to adopt new public involvement/public hearing procedures.

The public involvement procedures developed pursuant to this section must be sufficient to meet the public hearing and other public involvement requirements imposed by law or regulation on FHWA. Furthermore, in implementing this section, the FHWA urges the States, including States with procedures already approved by FHWA, to consider the public involvement needs of other State and Federal agencies with approval, permitting or consultation responsibilities for highway actions. The FHWA has engaged in extensive discussion with Federal agencies having such responsibilities in an effort to find ways to expedite the highway approval process. One of the most effective ways of accomplishing this goal is to avoid multiple and other duplicative public hearings or other public meetings. Section 771.111(h)(2)(i) should be read broadly to encourage the States to adopt public involvement procedures which accommodate the needs of as many other involved State and Federal agencies as practicable.

#### Implementation

Other Federal agencies are often involved in reviewing the environmental effects of UMTA and FHWA actions. It is important that these agencies have an opportunity to provide feedback on how well they perceive that interagency coordination is working under the new regulation. To give them this opportunity, FHWA will sponsor a series of meetings, region by region, to air issues of mutual concern pertaining to this regulation. FHWA plans to hold these meetings about a year to a year and a half after this regulation becomes effective.

#### Regulatory Impacts

The Administrators of FHWA and UMTA have determined that this document does not contain a major rule as defined by Executive Order 12291. However, it is a significant rulemaking action under Department of Transportation regulatory policies and procedures because important departmental policy is implemented by FHWA and UMTA is involved.

A regulatory evaluation has been prepared and is available for inspection in the FHWA docket room. A copy may be obtained from Mr. Frederick Skaer or Mr. A. Joseph Ossi at the addresses provided under the heading "For Further Information Contact."

The amendments impose no additional requirements. The anticipated impacts include the elimination of duplicative requirements and the increase in decisionmaking authority for the Administration's field offices. By streamlining the project development process, the amendments should reduce project development time and costs. Economic savings will be realized through changes which permit more efficient processing of legally required documentation.

With regard to the public involvement requirements which were the subject of a separate NPRM (50 FR 4526), since there will be no substantial change in the approach FHWA has traditionally employed in dealing with public involvement, it is anticipated that this action will not have a significant economic impact. The economic impacts, if any, would result in administrative savings caused by the elimination of procedural duplication.

The impact of the other amendments will fall primarily on Federal and State and local governments. It is possible that application of this rule could have an adverse economic impact on small governmental jurisdictions that must prepare environmental documents. However, the potential impacts derive primarily from NEPA and not from the procedures contained in this rule. For these reasons and under the criteria of the Regulatory Flexibility Act, FHWA and UMTA hereby certify that this document will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the information collection requirements contained in this document are being submitted for approval to the Office of Management and Budget (OMB).

#### List of Subjects in 23 CFR 771 and 790 and 49 CFR 622

Environmental impact statements, Grant programs—transportation, Highways and roads, Highway location and design, Public hearings, Reporting and recordkeeping requirements, Mass transportation, Historic Preservation, Parks, Public lands—multiple use, Recreation areas, Wildlife refuges.

(Catalog of Federal Domestic Assistance Program Numbers: 20.205, Highway Research, Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501, Urban Mass Transportation Capital Improvement Loans; 20.504, Urban Mass Transportation Technology; 20.505, Urban Mass Transportation Technical Studies Grants; 20.506, Urban Mass Transportation Demonstration Grants; 20.507, Urban Mass Transportation Capital and Operating

Assistance Formula Grants; 20.509, Public Transportation for Rural and Small Urban Areas; 20.510, Urban Mass Transportation Planning Methods, Research and Development; 23.003, Appalachian Development Highway Systems; 23.008, Appalachian Local Access Roads. The regulation implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

In consideration of the foregoing, Chapter VI of Title 49 and Chapter I of Title 23, Code of Federal Regulations, are amended as set forth below.

Issued on August 21, 1987.

Robert E. Farris,  
Deputy Federal Highway Administrator.  
Alfred A. DelliBovi,  
Deputy Administrator, Urban Mass  
Transportation, Administration.

1. Subpart A of Part 622 of 49 CFR is revised to read as follows:

#### TITLE 49—TRANSPORTATION

#### CHAPTER VI—URBAN MASS TRANSPORTATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

#### PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

#### Subpart A—Environmental Procedures

Sec.

622.101 Cross-reference to procedures.

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 1501 *et seq.*; 49 CFR 1.51.

#### Subpart A—Environmental Procedures

#### § 622.101 Cross-reference to procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and orders are set forth in Part 771 of Title 23 of the Code of Federal Regulations.

2. Part 771 of 23 CFR is revised to read as follows:

#### TITLE 23—HIGHWAY

#### CHAPTER I—FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

#### SUBCHAPTER H—RIGHT-OF-WAY AND ENVIRONMENT

#### PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

771.101 Purpose.

771.103 [Reserved]

771.105 Policy.

771.107 Definitions.

771.109 Applicability and responsibilities.

771.111 Early coordination, public involvement, and project development.

771.113 Timing of Administration activities.

## Sec.

- 771.115 Classes of actions.
- 771.117 Categorical exclusions.
- 771.119 Environmental assessments.
- 771.121 Findings of no significant impact.
- 771.123 Draft environmental impact statements.
- 771.125 Final environmental impact statements.
- 771.127 Record of decision.
- 771.129 Reevaluations.
- 771.130 Supplemental environmental impact statements.
- 771.131 Emergency action procedures.
- 771.133 Compliance with other requirements.
- 771.135 Section 4(f) (49 U.S.C. 303).
- 771.137 International actions.

**Authority:** 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 128, 138 and 315; 49 U.S.C. 303(c), 1602(d), 1604(h), 1604(i), and 1610; 40 CFR Part 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

**§ 771.101 Purpose.**

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Urban Mass Transportation Administration (UMTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and the regulation of the Council on Environmental Quality (CEQ), 40 CFR Parts 1500-1508. This regulation sets forth all FHWA, UMTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and urban mass transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, and 49 U.S.C. 303, 1602(d), 1604(h), 1604(i), 1607a, 1607a-1 and 1610.

**§ 771.103 [Reserved]****§ 771.105 Policy.**

It is the policy of the Administration that:

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.<sup>1</sup>

(b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation

improvement; and of national, State, and local environmental protection goals.

(c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(d) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(f) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation.

**§ 771.107 Definitions.**

The definitions contained in the CEQ regulation and in Titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply.

(a) *Environmental studies*—The investigations of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

(b) *Action*—A highway or transit project proposed for FHWA or UMTA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) *Administration action*—The approval by FHWA or UMTA of the applicant's request for Federal funds for construction. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(d) *Administration*—FHWA or UMTA, whichever is the designated lead agency for the proposed action.

(e) *Section 4(f)*—Refers to 49 U.S.C. 303 and 23 U.S.C. 138.<sup>2</sup>

**§ 771.109 Applicability and responsibilities.**

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

(2) This regulation does not apply to, or alter approvals by the Administration made prior to the effective date of this regulation.

(3) Environmental documents accepted or prepared by the Administration after the effective date of this regulation shall be developed in accordance with this regulation.

(b) It shall be the responsibility of the applicant, in cooperation with the Administration to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation. The FHWA will assure that this is accomplished as a part of its program management responsibilities that include reviews of designs, plans, specifications, and estimates (PS&E), and construction inspections. The UMTA will assure implementation of committed mitigation measures through incorporation by reference in the grant agreement, followed by reviews of designs and construction inspections.

(c) The Administration, in cooperation with the applicant, has the responsibility to manage the preparation of the appropriate environmental document. The role of the applicant will be determined by the Administration accordance with the CEQ regulation:

(1) *Statewide agency*. If the applicant is a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or is a local unit of government acting through a statewide agency, and meets the requirements of section 102(2)(D) of NEPA, the applicant may prepare the environmental impact statement (EIS) and other environmental documents with the Administration furnishing guidance, participating in the

<sup>1</sup> FHWA and UMTA have supplementary guidance on the format and content of NEPA documents for their programs. This includes a list of various environmental laws, regulations, and Executive Orders which may be applicable to projects. The FHWA Technical Advisory T6640.8A, October 30, 1987, and the UMTA supplementary guidance are available from the respective FHWA and UMTA headquarters and field offices as prescribed in 49 CFR Part 7, Appendices D and G.

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

preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(2) *Joint lead agency.* If the applicant is a public agency and is subject to State or local requirements comparable to NEPA, then the Administration and the applicant may prepare the EIS and other environmental documents as joint lead agencies. The applicant shall initially develop substantive portions of the environmental document, although the Administration will be responsible for its scope and content.

(3) *Cooperating Agency.* Local public agencies with special expertise in the proposed action may be cooperating agencies in the preparation of an environmental document. An applicant for capital assistance under the Urban Mass Transportation Act of 1964, as amended (UMT Act), is presumed to be a cooperating agency if the conditions in paragraph (c) (1) or (2) of this section do not apply. During the environmental process, the Administration will determine the scope and content of the environmental document and will direct the applicant, acting as a cooperating agency, to develop information and prepare those portions of the document concerning which it has special expertise.

(4) *Other.* In all other cases, the role of the applicant is limited to providing environmental studies and commenting on environmental documents. All private institutions or firms are limited to this role.

**§ 771.111 Early coordination, public involvement, and project development.**

(a) Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental document.

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action. For UMTA, this is normally no

later than the review of the transportation improvement program (TIP) and for FHWA, the approval of the 105 program (23 U.S.C. 105).

(c) When FHWA and UMTA are involved in the development of joint projects, or when FHWA or UMTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.

(d) During the early coordination process, the Administration, in cooperation with the applicant, may request other agencies having special interest or expertise to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

(e) Other States, and Federal land management entities, that may be significantly affected by the action or by any of the alternatives shall be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any significant unresolved issues and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

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

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 40 CFR Parts 1500-1508.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process.

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest.

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice shall also provide information required to comply with public involvement requirements of other laws, Executive Orders, and regulations.

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives, and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process.

(E) The State highway agency's procedures for receiving both oral and written statements from the public.

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.

(3) Based on the reevaluation of project environmental documents required by § 771.129, the FHWA and the State highway agency will determine whether changes in the project or new information warrant additional public involvement.

(4) Approvals or acceptances of public involvement/public hearing procedures prior to the publication date of this regulation remain valid.

(i) Applicants for capital assistance in the UMTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental documents. For projects requiring EISs, a public hearing will be held during the circulation period of the draft EIS. For all other projects, an opportunity for public hearings will be afforded with adequate prior notice pursuant to 49 U.S.C. 1602(d), 1604(i), 1607a(f) and 1607a-1(d), and such hearings will be held when anyone with a significant social, economic, or environmental interest in the matter requests it. Any hearing on the action must be coordinated with the NEPA process to the fullest extent possible.

(j) Information on the UMTA environmental process may be obtained from: Director, Office of Planning Assistance, Urban Mass Transportation Administration, Washington, DC 20590. Information on the FHWA environmental process may be obtained from: Director, Office of Environmental Policy, Federal Highway Administration, Washington, DC 20590.

#### § 771.113 Timing of Administration activities.

(a) The Administration in cooperation with the applicant will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying, as defined in § 771.117(d)), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

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

(2) For actions proposed for FHWA funding, the FHWA Division Administrator has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements

of 23 CFR Part 450, Subpart B, and 23 CFR Part 630, Subpart A, have been met.

(b) For FHWA, the completion of the requirements set forth in paragraph (a)(1) and (a)(2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. However, such approval does not commit the Administration to approve any future grant request of fund the preferred alternative.

(c) Letters of Intent issued under the authority of section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

#### § 771.115 Classes of actions

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

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

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

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

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

(b) *Class II (CEs)*. Actions that do not individually or cumulative have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c). When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d).

(c) *Class III (EAs)*. Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

#### § 771.117 Categorical exclusions.

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental

impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

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

(1) Significant environmental impacts;  
 (2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or

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

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and § 771.117(a) of this regulation and normally do not require any further NEPA approvals by the Administration:

(1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 CFR Part 630; approval of project concepts under 23 CFR Part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's "highway safety plan" under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

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

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

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 CFR Part 480 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives. (d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).

(2) Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.

(3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to

replace existing at-grade railroad crossings.

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

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

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

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

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes; advance land acquisition loans under section 3(b) of the UMT Act.<sup>3</sup> Hardship and protective

<sup>3</sup> Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

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

buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition quality for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(e) Where a pattern emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

#### § 771.119 Environmental assessments.

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

(b) For actions that require an EA, the applicant, in consultation with the Administration, shall, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements which should be performed concurrently with the EA. The applicant shall accomplish this through an early coordination process (i.e., procedures under § 771.111) or through a scoping process. Public involvement shall be summarized and the results of agency coordination shall be included in the EA.

(c) The EA is subject to Administration approval before it is made available to the public as an Administration document. The UMTA applicants may circulate the EA prior to Administration approval provided that the document is clearly labeled as the applicant's document.

(d) The EA need not be circulated for comment but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of availability of the EA, briefly describing the action and its impacts, shall be sent by the

applicant to the affected units of Federal, State and local government. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(e) When a public hearing is held as part of the application for Federal funds, the EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the availability of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in § 771.111.

(f) When a public hearing is not held, the applicant shall place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice shall invite comments from all interested parties. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the publication of the notice unless the Administration determines, for good cause, that a different period is warranted.

(g) If no significant impacts are identified, the applicant shall furnish the administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

(h) When the Administration expects to issue a FONSI for an action described in § 771.115(a), copies of the EA shall be made available for public review (including the affected units of government) for a minimum of 30 days before the Administration makes its final decision (See 40 CFR 1501.4(e)(2).) This public availability shall be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

#### § 771.121 Findings of no significant impact.

(a) The Administration will review the EA and any public hearing comments and other comments received regarding the EA. If the Administration agrees with the applicant's recommendations pursuant to § 771.119(g), it will make a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

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

(c) If another Federal agency has issued a FONSI on an action which includes an element proposed for Administration funding, the Administration will evaluate the other agency's FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed, and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

#### § 771.123 Draft environmental impact statements.

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the *Federal Register*. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the Administration, in cooperation with the applicant, will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.111. For UMTA, scoping is achieved by soliciting agency and public responses to the

action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) An applicant which is a "statewide agency" may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures. Where the applicant is a "joint lead" or "cooperating" agency, the applicant may select a consultant, after coordination with the Administration to assure compliance with 40 CFR 1506.5(c). The Administration will select any such consultant for "other" applicants. (See § 771.109(c) for definitions of these terms.)

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

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

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

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

(3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(h) The UMTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described in § 771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(i) The Federal Register public availability notice (40 CFR 1506.10) shall establish a period of not less than 45 days for the return of comments on the draft EIS. The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) For UMTA funded major urban mass transportation investments, the applicant shall prepare a report identifying a locally preferred alternative at the conclusion of the Draft EIS circulation period. Approval may be given to begin preliminary engineering on the principal alternative(s) under consideration. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS or, where appropriate, a supplemental draft EIS.

#### § 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in § 771.109(b). The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

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

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State or local governmental agencies is needed; (ii) the social, economic, or environmental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or (v) the action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(3) Major urban mass transportation investments as defined by UMTA's

policy on major investments (49 FR 21284; May 18, 1984).

(d) The signature of the UMTA approving official on the cover sheet also indicates compliance with section 14 of the UMT Act and fulfillment of the grant application requirements of sections 3(d)(1) and (2), 5(h), and 5(i) of the UMT Act.

(e) Approval of the final EIS is not an Administration Action (as defined in § 771.107(c)) and does not commit the Administration to approve any future grant request to fund the preferred alternative.

(f) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

#### § 771.127 Record of decision.

(a) The Administration will complete and sign a record of decision (ROD) no sooner than 30 days after publication of the final EIS notice in the Federal Register or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project and document any required section 4(f) approval in accordance with § 771.135(l). Until any required ROD has been signed, no further approvals may be given except for administrative

activities taken to secure further project funding and other activities consistent with 40 CFR 1506.1.

(b) If the Administration subsequently wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be subject to review by those Administration offices which reviewed the final EIS under § 771.125(c). To the extent practicable the approved revised ROD shall be provided to all persons, organizations, and agencies that received a copy of the final EIS pursuant to § 771.125(g).

#### § 771.129 Re-evaluations.

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether a supplement to the draft EIS or a new draft EIS is needed.

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

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

#### § 771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administration determines that:

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

(2) New information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant

environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared and circulated in accordance with § 771.127(b).

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

(d) A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) A supplemental draft EIS may be necessary for UMTA major urban mass transportation investments if there is a substantial change in the level of detail on project impacts during project planning and development. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original draft EIS.

(f) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily:

(i) Prevent the granting of new approvals;

(ii) Require the withdrawal of previous approvals; or

(iii) Require the suspension of project activities; for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice

of reasonable alternatives, until the supplemental EIS is completed.

#### § 771.131 Emergency action procedures.

Requests for deviations from the procedures in this regulation because of emergency circumstances (40 CFR 1506.11) shall be referred to the Administration's headquarters for evaluation and decision after consultation with CEQ.

#### § 771.133 Compliance with other requirements.

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive Orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

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

(a)(1) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

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

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

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not

significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.

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

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register). The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.

(f) The Administration may determine that section 4(f) requirements do not apply to restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

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

(2) The SHPO and the Advisory Council on Historic Preservation (ACHP) have been consulted and have not objected to the Administration finding in paragraph (f)(1) of this section.

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

including the consultation with other agencies, will be shortened as appropriate.

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

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

(i) The evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant in cooperation with the Administration. This information should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document. The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

(j) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, FONSI, or separate section 4(f) evaluation shall specifically address:

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

(2) All measures which will be taken to minimize harm to the section 4(f) property.

(k) The final Section 4(f) evaluation will be reviewed for legal sufficiency.

(l) For actions processed with EISs, the Administration will make the section 4(f) approval either in its approval of the final EIS or in the ROD. Where the section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notified by the Administration of section 4(f) approval. For these actions, any required section 4(f) approval will be documented separately.

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

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

(2) The Administration determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property;

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original section 4(f) approval) would result in a substantial increase in the amount of section 4(f) land used, a substantial increase in the adverse impacts to section 4(f) land, or a substantial reduction in mitigation measures; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the section 4(f) evaluation.

(n) If the Administration determines under section 771.135(m) or otherwise, that section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental environmental document. Where a separately circulated section 4(f) evaluation is prepared, such evaluation does not necessarily:

(i) Prevent the granting of new approvals;

(ii) Require the withdrawal of previous approvals; or

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

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

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

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

(i) The preliminary section 4(f) determination made pursuant to paragraph (o)(1) of this section is still valid; and

(ii) The criteria of paragraph (a) of this section have been met.

**§ 771.137 International actions.**

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

Due to the revision of 23 CFR Part 771, the following technical amendments are necessary to correct references and certain phrases found in Parts 640 and 712. These technical amendments are effective on the same date as the rule for Part 771.

**PART 640—[AMENDED]**

**§ 640.107 [Amended]**

3. In § 640.107, paragraph (d) is amended by removing the words "a nonmajor action" and "23 CFR 771.9" and inserting in their place "categorical exclusions" and "23 CFR Part 771" respectively.

**PART 712—[AMENDED]**

**§ 712.204 [Amended]**

4. In § 712.204, paragraph (c)(1) is amended by removing the words "negative declaration" and inserting in their place "environmental assessment;" paragraph (c)(3)(ii) is amended by removing the reference "§ 771.5" and the words "negative declarations" and inserting in their place "23 CFR Part 771" and "findings of no significant impact," respectively; and paragraph (c)(3)(iii) is amended by removing the reference "§ 771.19" and the word "statements" and inserting in their place

"23 CFR Part 771" and "evaluations," respectively.

**PART 790—[REMOVED]**

5. Part 790, Public Hearings and Location/Design Approval is removed from Chapter I of 23 CFR, effective one year after publication in the Federal Register.

Due to the rescission of 23 CFR Part 790, the following technical amendments are necessary to correct references found in other parts of Title 23, Code of Federal Regulations, as set forth below. These technical amendments are effective on the same date as the rescission of 23 CFR Part 790.

**PART 635—[AMENDED]**

**§ 635.309 [Amended]**

6. In § 635.309, paragraph (d) is amended by removing "has satisfied the requirements of 23 CFR Part 790 where applicable or, under alternate procedures which have been accepted by FHWA" and inserting in its place "in accord with 23 CFR 771.111(h)."

**PART 650—[AMENDED]**

**§ 650.109 [Removed]**

7. Part 650, Subpart A, is amended by removing § 650.109, Public Involvement, in its entirety.

**PART 712—[AMENDED]**

**§ 712.204 [Amended]**

8. In § 712.204, paragraphs (c)(3) (iii) and (iv) are amended by removing, "and" and inserting a period at the end of paragraph (c)(3)(iii), and removing paragraph (c)(3)(iv) entirely.

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